A Comparative Look at Pre-Packs in Selected Jurisdictions

June 2023

SPECIAL REPORT

CONTENTS

Published June 2023

Acknowledgement

This timely and very interesting Special Report looks at “pre-packs” in various jurisdictions by asking very specific questions about the process involved and the concerns that are raised in getting these approved in practice.

The fundamental question that pre-packs seek to answer is how to protect, preserve and maximise value in a trading business when it is prejudicial for it to continue to trade following the opening of formal insolvency proceedings. Pre-packs answer that question by bringing forward certain elements of the process, although this can give rise to concerns being raised regarding a lack of transparency and a perceived loss of independence by officeholders. As the Report demonstrates, there is significant divergence in the approaches that have been taken in different jurisdictions to seek to address these issues.

INSOL International wishes to sincerely thank **Ben Jones, INSOL Fellow** (Simmons & Simmons LLP, UK) for leading this important project to which a number of colleagues around the world have contributed. INSOL International would also like to thank the various authors for their contribution to this Report, which we have no doubt the INSOL membership will find useful and informative.

June 2023

Foreword

The question that pre-packs seek to answer is how to protect, preserve and maximise value in a trading business when it is unable to, or it would be value destructive for it to, continue to trade following the opening of formal insolvency proceedings. For example, the business might not have sufficient working capital to continue to trade in the environment of a formal insolvency, or at all. Or the stigma of formal insolvency proceedings may be perceived to damage value, for example through damage to the business's brand, loss of intellectual capital as staff move on, or loss of customers as they move to new, stable suppliers.

Pre-packs answer that question by bringing forward certain elements of the process. For example, in England and Wales the traditional model (where an insolvency officeholder is appointed, assesses their options and then takes proposals to creditors for approval), is turned on its head in a pre-pack. The insolvency officeholder will transact on or very shortly after their appointment, then report to their creditors what they have done: seeking forgiveness rather than approval.

The concerns that are typically raised with pre-packs fall into the lack of transparency and a perceived loss of independence. Creditors lose the benefit of the measures for transparency that are baked into the traditional process through a pre-pack. Creditors are told what has happened rather than their approval being sought in advance. Similarly, the early involvement of insolvency professionals in an advisory capacity can also give the appearance of a lack of independence.

There is a divergence in the approaches that have been taken in different jurisdictions to seek to address these issues. If a concern with pre-packs is caused by a perception of the absence of independent review and scrutiny of the sale process undertaken before formal insolvency proceedings are opened, why not create the legal apparatus to provide it at that stage. For example, in the Netherlands, there is a concept of the appointment by a "silent delegated judge" of a "silent trustee" to examine the pre-pack transaction as it is put together. In France, there is a pre-appointment period through opening of a *mandate ad hoc* or *conciliation* proceeding during which there is oversight. Even in England and Wales, there is apparatus for the independent review of a transaction before it is entered into. In addition, there are reporting obligations to creditors in relation to pre-pack transactions.

So what's the future for pre-packs? In some jurisdictions they are so difficult as to in effect be impossible to undertake (such as in Australia and in Italy). In Germany, the availability of a pre-financing regime to fund trading and a sales process combined with a debtor-in-possession preliminary restructuring regime mitigates some of the issues that favour pre-packs. It is notable that India, which in 2016 undertook a wholesale reform of its corporate bankruptcy laws, has recently in 2021 implemented its own pre-pack law. That law permits pre-packs for MSMEs, (which are the type of businesses in respect of which pre-packs often attract the most criticism). The new laws do, however, contain checks and balances through involvements of the courts and creditors' committee.

With thanks to **Sophie Taylor** and **Phil de Vries** for their input into early drafts.

Ben Jones, INSOL Fellow
Project Lead
Simmons & Simmons LLP, United Kingdom

Contributors

Chapter	Contributing firm	Named contributors
Australia	Arnold Bloch Leibler	Stephen Lloyd
Belgium	Simmons & Simmons LLP	Eric Blomme Olivier Mignolet Glenn Smet
British Virgin Islands	Carey Olsen	Richard Brown
Cayman Islands	Carey Olsen	Peter Sherwood
England and Wales	Simmons & Simmons LLP	Ben Jones, INSOL Fellow Tina Lockwood Emma Lloyd
France	Simmons & Simmons LLP	Sandra Esquiva-Hesse
Germany	Simmons & Simmons LLP	Christopher Kranz
Guernsey	Carey Olsen	David Jones
India	DSK Legal	Ajay Shaw Ashish Pahariya Anisha Kumar
Ireland	Simmons & Simmons LLP	Andrea Brennan
Italy	Simmons & Simmons LLP	Mario Orsenigo Davide D'Affronto
Jersey	Carey Olsen	Marcus Pallot
The Netherlands	Simmons & Simmons LLP	Ivo van Dijk Jeroen Bos Emrecan Karacaoglu
Singapore	Simmons & Simmons LLP	Nigel Pereira Justin Kwek

Spain	Simmons & Simmons LLP	Ignacio Gonzalez
United States of America	Nixon Peabody LLP	Richard Pedone John Murray

AUSTRALIA

1. What measures are available in your jurisdiction to allow struggling businesses to enter into a "pre-pack"?

Achieving a "pre-pack"-style outcome requires a more nuanced approach than in the United Kingdom. In the only case where an Australian court has paid any attention to the issue, the judge said "it is difficult to imagine a situation in which the taking of such an appointment in the circumstances [a "day-one" pre-pack sale]… would ever be countenanced".[1] Although expressed emphatically, that comment was only made in passing by the judge in response to a submission made by Arnold Bloch Leibler in that case and is not a binding decision on this issue.

The reason why the scope to undertake a traditional pre-pack in Australia is limited is the independence requirements which apply to Australian insolvency practitioners. Australian law requires voluntary administrators and liquidators to be free of actual or potential conflicts of interest and actual or apprehended bias. While substantial pre-appointment involvement with a company does not necessarily disqualify an administrator from accepting the appointment, the courts have made it clear that pre-appointment involvement should be limited to planning and preparing for a prospective administration. Any pre-appointment commitment to enter into a particular transaction would, as the law in Australia currently stands, constitute a breach of the administrator's or liquidator's duty to be independent.

Given this independence requirement, any pre-pack structure could not involve a pre-commitment by an administrator to complete a transaction, nor could it involve the active participation of the potential administrator in the planning or negotiation of the pre-pack transaction.

One avenue which is yet to be considered by an Australian court is the option of permitting the proposed administrator to independently observe the negotiation and planning of the potential transaction, alongside or as part of the administrator's pre-appointment planning. This would mean that the administrator, upon their appointment, would be familiar with the process which had been undertaken as part of the planning for the transaction, which may enable the administrator to be comfortable implementing the transaction early in the administration. Any such approach would require careful and nuanced structuring to ensure that the administrator's independence was not compromised.

Aside from this approach, the term "pre-pack" is used more generally in Australia to refer to a transaction which is, to the fullest extent possible, worked out in advance in such a

[1] *Korda, in the matter of Ten Network Holdings Ltd (Administrators Appointed) (Receivers and Managers Appointed)* [2017] 252 FCR 519 at 23.

way as to be completed in the shortest amount of time with the least disruption to the affected business.

The structure of each arrangement is driven by the particular factors at play in the insolvency scenario.

In addition to the "independent observer" approach discussed above, structures and strategies which have been used or considered, include:

- agreeing key terms with critical stakeholders ahead of the appointment so that an asset / business purchase proposal can be put to the voluntary administrator immediately, thereby putting commercial pressure on the administrator to accept the offer at a stage where no other party has had an opportunity to prepare an offer. Where a key stakeholder has a large stake in the outcome (for example, a major customer accounting for a significant portion of the company's revenue), then the fact that the key stakeholder supports the proposal (say, by agreeing to an assignment of the benefit of the contract to the proposed purchaser only) may place the administrator in a position where they are under significant commercial pressure to accept the offer;

- agreeing an arrangement with the secured creditor to appoint a receiver to sell the assets during the administration (however, again, as explained below, the receiver is subject to legal obligations which make it difficult for the receiver to commit to any transaction in advance of appointment);

- using the recently introduced "safe harbour" period to negotiate a sale which achieves a better result for the company than its immediate liquidation. Under the Corporations Act 2001 (Cth) (Corporations Act), directors have a defence to insolvent trading or "creditor-defeating disposition" claims against them if they incur debts or make a disposition in connection with a course of action reasonably likely to lead to a better outcome for the company than the immediate appointment of an administrator or liquidator; and

- purchasing a sufficient amount of the company's debt to provide effective control over the insolvency process.

None of these options replicates a traditional "day-one" pre-pack transaction. Each option which involves an administrator requires the voluntary administrator to be satisfied that the sale is consistent with their duties as officers of the company to the company and its creditors. In the case of a receiver, the receiver has an obligation under section 420A of the Corporations Act to take all reasonable care to sell the company's property for the market value (if it has one) or otherwise the best price that is reasonably obtainable in the circumstances. A voluntary administrator is not subject to that obligation and has greater latitude to sell company property under section 437A(1) and 442A of the Corporations Act, and is entitled to take into account a number of other considerations (such as the benefit of preserving jobs and supply contracts) when deciding whether to sell the company's assets. In the case of a "safe harbour" transaction, the "safe harbour" does not give directors a defence to claims of breach of their duties to the company and its shareholders, and any transaction involving a related party would be subject to the usual duties and restrictions relevant to related-party transactions (which would not be the case in a standard pre-pack, where the transaction is carried out by the administrator and not the company's directors).

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

As set out above, the independence requirements which courts apply to liquidators and administrators in Australia mean that "day-one" pre-packs as used in the United Kingdom cannot be undertaken in Australia, and more nuanced structures are required that do not involve a pre-commitment by the administrator to implement the pre-pack transaction.

Structures which are intended to replicate some of the advantages of a traditional pre-pack are usually aimed at (i) increasing the speed of the transaction or (ii) maximising the certainty of the transaction for the company, its creditors, its contract counterparties, and the proposed purchaser.

Regarding speed, the standard voluntary administration timeframe is:

- a first meeting of creditors must occur within eight business days after the administration begins – creditors have the power at this meeting to vote to replace the administrator; and

- the second meeting of creditors must be held within the period from 15-25 business days after the administrator was appointed (20-30 business days if the administration starts in December or within 25 business days of Good Friday). This period may be extended by court order, and often is. At the second creditors' meeting, the creditors of the company must decide:

    - whether to return the company to the control of the directors;

    - whether to place the company into liquidation; or

    - that the company execute a deed of company arrangement (DOCA) (being a proposal put forward to deal with creditor claims, usually involving the sale of the company or its business in return for cash which is available for distribution to creditors).

As can be seen from that timeframe, if a transaction is to be executed using a deed of company arrangement, the shortest time period for that process is 15 business days. Three weeks may be too long a period if the business is subject to disruption caused by its insolvency, and the three-week period may also permit an alternative bidder to formulate a proposal for creditors to consider. A three-week period could also have disastrous effects on a company's trading (although Australia has recently introduced statutory provisions which limit the enforceability of *ipso facto* provisions in contracts).

To shorten the timing, the administrator has the power to execute an asset sale without creditor approval. However, the administrator will need to be comfortable that entering into that agreement best serves the purposes of voluntary administration – this will be an easier proposition in some cases rather than others – for example, in the case of a simple business structure where there is an established market an administrator may be less willing to sell without engaging in a marketing process. This is why the "independent observer" approach discussed above may facilitate a quick sale, because the administrator may have had the opportunity to satisfy him or herself that the price is a reasonable one having regard to the marketing process undertaken before their appointment.

Regarding certainty, as mentioned above, voluntary administrators have the power to sell a company's assets, in which case creditors are not involved in deciding whether the transaction should take place. In recent years, we have seen examples of a "hybrid" structure, where the administrator enters into a conditional asset sale arrangement which comes into effect only if the deed of company arrangement proposed by the purchaser is not approved by creditors. In this structure, the purchaser gets the certainty of knowing that it will obtain the company's assets but is also able to obtain the benefits of a deed if creditors vote to approve the deed. This in effect means that creditors are not given a real say in the outcome of the administration process, because on either outcome the purchaser will obtain the shares in the company and / or its assets. However, although adopting this structure provides certainty as to outcome, the administrators will still usually engage in a formal sale process in order to fulfil their obligations to creditors.

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

Directors considering their options around insolvency-adjacent transactions have the following duties:

- to act in good faith in the best interests of the company and for proper purposes;
- to act with the required care and diligence;
- not to improperly use their position to gain an advantage for themselves or someone else, or cause detriment to the corporation (this is a particularly important duty when considering a related-party transaction);
- to avoid conflicts of interest (again, an important duty in a related-party transaction);
- in the case of a company in the "twilight zone" of insolvency, to consider the interests of creditors when discharging their duties to the company;

- to avoid insolvent trading (subject to any "safe harbour" protection); and

- not to engage in a creditor-defeating disposition (being a sale of property for less than market value or the best price reasonably obtainable in the circumstances, or a disposition with the effect of preventing or hindering the process of the property from becoming available for the benefit of the company's creditors in a winding up).

The question of whether an administrator should be appointed to the company is a question for the directors. Directors may appoint a voluntary administrator by ordinary resolution and there is no need for court involvement. In order to appoint an administrator, the directors must be of the opinion that the company is insolvent or is likely to become insolvent at some future time.

4. What level of involvement does a court have in a pre-pack?

As discussed, classical "pre-packs" do not have a formal place as a structure in Australian insolvency law.

If the administrator or liquidator sells the company's assets relying on their statutory powers of sale, then no court involvement is required. The courts have made it clear that they will rarely, if ever, interfere with the exercise of a practitioner's power of sale where the sale involves elements of commercial judgment as to what is in the best interests of the company and its creditors. The only way the court would become involved in such a sale would be if a creditor or other interested party sought court orders preventing the sale.

In a scenario involving the use of a deed of company arrangement, court involvement will only occur if a creditor or other interested party (such as a competing bidder) brings proceedings attempting to prevent the DOCA from being put to creditors, or seeking orders terminating the DOCA after it has been executed (section 445D of the Corporations Act allows the court to make an order terminating the deed if, among other things, creditors were given false or misleading information that was material, or if the deed is oppressive or unfairly prejudicial to or unfairly discriminatory against one or more creditors, or contrary to the interests of creditors as a whole).

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

As to duties, see question 3 above.

6. How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?

Not applicable.

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

Not applicable.

BELGIUM

1. What measures are available in your jurisdiction to allow struggling businesses to enter a "pre-pack"?

Belgian insolvency law offers two types of insolvency proceedings: bankruptcy and the judicial reorganisation procedure. Bankruptcy is a liquidation process that results in the dissolution of the debtor company. The judicial reorganisation procedure is a pre-bankruptcy moratorium process that may lead to (i) the conclusion of an amicable agreement with two or more creditors, (ii) the conclusion of a collective agreement (binding on dissenting creditors) and (iii) the transfer of a business. Both procedures are public and often negatively perceived by suppliers and customers.

In practice, debtors have sometimes sought to prepare a judicial reorganisation procedure by confidentially agreeing certain restructuring measures (for example haircuts, payment terms, etcetera) upfront with some of their key creditors known as the Informal Pre-Pack. Once the agreement of the key creditors is obtained, the debtor would then file a formal judicial reorganisation proceeding to formalise the agreement and make it binding upon other creditors.

The Law of 21 March 2021 (the Pre-Pack Act) introduced a formal pre-pack (the Formal Pre-Pack) as an alternative to the Informal Pre-Pack. The Formal Pre-Pack takes the form of a court-authorised, confidential preparatory negotiation phase, supervised by a judicial officer (the Pre-Pack Phase). If successful, the Formal Pre-Pack will result in the opening of regular, formal and public judicial reorganisation proceedings with an expedited timeframe (the Judicial Reorganisation Phase).

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

2.1 In practice

In the Pre-Pack Phase, a judicial officer is appointed by the court to facilitate the negotiations with the (key) creditors in order to prepare for the Judicial Reorganisation Phase.

If the negotiations conducted by the judicial officer are successful, the agreement made as a result thereof will be the subject of a vote by the creditors and / or ratification by the court as part of the Judicial Reorganisation Phase. This will take the form of either an amicable agreement approved by and binding on two or more individual creditors; or a collective agreement approved by a majority creditor vote and binding on all dissenting creditors.

2.2 Advantages compared to regular judicial reorganisation proceedings

As an agreement with key creditors will already have been found in the Pre-Pack Phase, the Judicial Reorganisation Phase can be carried out on an expedited timetable. This operates to maximise going concern value. Suppliers and customers should be more comfortable and value destruction is avoided or reduced.

2.3 Disadvantages compared to regular judicial reorganisation proceedings

Contrary to regular judicial reorganisation proceedings, there is no moratorium which applies by default pending negotiations. The debtor will only enjoy a suspension of enforcement measures against the company's assets for debts incurred prior to the opening of the formal proceedings, from the time of referral to the court for the formal opening of judicial reorganisation proceedings. However, see below for a possibility to impose an *ad hoc* moratorium.

The mandatory appointment of a judicial officer could be viewed as a disadvantage compared to standard judicial reorganisation proceedings, where the debtor retains full control subject to clearly defined exceptions. In light of the relatively succinct description in the Pre-Pack Act of the role of the judicial officer, friction may arise between the debtor and the judicial officer in respect of the powers of the latter and the control over the negotiation process in general. The level of experience and approach of the chosen practitioner will have a significant impact on the outcome of the procedure.

Finally, the Pre-Pack Act is limited in time and will (save an extension) expire on 31 March 2023. This – highly unusual – sunset mechanism could give rise to unintended issues. For example: what if a debtor is still in the Pre-Pack Phase at the time of expiry of the Pre-Pack Act?

2.4 Advantages compared with the Informal Pre-Pack

As a statutory alternative to the Informal Pre-Pack, the Formal Pre-Pack provides the possibility for the judicial officer to request the court to order a moratorium on enforcement measures for a maximum period of four months and / or subject creditors to payment terms or other conditions. This moratorium can be lifted at any time by the court upon request of the judicial officer or an interested creditor.

The Formal Pre-Pack will also provide the benefit of court validation and expertise form the court-appointed officer.

2.5 Disadvantages compared with the Informal Pre-Pack

On the other hand, the debtor will need to assess the fees and costs associated with the judicial officer's intervention as well as a partial loss of control over the process.

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

The directors of the debtor must consider whether an Informal or Formal Pre-Pack, a regular judicial reorganisation procedure or a bankruptcy filing is in the best interest of the debtor. In doing so, directors will need to consider the following:

- a bankruptcy trustee can hold (former) directors liable in the event of a subsequent bankruptcy if the director concerned was aware of or should have been aware that there was no reasonable prospect of maintaining the company or its business by attempting the Informal or Formal Pre-Pack;

- current or former directors can be held jointly liable by creditors and / or a bankruptcy trustee for having committed a "manifest gross error" which contributes to a subsequent bankruptcy;

- directors have specific monitoring duties in terms of the company's share capital and net assets;

- directors have a duty to convene and deliberate on measures to preserve the continuity of the debtor for a minimum period of 12 months whenever "significant and congruent circumstances" threaten the business' continuity; and

- the directors have a duty to file for bankruptcy within one month as from the date on which the debtor has ceased payments and lost credit. This duty ceases to apply only upon the opening of formal judicial reorganisation proceedings (as part of the Judicial Reorganisation Phase or directly).

4. What level of involvement does a court have in a pre-pack?

As set out above, a judicial officer is appointed by the court. This decision is not published. The judicial officer has the following important powers and duties in the Pre-Pack Phase:

- deciding which creditors to include in the negotiations on the basis of a list submitted by the debtor;

- participating in the negotiations as they see fit;

- safeguarding the due information of creditors;

- reporting to the delegated supervising judge, especially when a differentiated arrangement is sought in respect of certain (categories of) creditors; and

- once an amicable agreement with two or more creditors has been reached or the approval of a collective agreement by a majority vote of the creditor seems sufficiently likely, requesting the court to move to the Judicial Reorganisation Phase.

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

As per question 3 above.

6. How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?

We would not expect judicial officers to rely on valuations. As practice develops further, judicial officers will need to determine how to best comply with their duties under the Pre-Pack Act in practice.

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

The Pre-Pack Phase is supervised by an independent judicial officer, who can be a person proposed by the debtor but will act independently from it. They will not only consider the interests of the debtor but also those of the creditor.

The arrangement which results from the Pre-Pack Phase is referred to the insolvency chamber of the Enterprise Court for the formal opening of judicial reorganisation proceedings. Within that framework, both an amicable and a collective agreement must be ratified by the court (in the case of the latter following a successful majority creditor vote).

BRITISH VIRGIN ISLANDS

There is no bespoke legislation dealing with "pre-pack" restructuring or sale of the business or assets of an insolvent British Virgin Islands (BVI) company, and in practice, as primarily a holding company jurisdiction pre-packs are not in high demand in the BVI. Whilst the existing BVI insolvency legislation includes procedures that may achieve some aspects of a pre-pack style transaction, there will be limitations compared with the English regime meaning that, in essence, it would usually be necessary to have buy-in from the majority of the company's stakeholders and, in all likelihood, court approval, which would add time and cost to the process and in many cases defeat the purpose. We are not aware of any precedents for BVI companies undergoing a pre-pack in the BVI. This would not however preclude the possibility of a BVI company undergoing a pre-pack in another jurisdiction, since it is not uncommon for a BVI company to have its centre of main interests outside the BVI. If that were the case, the BVI's cross border assistance provisions might be available to provide relief in support of the foreign pre-pack process, if required (provided that the jurisdiction of the main restructuring was a designated country for the purposes of the BVI's cross-border assistance provisions: Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom, and the United States of America).

One of the limitations of the BVI insolvency regime is that the administration provisions contained in the BVI Insolvency Act 2003 have not been brought into force, and there is no intention to bring them into force. Administrative receivership is available, but that regime would only be suitable to achieve a pre-pack if the secured creditor was fully co-operative and willing to initiate an administrative receivership to achieve the sale of the company's assets. The principal insolvency procedure in the BVI is liquidation. That is usually initiated by a creditor's application which must be advertised and generally takes four to six weeks to be determined. A liquidation can however also be commenced straightaway if the company's members pass a special resolution to appoint a liquidator. It is also possible to apply to court to appoint a provisional liquidator (but only where a full liquidation application has also been filed), and whilst the BVI court has confirmed that provisional liquidation can in certain circumstances be used as a tool to facilitate a restructuring (light touch provisional liquidation), that procedure has not been widely used in the BVI.

However, there are limitations with both a members' appointment and provisional liquidation which means that they are not ideal procedures to facilitate a pre-pack.

- Where a liquidator is appointed by members' resolution, the liquidator's powers to dispose of assets are limited until after the first creditors' meeting has been held. As such, in practice it would be difficult to achieve a pre-pack sale of a company's business or assets without the buy-in of the majority of unsecured creditors, and / or a court order approving the transaction.

- Whilst a provisional liquidation is available as a restructuring tool in the BVI, in practice it is rarely used as such, and certainly less so than in Cayman or Bermuda. The principal limitations with a BVI provisional liquidation in the context of a proposed pre-pack would be that, unlike in Cayman, provisional liquidation does not come with the protection of a moratorium on claims, and the provisional liquidators' powers are generally limited to preserving assets, rather than disposing of them. Accordingly, as with a members' appointment, in practice it would be difficult to achieve a pre-pack administration using provisional liquidation without the buy-in of unsecured creditors and other stakeholders and / or a court order.

  As such, a pre-pack sale by an insolvent company would in all likelihood be difficult to achieve in the BVI without buy in from creditors and other stakeholders, and in most cases court approval would be required in any event.

CAYMAN ISLANDS

1. **What measures are available in your jurisdiction to allow struggling businesses to enter into a "pre-pack"?**

There is no bespoke legislation dealing with "pre-pack" restructuring or sale of the business or assets of an insolvent Cayman Islands company. However, the existing insolvency legislation is sufficiently flexible to allow transactions approximating an English "pre-pack" to take place in the appropriate case, albeit there will be limitations compared with the English regime.

One of the limitations of the Cayman Islands insolvency regime is that there is no out-of-court method for putting a company into an insolvency process equivalent to administration in England. Broadly speaking, there are three forms of insolvency procedures in the Cayman Islands:

- Voluntary liquidation: A company may be placed into voluntary liquidation on the resolution of its shareholders (that is without a court application). However, if the company is insolvent, the voluntary liquidator is required to apply to have the liquidation placed under the supervision of the court (which is akin to official liquidation, discussed below). It is therefore unlikely to be an appropriate procedure for implementing a "pre-pack".

- Official liquidation: The court may order a company to be placed into official liquidation on the petition of the company itself, or any one of its creditors or shareholders. This is a terminal procedure, in which official liquidators are appointed to wind up the affairs of the company and distribute its assets, before applying for the company to be dissolved. It could therefore in theory be used to implement a "pre-pack" in which all of the assets of the company were to be sold. However, the route into official liquidation is not quick (the statutory steps, including advertising the hearing of the petition, usually takes at least three months), meaning this is unlikely to be a suitable procedure.

- Restructuring Officer: A company may apply for the appointment of a restructuring officer on the grounds that it is (or is likely to become) insolvent and "intends to present a compromise or arrangement to its creditors".[1] This bespoke restructuring regime was introduced in 2022 and is the process used to give effect to facilitate attempts at a rescue or restructuring of an insolvent company.

Where there are grounds for urgency, and subject to court availability, an appointment of a restructuring officer can be made within a few days. The application can also be made *ex parte*, without notice to creditors. Therefore, in the appropriate case, the process could

[1] Companies (Amendment) Act 2021, s 91B(1)(b).

be used to meet the urgency and secrecy requirements that typically drive the need for a pre-pack.

The application to appoint a restructuring officer triggers a moratorium on proceedings and creditor enforcement action against the company.[2] Licensed insolvency practitioners are appointed as provisional liquidators, but their powers are derived from the court order appointing them. Restructuring officers are typically appointed on a "light touch" basis, in which control of the day-to-day operations of the company remains with the directors and the restructuring officer focuses on the restructuring.

There are no reported or unreported cases of the restructuring officer regime (or the previous provisional liquidation regime) being used to implement a true "pre-pack" - that is, one in which restructuring officers (or provisional liquidators) are appointed to immediately give effect to a pre-arranged sale of the company's business and assets. Court sanction would be required for the restructuring officer to undertake such a sale at any time, and while in theory the application for sanction could be made immediately following the appointment (that is at the same hearing), there are a couple of obstacles that would be difficult to overcome:

- firstly, it is not clear that the purpose of the appointment of the restructuring officer, that is to "present a compromise or arrangement to its creditors",[3] would be met where an immediate sale with no creditor consultation is proposed. While the court has in the past interpreted this phrase flexibly in the past, a "true pre-pack" may be one step too far; and

- secondly, the court would need to be willing to permit the restructuring officer to forego the usual creditor consultation process that is usually expected before a substantial sale is sanctioned.

These obstacles are not necessarily insurmountable, but it is likely the court would need to be satisfied that there was an overwhelmingly strong case that the "pre-pack" was in the interests of creditors.

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

As discussed above, there are no reported or unreported cases of the restructuring officer regime (or its predecessor, provisional liquidation regime) being used to implement a true "pre-pack".

[2] Although a crucial difference between a Cayman Islands provisional liquidation and English administration is that provisional liquidation does not prevent secured creditors enforcing their security.
[3] *Ibid*.

Prior to the implementation of the new restructuring officer regime in 2022, provisional liquidation was however often used to implement restructurings and / or business or asset sales by insolvent companies, including in cases where urgency is required, and the new regime will continue to facilitate this. If the restructuring officer can demonstrate that there is broad creditor support for sale, there is no reason why court sanction could not be obtained very quickly following the appointment, particularly if much of the work (that is negotiating sale documents, liaising with key creditors) has begun prior to the appointment. Therefore, while the lack of creditor consultation makes a true "pre-pack" difficult, in cases where creditor consultation will not defeat the proposed transaction, the Cayman Islands regime is sufficiently flexible that transactions can be implemented relatively quickly with limited cost.

Provisional liquidation has also been used to implement a restructuring or sale that predominantly takes place under an overseas insolvency regime. While the Cayman Islands Court will not recognise and give effect to insolvency appointments by foreign courts over Cayman Islands companies (except in extremely limited circumstances), it will cooperate with overseas attempts to rescue or restructure Cayman Islands companies. This was usually achieved by the appointment of provisional liquidators on a "light touch" basis to cooperate with and give effect to the overseas restructuring efforts. For example, in the case of CHC Group Ltd,[4] the court appointed "light touch" provisional liquidators on the application of a Cayman Islands holding company that was the subject of Chapter 11 proceedings in the United States of America, and shortly thereafter sanctioned the sale of the whole of the company's holdings to a Newco to give effect to the Chapter 11 restructuring. Going forwards, restructuring officers will perform this function.

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

The duties owed by directors of Cayman Islands companies include the duty to act for a proper purpose, in what they believe to be in the best interests of the company, to avoid conflicts of interest, and to act with due care and attention when exercising their powers.

While these duties are owed to the company, in circumstances where the company is insolvent or is doubtful of its solvency, the directors are required to have primary regard to the interests of creditors in discharging their duties.

Therefore, in determining whether to proceed with a pre-pack restructuring (or similar), the directors should be primarily concerned with maximising returns to creditors.

4. What level of involvement does a court have in a pre-pack?

There will be significant court involvement in a Cayman Islands pre-pack. As noted above, the appointment of a restructuring officer involves an application to court, and any

[4] Unreported, 24 January 2017.

decision by the restructuring officer to implement a sale (whether by way of a pre-pack or otherwise) will also require a court order.

In exercising its discretion in these matters, the court will be concerned with: (i) whether it has jurisdiction to grant the relief sought (for example are the statutory requirements for the appointment of provisional liquidators met), and (ii) the interests and wishes of creditors.

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

Restructuring officers' duties will depend on the court order appointing them. As noted above, it is likely that the directors will retain day-to-day control and that the restructuring officer will be directed to focus on the restructuring. In the case of a pre-pack, the restructuring officer may be specifically directed to consider and, if thought appropriate, implement, a specific transaction.

Restructuring officers must act with skill and care in the performance of their duties. They are required to act impartially, in good faith, with the interests of all stakeholders in mind. In considering any sale, particularly one in which the opportunity for creditor consultation may be limited, these duties must be at the forefront of their mind.

In a pre-pack situation (or similar), to a certain extent it is possible to discuss the terms of the proposed transaction with the prospective provisional liquidators prior to their appointment. However, restructuring officers are required to be independent, and so great care must be taken that this is not compromised (or seen to be compromised) by any pre-appointment discussions. For example, the selection of prospective restructuring officers should not be conditional upon their approval of the proposed transaction. However, the legislation expressly provides that the fact that an insolvency practitioner has advised the company on a potential restructuring does not prevent their appointment.

6. How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?

There are no hard-and-fast rules for the procedure that must be followed by restructuring officers in conducting a sale. For example, there is no requirement to obtain a formal valuation, or to conduct an open market sale, as there are in certain jurisdictions. Restructuring officers must simply satisfy themselves and the court that the proposed transaction is in the interests of creditors, and the appropriate methodology will therefore vary from case to case.

In the ordinary course, the court places a good deal of faith in the commercial judgment of the restructuring officers as well as the wishes of creditors. However, in a pre-pack situation where there has been little or no creditor consultation, the court is likely to heavily scrutinise the restructuring officers' reasons for the transaction. If the proposed sale is to a related party, the reasons would need to be extremely compelling.

There is no specific guidance on a pre-pack situation equivalent to SIP 16 (Statement of Insolvency Practice 16) in England. However, a restructuring officer may choose to adopt this guidance in order to demonstrate to the court that the process is justified.

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

None.

ENGLAND AND WALES

1. What measures are available in your jurisdiction to allow struggling businesses to enter a "pre-pack"?

In England and Wales, the term "pre-pack" is used as shorthand to describe a transaction (most often a sale of a company's business and / or assets), the terms of which are negotiated and finalised prior to the formal commencement of an insolvency proceeding in respect of that company, but which is entered into and takes effect immediately thereafter. Contrast this with a "normal" administration sale where administrators take possession then market and transact after their appointment.

The use of pre-packs is not restricted to any particular insolvency proceeding; however, they are most commonly used in conjunction with an English law administration. This is because the provisions of Schedule B1 to the Insolvency Act 1986 (IA 1986) permit administrators to be appointed by a company, its directors, or its qualifying floating charge holders without the involvement or sanction of the court or the company's general body of creditors (therefore placing the timing of the administrators' appointment in the hands of the appointor). Once a debtor has identified a risk of insolvency, it is able to work with its key stakeholders, legal advisers and prospective administrators at an early stage to plan for, negotiate and agree the terms of a sale which is then "pre-packaged" ahead of the formal commencement of administration. Sale documentation is then entered into, and the transaction is effected by, the administrators immediately on or after their appointment.

This necessary sequencing presents a theoretical risk for the buyer that they are "gazumped" if, in the scintilla of time between the appointment of the administrators (which is when the administrators get *locus* to execute the pre-pack transaction) and their execution of the deal, the administrators receive a better offer from a third party. In practice, this risk to the buyer may be mitigated by the circumstances of the pre-pack because an administrator would need to be sufficiently confident in being able to transact on the terms offered with the third party to risk the deal in hand and any deterioration in value from continuing to trade, and they would have to be funded for long enough to negotiate and agree sale documentation. However, it presents a risk inherent for administrators where they may not have had time or funding to carry out a full marketing exercise that a third party subsequently emerges who says that they would have paid more.

This procedure affords a struggling debtor an opportunity to effect a sale quickly, discreetly, cheaply (relative to a sale conducted during a trading administration) and with minimal disruption to its operations, goodwill and employees. Those assets not "cherry-picked" by the buyer as part of the sale are left with the insolvent company and become subject to the administration procedure in the ordinary course.

Due to their rapid and rather opaque nature, there is a common perception amongst critics that pre-packs inherently (and disproportionately) favour existing management and secured creditors and are conducted without sufficient consideration to the interests of creditors as a whole. This has led to numerous calls for greater transparency and oversight of such transactions.

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

The pre-pack process is intended to maximise the consideration obtained for the insolvent company's business and assets, thereby achieving the greatest realisations for creditors as a whole. The relatively low costs of conducting a pre-pack sale can be attributed to its quick and discreet nature (including a lack of court involvement). Once it is public knowledge that a company has entered into a formal insolvency process, a number of issues tend to arise most of which can serve to erode business value. Key employees may leave the company; suppliers may refuse to supply or change their terms; and the company's goodwill may deplete rapidly. In addition, for the duration of any trading period of the business in administration, the insolvency officeholder will necessarily have to be more closely involved in the management of the company and this will increase their fees and expenses in that period. Buyers are often acutely aware that their bargaining power increases in circumstances where a company already in administration wants to get a deal over the line as soon as possible to avoid further costs and erosion of value. In a pre-pack scenario, most of the issues described above are mitigated (and accordingly value is preserved) due to the sale being primed in advance of the commencement of an insolvency process and non-key stakeholders only being notified after the event. For example, most suppliers tend to be focused more on business continuity than the identity of their customer and are often happy to continue to contract with a new buyer with greater covenant strength than their insolvent predecessor.

This is not to say, however, that pre-pack sales are entirely unproblematic. Taking again the example of suppliers: most often, the contractual terms between the seller and supplier will prevent the seller assigning the benefit of that contract without the supplier's consent. There is usually insufficient time to contact each supplier for their consent prior to the sale (and consultation with suppliers in advance would in any event defeat the purpose of a pre-pack), and so the buyer usually wears this risk by taking a purported assignment of key contracts without the supplier's consent, under the proviso that they will need to obtain their consent retrospectively and / or renegotiate the terms of supply. As mentioned above, suppliers generally have a vested interest in securing business continuity and so tend to be open-minded to a renegotiation of terms (but this should not be assumed).

A similar issue is often encountered with landlords. Pre-pack sale agreements often permit the buyer to occupy (under a licence) the properties which are leased to the seller, pending receipt of the landlord's consent to a formal assignment of the lease. Given there is no guarantee that landlord consent will be obtained, the consideration paid in respect of these leases by the buyer is often deferred until such time as consent is obtained. It is unusual for landlords to be consulted prior to the sale becoming effective and therefore the granting of a licence to occupy is usually done without the landlord's consent, in breach of the terms of the lease. The statutory moratorium which falls into place on administration prevents landlords from exercising their right to repossess their property without the permission of the administrators or order of the court. This means that, in practice, provided that the contractual rent is paid for the period during which the property is being used in the administration, the buyer will have a period of occupation during which to negotiate with the landlord while the landlord is unable to retake possession.

It is also worth noting that the Transfer of Undertakings (Protection of Employment) Regulations 2006[1] generally apply on a sale of the company's business and assets, and there is no exception in the context of pre-pack sales. This means that, on a transfer of a business as a going concern, the employees of that business (and any corresponding liabilities) generally automatically transfer from the insolvent company to the buyer on their existing terms of employment and are protected against "transfer-related" dismissal. If redundancies are anticipated as part of a pre-pack sale, the parties to the sale may be exposed to liability vis-à-vis the employees of the company, however the scope of risk will differ depending on the circumstances of each case. These kinds of unknown risks are usually reflected in the consideration offered for the sale.

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

Directors are by no means exempt from considering the implications of their company's entry into a pre-pack sale. At a time where directors will already have identified that the company is, or will in the reasonably near future become, insolvent, the directors will need to carefully consider their duties (with the benefit of appropriate independent legal and financial advice) to act in the best interests of the company's creditors as a whole and minimise loss, particularly in circumstances where the company continues to trade pending the completion of a pre-pack sale. Detailed minutes should be taken in respect of all board meetings pre-completion in order to ensure that there is in place an accurate record of the management's justifications for making decisions and its focus on the interests of creditors as a whole.

The need for directors to tread carefully is particularly prevalent where it is proposed that the former management of the insolvent company will be involved with the management of the buyer after the sale. As a precautionary measure against the act of "Phoenixism" (essentially, where the directors of an insolvent company purchase its business and assets through a newly incorporated company in which they hold directorships, with a view to the business re-emerging without the burden of its former liabilities), section 216 of the IA 1986 prevents the directors of a company which has gone into liquidation from acting for

[1] SI 2006/246.

five years after the date of the liquidation as director of any company with a "prohibited" name (broadly, the same name as the company in liquidation or something so similar as to imply a connection). As the debtor will often move into liquidation at some point after its entry into administration, this issue is frequently considered by the connected party purchaser before a pre-pack sale is completed, however this is not an absolute prohibition and certain statutory exemptions set out in rules 22.4 to 22.7 Insolvency (England & Wales) Rules 2016 (such as giving notice to creditors) are regularly utilised in sales to connected parties.

In addition, the courts have clarified that a director's fiduciary duties to their company survive the company's entry into administration proceedings. This means that where a director of a company which has gone into administration is also buying assets from that company, they cannot wash their hands of their responsibility to achieve the best terms for creditors and leave it all to the administrator.

4. What level of involvement does a court have in a pre-pack?

There is no requirement for the court or the debtor's general body of creditors to sanction or otherwise supervise a pre-pack sale. The administrators to the insolvent debtor are also usually appointed without court involvement using the out of court procedure laid out in Schedule B1 of the IA 1986.

The debtor will typically engage the prospective administrator at an early stage to undertake a formal analysis of the debtor's options. Once the debtor decides to proceed with a pre-pack solution, the prospective administrator will assist with the commencement of an accelerated merger and acquisition process with a select number of parties. The chosen buyer may be an independent third party or (more commonly in recent times) a party connected to the insolvent company, such as its former management via a newly incorporated entity.

Sales to connected parties require additional legal and reputational considerations, not least because at the time of transacting the insolvency practitioner may not have been able to undertake any independent investigations into the underlying causes of the failure of the business and will be reliant on what they are told by those who may bear some responsibility for it. Notwithstanding this, many insolvency officeholders agree to act on the basis that the potential sale consideration (and therefore the possible return to creditors) is greater in circumstances where business disruption is minimised, and accordingly the statutory purpose of the debtor's administration is achieved.

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

The proposed administrators will often be involved at an early stage to advise the debtor on all applicable restructuring options. Where a pre-pack solution is chosen, it is often done at the express recommendation and advice of the proposed administrators, and it is therefore invariably in the administrators' interests to see such a sale completed successfully and swiftly.

Commentators are divided on whether this means that the rules regarding pre-packs should be restricted further, or whether the focus should instead be on increasing the responsibility (and accountability) of the relevant officeholders, as regulated professionals and officers of the court, to ensure that pre-packs are at all times conducted in a fair and reasonable manner. As things currently stand, officeholders generally have flexibility to conduct pre-packs on such terms as they (and the debtor) see fit, so long as they can demonstrate that the terms of the sale are appropriate in accordance with their duties.

To that extent, following the completion of any pre-pack sale, the relevant administrator must provide to creditors certain information regarding the sales process in a statement known as SIP 16 (Statement of Insolvency Practice 16). The primary purpose of the SIP 16 is to provide creditors with sufficient information about the sale that "a reasonable and informed third party would conclude that the pre-packaged sale was appropriate, and that the administrator has acted with due regard for the creditors' interests."[2] The statement will typically include (amongst other things) details as to the reasons for conducting a pre-pack process and any alternative options that were considered and rejected, as well as details of the terms of sale (including the consideration). The administrator will naturally undertake a more detailed review of what should be disclosed in circumstances where the pre-pack sale is arranged with a connected party purchaser. To support the administrator's conclusion that a pre-pack sale was in all circumstances the most appropriate option for the debtor, the administrator may append various pieces of evidence to the SIP 16, including the matters set out under the headings below.

5.1 Pre-appointment matters

The SIP statement should include details of the administrator's prior involvement, the alternative options considered together with an explanation of possible outcomes, whether efforts were made to consult with major stakeholders (and if no consultation took place, an explanation of why it did not), why the business could not be traded and offered for sale in the administration and details of any action taken to obtain funding for working capital.

5.2 Details of marketing activity

SIP 16 sets out a number of guiding principles for prospective administrators conducting marketing activities for the business. If any of these principles are not adhered to, the administrator is required to explain the reasons for such divergence.

---

[2] SIP 16, para 8.

5.3 Valuations

The administrator should ensure that any offer for the business and assets of the insolvent company is commensurate with independent valuations obtained in advance of the sale. Details of such independent valuations should be provided in the SIP 16 statement in order to provide evidence that the business and assets were sold for a reasonable price.

5.4 Viability statement

SIP 16 recommends that where the purchaser is connected to the insolvent entity, the insolvency practitioner should make the purchaser aware of the potential for enhanced stakeholder confidence in preparing a viability statement. A viability statement will state how the purchasing entity will survive for at least 12 months from the date of the proposed purchase. The prospective purchaser should consider providing a short narrative detailing what the purchasing entity will do differently in order that the business will not fail.

5.5 Details of the transaction

Including: the identity of the purchaser and any connections it had with the company, the names of the directors and management of the purchasing entity, whether any directors had given guarantees to a financier and that financier is financing the new business, the assets involved, details of the sale consideration (amount, whether deferred) and any conditionality to the transaction.

5.6 Qualifying report

Where the sale is to a connected person, a copy of the "qualifying report" provided by the connected person to the administrators is to be included within the SIP 16 statement. The requirement for a qualifying report to be prepared is set out in the Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2021 (the Regulations). The Regulations apply to disposals by administrators of all or substantially all of the business and assets of the company to a connected person within eight weeks of their appointment. The administrator must obtain the prior approval of the creditors or a report from an independent evaluator stating, amongst other things, that the evaluator is satisfied that the consideration and the grounds for the sale are reasonable in the circumstances.

6. How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?

Administration is a collective insolvency procedure. As well as being an officer of the court, an administrator must perform their functions in the interests of the company's creditors as a whole. Before consenting to act as administrator of a company, the prospective administrator must be reasonably satisfied that one of the three purposes of the administration will be achieved pursuant to paragraph three of Schedule B1 of the IA 1986, namely:

(a) rescuing the company as a going concern; or (if that is not possible)

(b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration); or (if that is not possible)

(c) realising property in order to make a distribution to one or more secured or preferential creditors.

As mentioned above, insolvency officeholders regularly take up administration appointments within the context of a pre-pack on the basis that the distribution to creditors is anticipated to be larger than it otherwise would be for a trading administration or liquidation, given that the time taken to conduct a trading administration increases the level of administrators' fees which are paid out of the company's estate, and the discreet nature of pre-packs assists in preserving business value. This means that prospective administrators regularly rely on the second objective stated above when considering whether to consent to an appointment (or even the third objective in circumstances where the only creditors anticipated to receive a return from the sale proceeds are the secured and preferential creditors).

Other than considering whether the statutory purpose of the administration can be achieved, a prospective administrator will also consider how their duty to maximise value to creditors is compatible with the need to conduct a marketing exercise on an accelerated basis. Given there will be no opportunity post-appointment to test the market value of the business and assets for sale, the prospective administrator will need to be satisfied that the price to be paid is an appropriate price in the circumstances. This is of particular importance where the buyer is connected to the debtor. If it can be evidenced that the consideration is too low, the sale may be challenged, and the conduct of the prospective administrator called into question by the court. This is usually achieved by the administrator arranging for independent valuations of the business and assets prior to the sale, the details of which are subsequently disclosed to creditors.

To mitigate this risk of challenge, a "pre-pack" transaction may be structured as a "post-pack". This is a little like a "stalking horse" process utilised in section 363 sales undertaken in Chapter 11 bankruptcy proceedings. In a "post-pack" the transaction is concluded per a pre-pack but the administrators are permitted by the buyer to continue to market the business following the sale, and have the benefit of a contractual device either to then have the original buyer match any higher bid subsequently obtained, or to unwind the original sale and sell to the new higher bidder. The legal complexities and obvious commercial unattractiveness of such arrangements means that they are rarely seen.

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

Pre-packs have attracted a lot of criticism in the United Kingdom over the years, and various attempts have been made by the Government to address that criticism, particularly regarding the perceived lack of transparency for creditors and the fact that in many cases the purchaser is connected with the insolvent company.

7.1 Statements of Insolvency Practice

Statements of Insolvency Practice (SIPs) are issued to insolvency practitioners by the insolvency regulatory authorities. The purpose of SIPs is to promote and maintain high standards by setting out required practice and harmonising the approach of insolvency practitioners to particular aspects of insolvency practice. SIPs set principles and key compliance standards with which insolvency practitioners are required to comply. They apply in parallel to the prevailing statutory framework. Non-compliance with a SIP is a regulatory matter. There are two SIPs that are of direct relevance to pre-packs: SIP 16 and SIP 13.

On 1 November 2015, SIP 16 was introduced. It has been modified a number of times. SIP 16 provides detailed guidance for practitioners involved in a pre-pack. The most significant innovation was the requirement for practitioners to prepare a "SIP 16 Statement" which is sent to creditors and filed at Companies House (making it a public document). The SIP 16 Statement contains, among other things, a detailed explanation and justification for the pre-pack, what alternatives were considered and why the pre-pack route was chosen, as well as details of the marketing process, any valuations, key terms of the transaction (including what was paid). Where the pre-pack is to a connected party, SIP 16 advises that the practitioner should assume, and plan for, greater interest in and possible scrutiny, and provide a greater level of detail in the SIP 16 Statement than they might otherwise do for a sale to an unconnected purchaser. The connected party is also to obtain a qualifying report under the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 (see below) and be urged to provide a "viability statement" explaining how the new business will survive for at least 12 months.

SIP 13 provides guidance to practitioners in relation to disposals of assets to connected persons. It explains that in these circumstances, "transparency in all dealings is of primary importance… It is equally important that the insolvency practitioner acts and is seen to be acting in the interests of the creditors as a whole and is able to demonstrate this".[3] The SIP sets out key compliance standards and required disclosures.

[3] SIP 13, paras 2 and 3.

7.2 The Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2020 (the Regulations)

The Government reviewed the impact of the voluntary industry measures introduced in November 2015 to improve the transparency of pre-pack sales in administration. The Government's conclusions, contained in its report published on 8 October 2020, were that, while the voluntary measures have resulted in some improvement, there were still concerns about transparency and a legislative approach was therefore needed.

The Regulations came into force in the United Kingdom, on 30 April 2021, and apply to administrations commencing on or after that date.

The Regulations prohibit an administrator of a company from completing a sale of all or substantially all of its business and assets to one or more connected persons within eight weeks from the date of the company's entry into administration unless the administrator has obtained either the approval of the company's creditors, or a written report from an independent evaluator opining on whether the consideration to be provided and the grounds for the disposal are reasonable in all of the circumstances. The responsibility for obtaining the qualifying report rests with the connected party.

Obtaining the prior approval of creditors to a pre-pack sale is impractical, and in cases where there are insufficient assets for more than the minimum prescribed part distribution to unsecured creditors, it is not required. It is expected that most if not all such sales to connected persons will comply with the Regulations by the obtaining of a qualifying report from an independent evaluator. It is for the practitioner to takes its own view on the adequacy of the report and whether or not to follow its conclusions (albeit if the practitioner decides to proceed with a connected party where the evaluator has stated that "I am not satisfied that the consideration to be provided for the relevant property and the grounds for the substantial disposal are reasonable in the circumstances"[4] it is for the practitioner to justify to creditors its decision).

[4] Administration (Restrictions on Disposal etc to Connected Persons) Regulations 2020, Statement B.

FRANCE

1. What measures are available in your jurisdiction to allow struggling businesses to enter into a "pre-pack"?

Pre-pack sales were created under French law by Order No 2014-326 of March 12, 2014, and inspired by the American "pre-arranged sale".

Under French law, a "pre-pack sale" is a total or partial asset sale project discussed during a preliminary confidential amicable proceeding and implemented in a subsequent insolvency proceeding of the target company. The anticipation of follow-up insolvency proceedings brings the advantage of preparing it in advance so to keep it to a minimum duration, which can be as short as three weeks (to a couple of months), yet getting the benefit to the buyer not to acquire any liabilities and the scope of the assets and employment contracts it sees fit for its own operation

As an hybrid transactional amicable yet insolvency proceedings related sale, it combines the advantages from both systems and allows for fast-tracked secured acquisitions of distressed companies.

Pre-pack sale plans are intended to better control the insolvency proceeding of which outcome and duration are uncertain, to limit the related costs, in particular those of the observation period, to obtain a better sale price by avoiding the devaluation of the assets, to involve the participating creditors in the restructuring thus maximising chances of success, or even to benefit, upon execution of the sale during insolvency proceedings, from the AGS guarantee[1] for indemnities due to employees not taken over by the purchaser. In any case, the various parties involved in prior pre-insolvency proceedings are bound by an obligation of absolute confidentiality, including third parties such as candidate buyers.

Pre-pack asset sales plan are intended to better control the insolvency proceeding period for which the outcome and duration are uncertain; to limit the related costs, in particular those of the observation period; to obtain a better sale price by avoiding the devaluation of the assets; to involve the participating creditors in the restructuring thus maximising chances of success; or even to benefit, upon execution of the sale during insolvency proceedings, from the AGS guarantee for indemnities due to employees not taken over by the purchaser. In any case, the various parties involved in prior pre-insolvency proceedings are bound by an obligation of absolute confidentiality, including third parties such as candidate buyers.

[1] *L'Association pour la gestion du régime de Garantie des créances des Salariés* (AGS).

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

French law pre-packs follow a specific timeline as depicted below:

- the debtor (target company) requests the president of the Commercial Court to open a confidential amicable proceeding to address his distressed situation (so called "conciliation" under article L611-7 of the French Commercial Code). A third party, usually an insolvency professional known as a "conciliator", is appointed to assist the debtor and may look for prospective buyers of the business. The conciliator's mission lasts up to five months (non-renewable);
- during the course of the amicable proceeding, potential bidders (competitors, specialised distressed investors, etcetera) are approached to seek their willingness for such an asset-based acquisition;
- should potential bidders manifest their interest, negotiations begin under the aegis of the conciliator, to define the scope and main terms of the contemplated takeover (which can lead to a letter of intent, or a term sheet);
- once the main conditions are finalised, ideally through the signature of a term sheet, the executive officer of the debtor company will request the court to open an insolvency proceeding and to implement the agreed upon prepack asset sale plan during its course. The amicable proceeding ends as soon as a bankruptcy proceeding starts;
- the conciliator addresses a report to the court detailing the outcome of the amicable proceedings and the bidder's offer's main terms. After hearing the Public Prosecutor's opinion, the court may decide to implement the pre-pack sale and therefore not to initiate an invitation for tenders;
- in such alternative, the bidder avoids competition of other bidders but sometimes allow new parties to bid. The court will set a hearing to discuss the merits of the offers received, under much shorter notice than under a regular insolvency proceedings (15 days would still be a minimum);
- external bidders may only submit takeover offers up to eight days before the scheduled hearing, which leaves little time for such competitors to position themselves;
- once submitted, offers cannot be withdrawn and can only be upgraded, no later than two business days before the hearing;
- the court hears the merits of each bids and may interview employees, contractors and executives of the debtor company, as well as bidders and court-appointed administrator; and

- approximately a week later, the court approves or reject the proposed sale through a ruling. Usually, the bidder gets the possession of the company as of the date of the ruling.

A pre-pack offer several advantages:

- it allows for a fast-tracked acquisition compared to an ordinary takeover (whether in insolvency or during insolvency proceedings);

- the pre-pack sale is presumably negotiated and prepared within a strictly confidential framework – amicable proceedings are strictly confidential, which preserve the target's reputation and market value. The shortened insolvency proceeding limits the damage to the target's value. The bidder may withdraw from the deal confidentially should the negotiations meet a dead end. In practice, however, this confidentiality may be difficult to enforce, especially if employees are informed of the steps being taken to find a buyer;

- less competitive process: potential bidders have already been filtered – in case of a single bidder, approved by the debtor, the court is more likely to order the sale;
- smoother relations with executives of the company as they are less likely to perceive the bidder as hostile and will be more involved in the takeover and subsequent operations, if needed;

- discounted price for the bidders as opposed to acquiring a non-distressed company;

- may be used in the context of carve-out operations;

- higher level of information on the target's business and figures than under insolvency proceedings;

- cherry-picking: the bidder may limit precisely the scope of its takeover; and

- the fact that the sale results from a court ruling and that such rulings are published renders the transfer of assets and contracts enforceable against all third parties.

However, several challenges may be noted including but not limited to:

- fast-paced due diligences and negotiations given the short deadlines;

- strong guarantees on bidder's side are often expected for the financing of the operations as well as potential commitments regarding future investments, level of business activity and employment;

- the assistance of seasoned advisors is highly recommended to navigate through these very specific operations and their challenges, both in legal and financial terms;

- no warranties whatsoever from the seller of the assets and business transfer; and
- the conciliator must continually ensure that the obligation of confidentiality is fulfilled, while ensuring "sufficient advertising" of the offer.

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

As mentioned above, full support of the debtor's directors is necessary for a pre-pack sale since they are the only ones entitled to open amicable proceedings.

The duties of directors firstly depend on the types of proceedings used to implement the pre-pack sale:

- in a conciliation proceeding, directors would remain fully in charge of the company's management and decision making;
- if a safeguard is opened, the court will likely appoint a judicial trustee (*administrateur judiciaire*) to assist directors in their day-to-day management. Such appointment is mandatory if the following thresholds are met: 20 employees and EUR 3,000,000 in turnover;
- in a receivership scenario, a judicial trustee will be appointed with a mission to either assist the directors or takeover in part or in full the management of the company; and
- in a liquidation scenario, the company's management is divested of the administration and disposal of its assets (the liquidator takes over).

Since a pre-pack sale entails the succession of amicable and insolvency proceedings, directors must beware of any transactions they enter into prior to the opening of insolvency proceedings which could hinder the assets' value.

Indeed, receivership or judicial liquidation proceedings are initiated upon the debtor's state of insolvency (*état de cessation des paiements*). The state of insolvency is legally defined as the debtor's inability to pay past owed receivables (even unclaimed) with its available cash and cash equivalent. However, under French law, any transaction entered into during the clawback period (*période suspecte*) can be subject to clawback provisions. This period has a maximum duration of 18 months between the date of insolvency and the opening judgment of the receivership / liquidation proceedings during which the court may re-examine all actions undertaken (that is certain transactions may be voidable assuming they have been entered into during that period and they contributed to the insolvency or having been unbalanced or detrimental as the debtor is deemed in a distressed situation during that period and not in the best position to defend its vested interests). During the clawback period, French law distinguishes between:

- compulsory nullity scenarios (*nullités de plein droit*). For instance, the following transactions will automatically be declared null and void: (i) any deed entered into without consideration transferring title to movable or immovable property; (ii) any bilateral contract in which the debtor's obligations significantly exceed those of the other party; (iii) any payment by whatever means, made for debts that have not fallen due on the date when payment is made; and (iv) any mortgage or pledge granted to secure a pre-existing debt (although substitution of secured interests is now authorised provided that the new security interest is equivalent in nature and scope) etcetera; and

- optional nullity scenarios (*nullités facultatives*), whereby the court has the option, but not the obligation, to declare null and void (i) voluntary payments for debts due as from the date of insolvency; and (ii) acts for material consideration carried out as from the date of insolvency, where the other party was aware of the state of insolvency of the debtor.

It should also be noted that the opening of safeguard, receivership or liquidation proceedings automatically entails a freeze on payments of prior claims. Therefore, when deciding whether to proceed with a pre-pack sale, directors should take care to ensure that the company's assets are preserved / not being dissipated so as to ensure that any transaction would not risk being declared null and void.

Additionally, as legal representatives of the debtor, directors will be expected to act diligently throughout the proceedings so as to facilitate the course of the proceeding, failing which they would risk being sanctioned.

4. What level of involvement does a court have in a pre-pack?

The court is significantly involved at the earliest stage in a French pre-pack sale. The directors must petition the court for the opening of a conciliation proceeding. Although directors may suggest the appointment of a specific debtor to the court (the choice of conciliator is free and subject to incompatibilities), the court will appoint the agent.

The debtor's directors will also need to petition the court for the extension of the *mandataire ad hoc* or conciliator's mission to "a mission to organise a partial or total transfer of the company which could be implemented, if necessary, within the framework of a subsequent safeguard, receivership or judicial liquidation proceeding".[2] The court will then be kept informed of the debtor's situation throughout the proceedings.

Similarly to pre-insolvency proceedings, the court will appoint the procedural bodies for the opening of the following safeguard, receivership or liquidation, including an insolvency judge (*juge-commissaire*), a creditors' representative (*mandataire judiciaire*), a judicial trustee (*administrateur judiciaire*) or a liquidator (*liquidateur*). As explained above,

---

[2] French Commercial Code, art L. 611-7 (para 1).

the court will decide on the application of the pre-pack sale, set the hearing date and examine all offers made on a discretionary basis. The decision of the court authorising the pre-pack asset sale plan does not mean that it approves the offer(s) filed in the framework of the preventive proceeding. Indeed, the court may subsequently decide to reject all offers, even those prepared and filed in the pre-insolvency proceeding.

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

Under French law, the creditors' representative (*mandataire judiciaire*) represents all creditors of the company and acts exclusively in the creditors' interests. Throughout the proceedings (safeguard, receivership or liquidation) the creditors' representative shall take all necessary measures to inform and consult the creditors. On the other hand, the judicial trustee's (*administrateur judiciaire*) main concern relates to safeguarding the company's interest.

6. How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?

Neither the creditors' representative, judicial trustee or liquidator determines the sale price. As the pre-pack sale is usually implemented in the context of a receivership or a liquidation proceeding, the offers submitted to the judicial trustee shall contain certain specific and mandatory provisions (for example description of the bidder, business plan, description of the assets, rights and contracts to be taken over, sale price, number of employment contracts to be taken over, guarantees provided for completion of the sale, etcetera).

Either the judicial trustee or the liquidator (depending on the insolvency proceeding) will need to verify the seriousness and quality of all submitted offers, and the third party status of each bidder. They are required to provide the court with the aforementioned elements, as well as all the information the court will need to assess the conditions for discharging the liabilities, in particular with regard to the price offered, residual assets to be recovered or disposed of, debts corresponding to the period of continued activity and, if applicable, other debts remaining to be paid by the debtor.

After having obtained the opinion of the Public Prosecutor and heard or duly called the debtor, the liquidator, the judicial trustee where one has been appointed, the person(s) appointed by the social and economic committee and the controllers, the court will decide on the sale applying several criteria to select the offer: the maintenance of the business activity, the safeguarding of employment and the payment of creditors (thanks to the disposal price). The attractiveness of the price offered for the purchase of the assets is therefore less predominant than the number of jobs safeguarded.

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

As mentioned above, the court's decision to apply the pre-pack sale plan is strictly subject to the verification that actions conducted by the *mandataire ad hoc* or conciliator have ensured sufficient publicity in preparation of the sale, in particular on the basis of the conciliator's report and having regard of the Public Prosecutor opinion. In addition, the court also verifies that the *mandataire ad hoc* or conciliator sufficiently "advertised" the sale plan. Even if the court approves the pre-pack sale plan, third party bidders may still submit offers to the court.

GERMANY

1. What measures are available in your jurisdiction to allow struggling businesses to enter into a "pre-pack"?

In German restructuring and insolvency, the term "pre-pack" is not used. Nonetheless, Germany has similar tools and practices which may resemble a pre-pack with a view to some of their outcomes; however, there are also important differences. It is therefore fair to say that Germany does not have a "pre-pack" as that term is used in the United Kingdom.

There exists a German restructuring practice which resembles a United Kingdom's "pre-pack". This practice is called *übertragende Sanierung* which literally translates as "transferring restructuring" and is often referred to in the German market as a "sale of the business as a going concern". Like a United Kingdom pre-pack, the practice aims at safeguarding the going-concern value of the debtor's business with as few disruptions by the insolvency proceeding as possible. The practice is very common in insolvencies in Germany, and it is by far the most frequently used rescue practice in Germany.

Usually, a transferring restructuring comprises the following steps:

(1) The debtor files for insolvency proceedings.

(2) The insolvency court appoints a preliminary insolvency administrator and a preliminary creditors' committee.

(3) The preliminary insolvency administrator sets up a marketing process for the debtor's business as a whole, while main proceedings have not been opened.

(4) When main proceedings are opened (usually three months after the insolvency filing), the insolvency court appoints the preliminary insolvency administrator as (permanent) insolvency administrator and the preliminary creditors' committee as (permanent) creditors' committee.

(5) After main proceedings have been opened, the insolvency administrator finalises the marketing process and requests the approval of the creditors' committee for the sale of the business as a whole to the highest bidding investor.

(6) Where the business will be sold to connected persons, the approval of the creditors' assembly must be requested instead of the creditors' committee.

(7) The sales agreement is executed, and closing will occur once all closing conditions have been satisfied (usually within three months after execution, depending, *inter alia*, on cartel clearance issues).

(8) Until closing the business may be pre-financed to some extent by the investor.

(9) After closing, all assets belonging to the debtor's business will transfer to the investor on an asset by asset basis and, as far as possible, without liabilities.

(10) The purchase price will be paid to the debtor's estate and will be used for quota-payments to the insolvency creditors whose claims have not transferred together with the assets.

(11) The debtor is subsequently liquidated, and proceedings will terminate thereafter.

Similar to the United Kingdom pre-pack, a transferring restructuring is used to rescue the debtor's business, but not the debtor itself (business rescue). For rescuing the debtor (company rescue) there are other tools available in the German insolvency and restructuring laws, for instance the use of an insolvency plan or a restructuring plan under the new German StaRUG Scheme.[1]

Although the aim to rescue the debtor's business is the same as in a United Kingdom pre-pack and a German transferring restructuring, there are various important differences between the two practices:

- Whilst a United Kingdom pre-pack is negotiated outside of insolvency, in Germany, an insolvency filing and initiation of preliminary insolvency proceedings is necessary. In other words, there exists no out-of-court initiation of German insolvency proceedings. Of course, this may have detrimental publicity effects.

- In addition, the court can only appoint as the preliminary insolvency administrator a neutral insolvency practitioner. Having advised the debtor or its directors on a potential sale of the business before an insolvency filing was made precludes an insolvency practitioner from being eligible. Even a unanimous vote of the preliminary creditors' committee in favour of a person as administrator cannot undermine this principle of neutrality.

- Hence, the marketing process generally only starts after the insolvency filing was made and thus usually at a very late stage. Obviously, this reduces the ability to plan for the business sale to a large extent and often leads to a reduction of the enterprise value. It is not uncommon for the preliminary insolvency administrator to be under significant time pressures to set up a sales process, because they are appointed at a time when the debtor has already filed for insolvency, and he / she usually only has three months during which he / she may receive a pre-financing of insolvency money from the employment agency.

[1] The Act on the Stabilisation and Restructuring Framework for Businesses.

- Furthermore, the insolvency administrator cannot sell the business without at least the approval of the creditors' committee. Depending on who the members of the creditors' committee are, the sale of the business may not be the preferred option for the committee majority. Each member of the committee has only one vote, irrespective of the value of their claim. If the committee does not approve the sale, it may be necessary for the insolvency administrator to seek the approval of the creditors' assembly, which can take up to six months after filing.

- Finally, the insolvency administrator can only transfer the business together with the employees; there is no insolvency exception in place in Germany. Of course, there are various alternative practices available, for example transferring employees into special outplacement companies (only possible with their consent), or terminations in line with an investor's employment concept (which needs to be in a binding and concrete form). Nonetheless, an investor must generally be prepared to assume at least a significant part of the debtor's workforce without being able to cherry pick.

There are some additional procedural options which may be used in line with a transferring restructuring:

- The debtor can apply for preliminary self-administration, and the debtor's directors will continue to run the sales process of the business. However, they will be supervised by a preliminary custodian. Like the preliminary insolvency administrator, the custodian needs to be neutral and, in addition, needs to approve the sale alongside the creditors' committee. The preliminary custodian is appointed by the court, and the court will follow a unanimous decision of the preliminary creditors' committee (provided that the neutrality requirements are met).

- Alternatively, the debtor can apply for protective shield proceedings. However, the aim of protective shield proceedings is to allow the debtor's directors to present an insolvency plan (company rescue) instead of a transferring restructuring (business rescue). Therefore, using protective shield proceedings is rather an exception in practice. One important advantage of the protective shield, however, is that unlike in preliminary self-administration proceedings, the debtor proposes to the court their choice of custodian.

- It is also possible to combine an insolvency plan with a transfer of the business. While this option is exceptional, it is not completely excluded that an insolvency plan is used to sell the business and to subsequently wind-down the debtor, particularly if the sale of the business is dependent on the consent of the security holders which can be crammed-down in an insolvency plan.

With regard to pre-packs there are current legislative developments at EU level. In a newly published draft proposal for a directive by the EU Commission on the harmonisation of insolvency law (COM(2022) 702), the pre-pack procedure was dealt with comprehensively. In short, it proposes to introduce a pre-pack procedure modelled on English law (see report on England and Wales). Nevertheless, there are some differences to the English model: for example, certain restrictions in relation to credit bidding of secured creditors, additionally, the approval of the pre-pack by an insolvency court is required and existing contracts are transferred to the purchaser without the consent of the contracting party. Given that numerous amendments to the draft are to be expected before it enters into effect, the specific impact of implementation of the directive on German insolvency law is not yet foreseeable.

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

For the steps usually involved in a transferring restructuring, please see the response to question 1 above.

The main advantage of a transferring restructuring as the main form of "business rescue" in Germany is reducing complexity when compared with the alternative of "company rescue" by way of an insolvency or restructuring plan. The transferring restructuring is an exit mechanism which gives the parties involved (debtor and its directors, insolvency practitioner acting as administrator or custodian, investor, creditors and the court) an easy to use, market-compliant valuation tool for determining the value of the debtor's business. Alternative measures are, for example, setting up an insolvency plan, or a restructuring plan in the StaRUG proceeding by which the debtor itself will be rescued. In these circumstances, the insolvency or restructuring plan must describe a relevant comparator (*Vergleichsrechnung*) to determine the value of each involved stakeholder's rights in the most likely alternative scenario, for example liquidation. Usually, this would be described in a lengthy and complex valuation report which may be heavily scrutinised by out-of-the-money creditors and the insolvency court. Therefore, today it is common practice to combine a valuation report with a "dual track" merger and acquisition (M&A) process, in order to test what the market would be prepared to pay for the business. Obviously, a "dual track" is more complex and produces higher costs than a simple marketing and sale of the business to the highest bidder.

There are, however, certain disadvantages, some of which have already been highlighted under question 1 above. One disadvantage is market failures. For some businesses, there simply is no adequate market, in particular where the assets are highly specialised. In addition, the marketing process may come under a lot of time pressure and may end up in a "fire-sale" scenario which can easily deplete the enterprise value. That is in particular the case where the sale of the business cannot be achieved within the three-month period before the opening of insolvency proceedings (see question 1 above). Usually within that timeframe, the preliminary insolvency administrator can pre-finance insolvency money for the workforce which is then used to finance the M&A process. However, if the M&A process takes longer than expected, the administrator may run out of money and is then dependent on either a creditor or the investor to pre-finance the M&A process until the end. This can further deplete the value of the business. An additional effect which often reduces the value paid for the business is the fact that the insolvency administrator never gives any representations or warranties in the sales agreement in relation to what is being sold. This is because the insolvency administrator will have no prior knowledge of the debtor and there is not enough time for them to undertake their own due diligence. This will generally reduce the value offered. Finally, asset transfers may not work where the business is largely dependent on licenses or contracts which cannot be transferred to an investor without the consent of the licensor or contractual counterparty. Examples are airlines in relation to their aircraft operating certificates, or automotive suppliers in relation to their supply contracts with the original equipment manufacturer. Obtaining these consents is time consuming and very often not acceptable for an investor.

Where the investor is a connected person, the insolvency administrator needs the consent of the creditors' assembly, as the consent of the creditors' committee is insufficient. This can effectively exclude connected persons from the marketing process, because the first creditors' assembly is generally scheduled to be held up to three months after the opening of insolvency proceedings and six months after the insolvency filing was made. Usually, an insolvency administrator will not have enough liquidity to fund such a long time period.

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

The duties of the directors depend on the type of proceeding used to implement the sale of the business:

- In a normal insolvency proceeding, the directors will no longer play any significant role and the (preliminary) insolvency administrator will drive the process.

- If the directors have applied for preliminary self-administration (or protective shield), they are only supervised by a custodian and will themselves drive the sales process. In that case, their duties are identical with the (strict) duties of care of an insolvency administrator. They owe the whole body of creditors and the debtor directly a duty of care and may become liable for entering into preferential liabilities, for example estate loans used to pre-finance the M&A process. Within insolvency the business judgment rule is not available to act as a safe harbour.

- Before executing the sale of the business, the directors in self-administration must get an approval from the custodian and the creditors' committee, or the creditors' assembly (where the sale is to a connected person).

Before an insolvency filing has been made, the directors owe their primary duty of care to the debtor. They are obliged to monitor financial distress and to report to the competent supervisory body what actions they are intending to take to remedy the distress, for example initiating a sales process or obtaining rescue financing.

The directors' duty of care shifts towards all creditors if the directors have notified the relevant restructuring court to utilise a StaRUG proceeding. Some commentators argue that even outside of an insolvency proceeding or a StaRUG, the duty of care of the directors shifts towards the creditors as a whole once the debtor has entered a state of imminent illiquidity (*drohende Zahlungsunfähigkeit*). However, as of today, this view has not been tested in court.

There is no third party, like the pre-pack pool in the United Kingdom, which would monitor the sales process.

4. What level of involvement does a court have in a pre-pack?

The insolvency court is involved in appointing the (preliminary) insolvency administrator or custodian. The court is also involved in opening main proceedings; in that respect the court needs to be certain that an insolvency reason has been triggered. There is no out-of-court initiation of insolvency proceedings in Germany.

If a StaRUG proceeding is used instead of insolvency proceedings, there is less involvement of the court. The debtor only has to notify the relevant restructuring court that it is using the StaRUG. The court will, however, be involved in sanctioning a restructuring plan, or in appointing a restructuring practitioner.

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

The insolvency administrator conducting the sales process is under a (strict) duty of care towards all creditors and the debtor. They are liable for the repayment of preferential liabilities, for example estate loans to pre-finance the M&A process. Before executing the sale of the business, the insolvency administrator must get an approval from the custodian and the creditors' committee, or the creditors' assembly (where the sale is to a connected person). The same applies in general to a custodian where self-administration was approved by the court, however with the exception that the custodian must execute his duty of care when giving its consent to the directors for conducting the sale of business.

6. How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?

An independent valuation of the business is not required for the sale of the business as such. An acceptable methodology would be to work out the sales structure along the following lines:

- Instruction of a reputable M&A advisor / investment bank to run the M&A process.
- Constantly monitoring liquidity and searching for options to pre-finance the M&A process, for example applying for / pre-financing insolvency money or entering into estate loans.

- Identifying the highest bidder and instructing a reputable law firm to negotiate the sales agreement.

- Keeping the creditors' committee up-to-date and informing them sufficiently about the sales options and bids.

- Entering into negotiations with security holders for the release of their security.

- Obtaining consent from the creditors' committee, or, where necessary (for example sale to connected persons) from the creditors' assembly.

- Executing the sales agreement and security release agreements, where applicable.

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

See question 1 above. The insolvency administrator and custodian are officers of the court and supervised by the court. They have a strict duty of care and can be personally liable for any misconduct. In particular, they are strictly neutral and cannot be appointed by the court, if they have been involved in advising the debtor in detail in relation to the sale of the business before they have been appointed. Additionally, the debtor's management will also be liable along the same lines as an insolvency administrator if it drives the sales process in a self-administration.

GUERNSEY

1. What measures are available in your jurisdiction to allow struggling businesses to enter into a "pre-pack"?

Guernsey stands out against many offshore jurisdictions because it has a dedicated administration regime designed to facilitate corporate rescue. The procedure is broadly similar to that in the United Kingdom, albeit it has been simplified and tweaked to suit Guernsey's finance industry. For example, the desire to remain "creditor friendly" has seen the administration moratorium limited to not affect the rights of secured creditors.

Part XXI of the Companies (Guernsey) Law 2008, as amended (the Companies Law) sets out the grounds and procedure for applying for an administration order. The application must be for the purpose of achieving either:

- the survival of the company and the whole or any part of its undertaking as a going concern; or
- a more advantageous realisation of the company's assets than would be achieved on a winding-up.

An application must be made to the Royal Court, supported by an affidavit seeking an order that the company be placed into administration and setting out the reasons why it should be placed into administration, and the purpose for which it is made. The application can be made by, *inter alios*, the company itself, a director, member or creditor. There is no out-of-court method of commencement.

The court has discretion to grant the order if it is satisfied that the company does not satisfy, or is likely to become unable to satisfy, the solvency test (which requires both balance sheet and cash flow solvency) and if it is satisfied that the purpose can be achieved.

Once appointed, an administrator has wide ranging powers exercisable in pursuit of the statutory purpose and may seek directions from the court as required.

Understanding the procedure assists when examining the use / availability of pre-packs. The Companies Law itself makes no specific references to them nor is there any other directly applicable legislation.

However, the Royal Court has consistently shown itself willing to be flexible and commercial in managing insolvencies and has been willing to look to England and Wales and other jurisdictions for guidance as to its procedure. For example, in *Esquire Realty*

Holdings Limited[1] the then Bailiff, Sir Richard Collas, was asked to consider an application for an administration order where it was intended to facilitate a pre-packaged sale of the company's assets immediately on appointment.

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

Guernsey has few practical examples of pre-packs at work, but the considerations will be similar to those in England and Wales with a couple of notable differences.

The necessity of a court application will naturally increase the costs and possibly the time involved in securing appointments. Consequently, the procedure is less likely to be used for smaller scale local trading businesses (albeit doing so should not be impossible).

The process will require the proposed appointees to prepare a SIP 16-style report (see England and Wales) and so they must have the requisite expertise to do so.

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

Once the directors of a company become aware of the possibility that the company may fail the solvency test, their duties will be to act in the best interests of the company to maximise value in the company for the benefit of creditors as a whole, which includes future, as well as present, creditors. Those duties have equal application to a decision to proceed with an application for an administration order involving a pre-packaged sale albeit the level of court involvement (as set out below) may provide some comfort to directors that their decision-making will have had prior scrutiny by the court if they are later criticised.

Once the directors of a company become aware that it is unlikely to remain solvent, they will, in discharging their fiduciary duty to act in the best interests of the company by maximising its value, need to have regard predominantly to the interests of the company's creditors. The duty is still owed to the company itself, and not the creditors. This becomes more apparent when assessed against the test of wrongful trading in Guernsey which broadly mirrors the English position.

Directors need always bear in mind that the Royal Court has the capacity to adjust what are called "antecedent transactions" under the preference and wrongful trading provisions of the Companies Law. Hence, a train of authorities states that where a company was insolvent, the directors had to consider the interests of the creditors as paramount and take those interests into account when carrying out their duties to the company; and such duties may have also applied when the company was of doubtful solvency or on the verge of insolvency.

1 (17.04.2014) Royal Court (unreported).

Where a company is close to insolvency or the prospect of it seems genuine, the directors should operate on the basis that their decision-making may be scrutinised later if they did not give sufficient regard to how their decision-making would affect creditors. Consequently, careful minute-taking to support decisions and taking appropriate professional advice are steps that all boards should take.

4. What level of involvement does a court have in a pre-pack?

The Royal Court has a very significant role in the pre-pack process because all applications for administration orders in Guernsey are heard by it.

In the *Esquire* case, the court was presented with an agreed proposal, endorsed by the intended administrators, that the business and its assets would be immediately sold to a newco upon the granting of an administration order. In exercising its discretion to grant the administration orders sought, the Royal Court concluded that it did not expressly approve the detailed arrangements of the proposed sale, but these were a material factor in the court's considerations and ultimately in the exercise of its discretion.

Notably, the Bailiff referred to the special risks of "pre-packs" as considered by the Royal Court of Jersey in *In the Matter of the Representation of Collections Group*[2] and considered guidance from the English High Court in *Kayley Vending Ltd*[3] and the decision of Kitchen J in *Halliwells LLP*.[4]

Importantly, the Bailiff endorsed the position held in the English High Court case *DKLL Solicitors v HMRC*[5] in which the judge held that the court, in exercising its discretion, may consider the interests of other stakeholders of the company. In Esquire, stakeholders included employees of the group and those for whom the group provided services (around 5,000 staff and 3,200 service users in 128 facilities together with close family members).

The Bailiff placed significant weight on the draft SIP 16 Report produced by the proposed administrators in accordance with the English and Welsh regime. That report considered the position of all creditors including those who would not benefit from the proposed arrangements. The Bailiff noted that, whilst there is no statutory requirement for a SIP 16 Report in Guernsey, it was of great assistance to the court and recommended that such report be produced in any similar applications.

As a result, the court plays a definitive role in the success of pre-packs in Guernsey. The application for the appointment of administrators will, by the nature of the procedure, require that details of the agreed sale are given in sufficient detail to allow the Court to

[2] [2013] JRC 096.
[3] [2009] EWHC 904.
[4] [2010] EWHC 2036.
[5] [2007] EWHC 2067(Ch).

consider the proposal in the exercise of its discretion as to whether to make the appointment. A SIP 16-style report is, in practice, a pre-requisite.

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

See question 1 above.

6. How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?

Again, see question 1 above. There is limited case law in Guernsey involving pre-packs. However, it is common practice for more than one administrator to be appointed joint administrators of Guernsey companies, with one typically being based in Guernsey and another based in the United Kingdom. For example, in the Esquire case, the joint appointees were both Guernsey and United Kingdom based. The practical experience of those overseas joint appointees will be highly relevant in any Guernsey appointment, particularly given the level of guidance taken by the Royal Court from English case law and procedure.

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

See above regarding level of court involvement. There is no specific regime for the scrutiny of pre-packs after the event.

INDIA

1. What measures are available in your jurisdiction to allow struggling businesses to enter into a "pre-pack"?

A composite framework to address corporate insolvency was introduced in India in the form of the (Indian) Insolvency and Bankruptcy Code 2016 (IBC), with effect from December 1, 2016. Ever since then, pre-pack as an option under the IBC has been discussed by stakeholders. The outbreak of the Covid-19 pandemic has had a long-lasting effect across the world especially on small businesses and therefore in India, the pre-pack option was introduced into the IBC with respect to micro, small and medium sized enterprises (MSME)[1] with effect from 4 April 2021 to alievate the stress faced by MSMEs. The pre-pack option is not available to large corporates which are not MSMEs. As per the information received from the Indian Central Statistics Office, Ministry of Statistics and Programme Implementation, MSMEs accounted for about 30% of India's GDP in the Financial Year 2019-2020. The Insolvency and Bankruptcy Board of India (Pre-Packaged Insolvency Resolution Process) Regulations, 2021 (Pre-Pack Regulations) came into force in India on 9 April 2021, and deal with the procedural aspects of implementing a pre-pack in relation to MSMEs.

Under the IBC, the corporate insolvency resolution process (CIRP) is a lengthy process and does not permit the involvement of the corporate debtor while formulating a resolution plan. In order to address the specific issues pertaining to resolution arising out of the insolvency of MSMEs and the unique nature of their business and simpler corporate structures and the fact that MSMEs did not attract many investors, the Government of India felt it expedient to offer a simpler resolution mechanism in addition to the option of proceeding with a fully-fledged corporate insolvency process under the IBC. Therefore, the Indian pre-pack framework was introduced with a view to providing an efficient alternative resolution process for corporate persons classified as MSMEs, whilst also ensuring quicker, cost-effective and value-maximising outcomes for all stakeholders, which is least disruptive to the continuity of their business and which preserves jobs. This was a welcomed step in the right direction.

To streamline the pre-packaged insolvency resolution process (PPIRP) and address some of the issues identified in the operation of the resolution process for MSMEs under the IBC, on 18 January 2023 the Government of India put forth certain amendments to the PPIRP

[1] In India, an enterprise is registered as a MSME in the following circumstances: (i) a micro enterprise, where the investment in plant and machinery or equipment does not exceed INR 10,000,000 and turnover does not exceed INR 50,000,000; (ii) a small enterprise, where the investment in plant and machinery or equipment does not exceed INR 100,000,000 and turnover does not exceed INR 500,000,000; (iii) a medium enterprise, where the investment in plant and machinery or equipment does not exceed INR 500,000,000 and turnover does not exceed INR 2,500,000,000.

framework (Proposed Amendments) for consideration. As of the date of this publication, the Proposed Amendments have not yet come into effect.

PPIRP was introduced during the Covid-19 pandemic to provide an efficient alternative insolvency resolution process for MSMEs. Subsequent public consultations and stakeholder views indicate that the framework should be expanded to apply to a broader range of corporate debtors. In response, under the Proposed Amendments the existing pre-pack framework would be amended to extend the availability of the PPIRP to more prescribed categories of corporate debtors.

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

The pre-pack framework has been introduced to provide an alternate to the CIRP for MSMEs with a target to be as efficacious as the CIRP, whilst being quicker, cost-effective, value maximising and causing the least amount of disruption to MSMEs. The major difference between the pre-pack framework and the CIRP is the involvement of the corporate debtor in the resolution process.

The PPIRP framework provides that only a corporate debtor can initiate the PPIRP, once approved by a special resolution (75%) of its shareholders, and the unrelated financial creditors representing not less than 66% in value of the financial debt due, by filing an application for initiation of the PPIRP. To facilitate faster and more efficient decision-making at this stage, the Proposed Amendments put forth lower the 66% threshold for unrelated financial creditors to 51% to approve the proposal and file an application for initiation of the PPIRP.

The minimum default threshold for initiating the PPIRP is INR 1,000,000, which makes initiation of the PPIRP much more feasible as opposed to initiation of the CIRP, where the threshold requires a minimum default of INR 10,000,000. The CIRP follows a "creditor in control" model, while the PPIRP follows a "debtor-in-possession" model. In the traditional CIRP route, the corporate debtor is excluded from the resolution process and the management of the corporate debtor is suspended from the date of commencement of the CIRP. However, in the Indian pre-pack framework, the corporate debtor plays a vital role in the resolution process. This along with some of the other advantages of pre-pack, are enumerated below:

(1) The National Company Law Tribunal (NCLT) is the adjudicating authority for insolvency cases in India. Much of the preparatory work is done before the application is made to the NCLT for initiation of the PPIRP. This includes: (i) obtaining approval of at least 66% of the unrelated financial creditors for proposing the PPIRP and putting forth the name of the Resolution Professional (RP); (ii) the corporate debtor having passed a special resolution of at least 75% of members to approve initiation of the PPIRP; (iii) the corporate debtor having prepared a base resolution plan which it needs to submit to the RP within two days of commencement of the PPIRP. Therefore, under the Indian

pre-pack regime, there must be an informal understanding with the financial creditors, who support the initiation of the PPIRP from the start. In contrast, the CIRP does not involve any preliminary steps before filing an application to the NCLT and any creditor or the corporate debtor itself may initiate an application for commencement of the CIRP on a payment default in accordance with the provisions of the IBC.

(2) During the PPIRP the business of the MSME is retained in the hands of the existing management, and the management of the affairs of the corporate debtor continues to vest in the board of directors or the partners, as the case may be, of the corporate debtor, subject to certain conditions prescribed in the IBC. The committee of creditors (CoC) has an option to vest the management of the MSME with the RP by a vote of not less than 66% of the voting share, anytime during the PPIRP. In contrast, under the CIRP, the board of directors is suspended with effect from the CIRP commencement date and the control of the corporate debtor vests with the RP. Bona fide corporate debtors attempting to resolve insolvency through this process should not be concerned by the possibility of a change of management or conversion to CIRP or liquidation and therefore the Proposed Amendments being considered suggest that these provisions may be omitted.

(3) The PPIRP is a relatively more cost effective and less time-consuming method than the CIRP route. The PPIRP must be completed within a period of 120 days from the pre-packed insolvency commencement date as opposed to the period provided for completion of the CIRP which is 270 days, and which may be extended to a maximum of 330 days. It is vital to note that even under the PPIRP, the NCLT passes the final order for approving the resolution plan and the same process is followed under the CIRP.

(4) In the PPIRP, the corporate debtor submits a base resolution plan for its revival. The CoC may provide the corporate debtor with a chance to improve its base resolution plan or invite prospective resolution applicants to submit a resolution plan for the company. This not only provides a fair chance for the corporate debtor to ensure its own revival but also warrants the best resolution for the corporate debtor by inviting competitive bids from other resolution applicants to ensure value maximisation of the corporate debtor. It is interesting to note that this is one of the fundamental differences between the PPIRP and the CIRP as under the CIRP the corporate debtor is not permitted to participate in the resolution process.

To summarise, the PPIRP is a practical and effective solution for quick resolution of MSMEs, and involves close collaboration between the corporate debtor and its unrelated financial creditors. This collaborative approach arguably presents a better opportunity for a successful outcome of the process.

3. **What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?**

During the PPIRP, the management of the affairs of the corporate debtor continues to vest in the board of directors or the partners, as the case may be, of the corporate debtor. The board of directors or the partners are entrusted with the responsibility under the IBC itself to make every endeavour to protect and preserve the value of the property of the corporate debtor and manage its operations as a going concern. Further, the promoters, members, personnel and partners, as the case may be, of the corporate debtor, are required to exercise and discharge their contractual or statutory rights and obligations in relation to the corporate debtor, subject to the provisions of the IBC.

This is a stark contrast to the CIRP route where the board of directors are suspended with effect from the CIRP commencement date and the powers of the board are vested with the RP.

In India, the unrelated financial creditors are required to approve the identity of the RP for conducting the PPIRP. The corporate debtor at the time of filing an application for initiation of the PPIRP with the NCLT is required to furnish the name and written consent of the RP proposed to be appointed to conduct the PPIRP. Accordingly, the RP so nominated, is confirmed by the NCLT when it passes the order admitting the PPIRP application filed by the corporate debtor.

The management of affairs of the corporate debtor continues to vest with the board of directors or partners of the corporate debtor unless the CoC at any time during the PPIRP period, by a vote of not less than 66% of the voting shares, resolves to vest the management of the corporate debtor with the RP. In such a case, the RP makes an application to the NCLT and if the NCLT is satisfied that (a) the affairs of the corporate debtor have been conducted in a fraudulent manner; or (b) there has been gross mismanagement of the affairs of the corporate debtor, it shall pass an order vesting the management of the corporate debtor with the RP.

The pre-requisite to commence the PPIRP process is through the passing of a special resolution by the members of the company. However, typically as per the Indian Companies Act, 2013, the board of directors first passes a resolution for initiating the PPIRP, which is subject to shareholders' approval. Therefore, right from the very start, the directors of the company play a critical role in setting in motion the PPIRP. Along with the application filed before the NCLT for initiating the PPIRP, a majority of the directors submit a declaration stating *inter alia*, that:

(1) the corporate debtor within a period of 90 days will file for initiating the PPIRP;

(2) the PPIRP will not be initiated to defraud any person; and

(3) the approved RP's name.

As the company continues as a going concern, the board of directors continue to hold board meetings to transact the company's business. The corporate debtor is required to submit the list of claims along with the details of the respective creditors, their security interest, guarantees etcetera, and a preliminary information memorandum containing information relevant for formulating a resolution plan within two days from the pre-packaged insolvency commencement date. If any person sustains a loss as a result of the omission of any relevant information or inclusion of any misleading information in the list of claims or the preliminary information memorandum submitted by the corporate debtor; every person who was a promoter or director or partner of the corporate debtor, at the time of submission of the list of claims or the preliminary information memorandum or who authorised the submission of the list of claims or the preliminary information memorandum by the corporate debtor, shall be responsible to pay compensation to the individual who has sustained such loss or damage. This is subject to a knowledge caveat to safeguard such persons, such that no person will be held liable if the list of claims or the preliminary information memorandum was submitted by the corporate debtor without his knowledge or consent.

4. What level of involvement does a court have in a pre-pack?

The PPIRP is a court-driven process. The PPIRP is initiated by order of the NCLT, and the NCLT must give final approval of the resolution plan (which has already been approved by 66% of the financial creditors). The PPIRP itself is run by the RP and they are responsible for making necessary filings before the NCLT. The termination of the PPIRP too requires the RP to file an application with the NCLT. In addition, any management changes of the corporate debtor require the approval of the NCLT and, on a careful consideration of the facts, in lieu of the provisions set out in the IBC, an order for vesting the management with the RP may be passed by the NCLT.

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

Please refer to our response in question 3 above for the duties of the directors in a pre-pack. The insolvency professional who is proposed to be appointed as the RP to conduct the pre-pack has certain duties prior to the commencement of the PPIRP which are as follows, namely to:

(a) prepare a report confirming whether the corporate debtor meets the requirements specified in the IBC, and that the base resolution plan conforms to the requirements of the IBC; and

(b) file reports and other documents with the Insolvency and Bankruptcy Board of India.

Once the PPIRP is initiated the responsibility to run the process is in the hands of the RP. A few indicative duties of the RP as part of the process are set out below, namely to:

(1) confirm the list of claims submitted by the corporate debtor;

(2) inform creditors regarding their confirmed claims;

(3) maintain an updated list of claims;

(4) monitor the management of the affairs of the corporate debtor;

(5) inform the CoC in the event of breach of any of the obligations of the board of directors or partners, as the case may be, of the corporate debtor;

(6) constitute the CoC and convene and attend all its meetings;

(7) prepare the information memorandum on the basis of the preliminary information memorandum submitted by the corporate debtor;

(8) file applications for avoidance of transactions as per the provisions of IBC;

(9) make a public announcement within two days of commencment of the PPIRP;

(10) appoint registered valuers within two days of commencment of the PPIRP; and

(11) publish the request for resolution plan within 21 days of commencement of the PPIRP, etcetera.

6. How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?

The RP is required to appoint two registered valuers to determine the fair value and the liquidation value of the corporate debtor, within three days of their appointment.

The registered valuers shall determine the fair value and liquidation value computed in accordance with internationally accepted valuation standards, after physical verification of the inventory and fixed assets of the corporate debtor. The average of the value determined by the two registered valuers shall be considered the fair value or the liquidation value, as the case may be. After the receipt of resolution plans in accordance with the IBC and the PPIRP, the RP shall provide the fair value and the liquidation value to every member of the CoC in electronic form, on receiving a confidentiality undertaking from the member.

The CoC in its commercial discretion will evaluate the resolution plan and if the resolution plan confirms to the mandatory requirements of IBC, is commercially feasible and viable and capable of being implemented, the CoC will approve the resolution plan, which is then submitted to the NCLT for its final approval.

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

Under the PPIRP, the corporate debtor is required to submit the base resolution plan to the RP within two days of the prepackaged insolvency commencement date, and the RP thereafter presents it to the CoC. The CoC has the option of providing the corporate debtor with an opportunity to revise the base resolution plan or inviting prospective resolution applicants to submit a resolution plan for the corporate debtor. This ensures value maximisation of the corporate debtor by allowing it to provide a plan to alleviate its stress as well as calling for plans from the public in order to select the best resolution for the company.

The PPIRP is a court driven process and the resolution plan which is approved by the CoC needs to be filed by the RP before the NCLT for its final approval. The NCLT will scrutinise the resolution plan and ensure that it confirms to the mandatory requirements of the IBC. Further, the NCLT shall approve a resolution plan under the PPIRP only after being satisfied that the resolution plan has sufficient measures to ensure its effective implementation, once approved. The RP also ultimately exercises powers conferred on him under the IBC, which ensures that the process is transparent. The entire pre-pack process is driven pursuant to the provisions of the IBC and the Pre-Pack Regulations wherein sufficient provisions have been included to ensure a clean, fair and seamless resolution for the MSMEs.

Typically, during the PPIRP, the management of affairs of the corporate debtor continues to vest with the board of directors or partners of the corporate debtor unless the CoC at any time during the PPIRP period, by a vote of not less than 66% of the voting shares, resolves to vest the management of the corporate debtor with the RP. In such a case, the RP makes an application to the NCLT and if the NCLT is satisfied that (a) the affairs of the corporate debtor have been conducted in a fraudulent manner; or (b) there has been gross mismanagement of the affairs of the corporate debtor, it shall pass an order vesting the management of the corporate debtor with the RP. Therefore, there is a level of scrutiny and accountability on the management of the corporate debtor and if the management acts in an errant manner, there is a checks-and-balances system in place to vest the management with the RP. This is undertaken in accordance with a court order to ensure that the financial creditors are also not behaving in an arbitrary manner in replacing the existing management of the company.

IRELAND

1. What measures are available in your jurisdiction to allow struggling businesses to enter into a "pre-pack"?

In Ireland, similar to the position in England and Wales, the term "pre-pack" is used as shorthand to describe a transaction (most often involving a sale of a company's business and / or assets), the terms of which are agreed prior to the formal commencement of an insolvency process in respect of that company, but which is entered into and takes effect immediately thereafter. Contrast this with a "normal" receivership or liquidation sale where the receiver or liquidator takes possession and then markets and transacts after their appointment.

The use of pre-packs is not restricted to any particular insolvency process; however, they are most commonly used in conjunction with a receivership appointment. This is because a receiver and manager can be appointed to a company without the involvement or sanction of the court or the company's general body of creditors (therefore placing the timing of the receiver's appointment in the hands of the appointor). Once a debtor has identified a risk of insolvency, it is able to work with its key stakeholders, legal advisers and prospective receivers at an early stage to plan for, negotiate and agree the terms of a sale which is then "pre-packaged" ahead of the formal commencement of the receivership. Often, it is the debtor's secured creditor which instigates or prompts the debtor to explore the possibility of a pre-pack sale. Sale documentation is then entered into, and the transaction is effected by the receivers immediately on or after their appointment.

This procedure affords a struggling debtor an opportunity to effect a sale quickly, discreetly, cheaply (relative to a sale conducted during a trading receivership) and with minimal disruption to its operations, goodwill and employees. Those assets not "cherry-picked" by the buyer as part of the sale are left with the insolvent company and either are dealt with as part of the receivership (if receivers remain appointed) or any liquidation of the company. However, depending on the directors of the company often the company is left to languish and simply becomes struck off the register for failing to file annual returns.

The usage of pre-pack insolvency sales is less developed in Ireland than in other jurisdictions, but there has been an increasing number of asset sales structured through pre-pack receiverships over the last number of years.

In Ireland there are no rules or guidelines for the conduct of pre-packs, although some insolvency professionals follow the United Kingdom's SIP 16 guidelines. In the absence of detailed rules, the critical standard for the appointed insolvency office holder is to ensure that they obtain the best price possible for the assets at the time of sale. Provided the insolvency office holder complies with this test and adheres to the highest professional standards, there is no barrier to affecting a pre-pack sale in a manner which will stand up to scrutiny and which will allay the concerns of creditors.

In order to ensure a receiver is satisfied that they are obtaining the best price possible, the proposed receiver is usually involved in the process prior to their appointment. The receiver in order to quickly effect the sale will need to have obtained sufficient information to ensure that they are happy that the sale is for the best price possible before they accept the appointment.

Because of the absence of formal reporting requirements for pre-packs, there are no hard statistics available on its usage in Ireland. Anecdotal evidence suggests that the process is being increasingly used and it is clear that investors looking for a speedy transaction, with a view to preserving the value of a company's goodwill and other assets, can avail of pre-packs in Ireland.

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

The pre-pack process is intended to maximise the value obtained for the insolvent company's business and assets, thereby achieving the greatest realisations for creditors as a whole. There are a number of advantages to a pre-pack sale: (i) quick; (ii) cost effective; (iii) minimal disruption to a trading business; (iv) preserves jobs; (v) is not subject to approval by the court or the company's creditors; and (vi) is a relatively flexible restructuring tool.

The relatively low costs of conducting a pre-pack sale can be attributed to its quick and discreet nature (including a lack of court involvement). Once a company enters into a formal insolvency process, the price achieved on a sale of its assets or business tends to be lower than a company outside of such a process. Buyers are aware that their bargaining power increases in circumstances where a company is already in an insolvency process. In addition, the longer a company is in an insolvency process, the higher the costs are that are incurred by the company which are paid in priority to unsecured debts.

A pre-pack sale tends to preserve value due to the sale being primed in advance of the commencement of an insolvency process and non-key stakeholders only being notified after the event. There are no restrictions in Ireland on the office holder in conducting a "pre-pack" sale other than the statutory obligation to obtain the best price possible. As a result of this obligation, the proposed receiver tends to have input on the terms negotiated for the proposed sale to ensure they are willing to implement same shortly after their appointment.

However, there are certain disadvantages to pre-pack sales such as (i) price chip based on certain risks, for example that landlords will not consent to an assignment of a lease to the buyer or the redundancy costs for certain employees that automatically transfer; and (ii) the lack of an open and transparent marketing of the business and its assets questions whether the best price is being achieved. Pre-packs also tend to result in the most valuable assets being extracted from the company with a shell remaining and therefore do not result in saving the enterprise as a going concern. There is no ability to cram down debts in a pre-pack which is possible in an examinership context or scheme of arrangement and as a result the assets and business are ultimately removed from the selling entity, usually leaving the debtor company hopelessly insolvent and placed into liquidation or allowed to become struck off the register for failing to file annual returns.

Pre-packs are also criticised in Ireland due to the lack of consultation with other creditors of the company and due to the lack of transparency and oversight.

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

In Ireland, whilst the directors of a company tend to be involved and consulted in respect of a pre-pack sale, this is not always the case. A proposed pre-pack sale is often subject to and very much controlled by the secured charge holder. Often, the directors are faced with the threat of a receiver being appointed to the company by the secured creditor and rather than allowing this to happen they work with the secured creditor to agree a sale of the company or its assets by way of pre-pack to preserve and maximise value.

Whilst the pre-pack sale may be very much required by the secured creditor (failing which a receiver will be appointed), the directors must still be aware of and consider their obligations as directors to the company and its creditors. As the directors are aware that the company is insolvent or on the cusp of insolvency they must have regard to the interests of the company's creditors. The directors need to be particularly cognisant of the risk of trading while insolvent during that period where the company will be continuing to trade pending the completion of the pre-pack sale. The directors (with the benefit of appropriate independent legal and financial advice) must carefully consider and record their reasoning for continuing to trade and the steps taken to minimise any loss incurred including all efforts to ensure that the position of creditors is not detrimentally affected by continuing to trade during this period. Detailed minutes should be taken in respect of all board meetings pre-completion in order to ensure that there is in place an accurate record of the management's justifications for making decisions and its focus on the interests of creditors as a whole.

Following the pre-pack sale, it is likely that the company will be placed into insolvent liquidation or struck off the register for failing to file annual returns and accordingly, the directors face the prospect of a restriction (or even disqualification) application being taken against them. If a restricted order is made against the directors, they can be prohibited from acting as a director of another company unless certain capital requirements are met. A restriction order could therefore cause difficulties where the directors of the insolvent company are intended to be involved as directors of the buyer after the sale. Similarly, a liquidator of the company could seek to make allegations that the directors continued to trade the company while insolvent and seek to have the directors made personally liable for all or some of the debts of the insolvent company. Accordingly, it is important that the directors ensure they take appropriate advice and steps to protect themselves from any possible arguments against fraudulent or reckless trading.

4. What level of involvement does a court have in a pre-pack?

In Ireland, the courts or the debtor's general body of creditors do not have any role in a pre-pack sale and are not required to sanction or otherwise supervise a pre-pack sale. The receiver and manager is appointed to the insolvent debtor by the secured creditor in accordance with the terms of the relevant mortgage or debenture without court involvement.

There is no third party body which scrutinises a pre-pack before it is entered into and there are no special reporting or disclosure requirements. The prospective receiver will typically engage with the debtor and the secured creditor to agree the proposed sales process and possible buyers. This process may involve an accelerated M&A process with a select number of parties, or an identified buyer may be suggested from the outset by the debtor or the secured creditor with no formal or informal marketing process carried out. It is then a matter for the receiver to ensure that they are comfortable that the proposed sale is for the best price possible, and that sufficient testing or knowledge of the market or professional valuations are held to support this opinion.

Sales to connected parties require additional legal and reputational considerations as these tend to be heavily criticised by unsecured creditors, who after the sale of the company's business and assets (on which they were neither informed nor consulted), are often left with claims against an insolvent "shell". Notwithstanding this, many insolvency office holders agree to act on the basis that the potential sale consideration (and therefore the possible return to creditors) is greater in circumstances where business disruption is minimised, and they have sufficient evidence that the best price is being achieved by virtue of the pre-pack sale.

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

In Ireland there are no strict statutory duties imposed on a receiver in respect of a pre-pack sale other than the obligation to exercise all reasonable care to obtain the best price reasonably obtainable at the time of the sale.[1] As a result, receivers generally have the flexibility to conduct pre-packs on such terms as they (and the charge holder and / or debtor) see fit, so long as they can demonstrate that the price achieved is the best price reasonably possible in accordance with their duties.

[1] Companies Act 2014, s 439.

6. **How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?**

As set out above, a receiver is obliged to exercise all reasonable care to obtain the best price reasonably obtainable at the time of the sale.[2] In order to protect a receiver from an allegation that they did not achieve the best price, a receiver will usually obtain one or more independent valuations of the business prior to the pre-pack which verify or support the level of consideration agreed in the pre-pack. If possible, a debtor (on request of the proposed receiver) may consider marketing the business to a select number of parties in advance of the pre-pack. However, it is not unusual for no formal marketing to be undertaken. A receiver will often get comfortable to execute a pre-pack on the basis that the realisation is higher than where a receiver is appointed and trades the business pending a sale of the business or the assets.

If it can be evidenced that the consideration achieved is too low, the sale may be challenged, and the conduct of the prospective receiver called into question by the court. Challenges against receiver sales on the basis that the assets were sold at an undervalue are usually brought by the debtor itself or more rarely by disgruntled unsecured creditors. However, given that pre-pack sales usually involved the co-operation of the debtor challenges to such pre-packs are rare in Ireland. However, challenges against sales by receivers outside a pre-pack process are more common in Ireland where disgruntled debtors allege that the receiver failed to get the best price and look to have the balance of debt remaining after the sale to be written off or reduced to reflect this failure.

7. **What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?**

Ireland has no mechanism by which pre-packs are scrutinised and the lack of transparency and information around pre-packs has been the subject of criticism. There is also no new legislation or guidelines being proposed at this time to ensure adequate supervision or scrutiny of pre-packs.

However, given that the United Kingdom introduced the SIP 16 guidelines in November 2015 and further restrictions of pre-pack sales to connected parties in April 2021; Ireland may ultimately look to implement certain measures. However, as it currently stands there are no measures now or anticipated to ensure the proper scrutiny of pre-packs.

---

2 *Ibid*.

ITALY

1. **What measures are available in your jurisdiction to allow struggling businesses to enter into a "pre-pack"?**

Italian law no longer permits a pre-pack scheme to be implemented that allows the sale of all (or substantially all) the business to a third party without a prior involvement of the impaired creditors.

Until 2015, a pre-pack scheme, substantially similar to that found in English law, was available in the context of a *Concordato Preventivo* proceedings effecting a composition with creditors.

In a nutshell, *Concordato Preventivo* is a collective proceeding supervised by the court, whereby the debtor, which remains in possession of the ordinary business, is allowed to submit for the approval of its creditors a plan for the restructuring of its indebtedness, based either on the prosecution of the business on a going concern basis or a liquidation of the business, in order to prevent the compulsory liquidation that would be applicable in an ordinary bankruptcy scenario.

The plan is submitted to a vote of the body of the creditors. A majority of the affected creditors (that is unsecured creditors and secured creditors, admitted to vote within the limit of their deficiency claims) can approve the plan.

If the creditors are subdivided into classes, the majority of the classes must also approve the plan, so cross-class cram-down is permitted.

The plan so approved must then be sanctioned by the court, by way of an homologation decree, and the dissenting (qualified) minority[1] of creditors can successfully oppose the homologation, on the grounds that is not a sufficiently favourable solution, only if they are able to prove that the plan submitted by the debtor offers a recovery to their claims lower than the bankruptcy liquidation scenario (Neutrality Test).[2] Please note that some

---

1 Only dissenting creditors representing 20% of the whole indebtedness (in a *Concordato Preventivo* without classes) or any dissenting creditor included in a dissenting class (in a *Concordato Preventivo* with classes) can file an opposition against the plan on the ground that it does not satisfy the Neutrality Test.

2 According to the expressions included in the relevant sections of Italian Bankruptcy Laws (IBL) (eg s 180 *bis* and s 182 *septies)* in order to satisfy the Neutrality Test it is necessary that dissenting creditors are not impaired in respect to the "liquidation scenario" or the "feasible alternative scenario", expressions which are ordinarily construed as the following: the dissenting creditors cannot be forced to accept a recovery, under the restructuring plan, which is lower (or less satisfactory) than the recovery they would reasonably obtain in the Bankruptcy Proceedings.
The liquidation in the Bankruptcy Proceedings, indeed, is generally considered the most likely alternative scenario to the restructuring plan, for neither the independent expert nor the court is required to speculate about the recovery that could be provided under any potential alternative restructuring plan which could have been submitted by the debtor or other entitled subject (including a qualified percentage of creditors submitting a competitive proposal in *Concordato Preventivo*) but, actually, has not been submitted by

amendments to *Concordato Preventivo* have been recently introduced by Legislative Decree no 14 of 12 January 2019 (new Crisis Code); however, they did not have a material impact on pre-packs topic.

As noted above, until 2015, the debtor was allowed to include in the plan a pre-pack offer by a third party for the purchase of the business and to submit it to the body of creditors thereby excluding the possibility for dissenting minority creditors to challenge the relevant approval of the plan unless they could prove that the recovery offered did not pass the Neutrality Test.

A reform passed in 2015, however, has excluded such a possibility by imposing a mandatory auction process applicable to any disposal of the business (or asset of the debtor) included in the plan as a pre-pack solution.

When a pre-pack offer is included in the plan, the court shall run a competitive procedure to seek other potential offerors which are invited to offer and to compete, through an auction process, for the purchase of the business / assets of the distressed company. Such an auction procedure prevails on any condition / clause of the pre-pack offer and the original offeror may participate in the process only by adapting its offer to the conditions set forth by the court.

Commentators have explained the rationale of such a mandatory mechanism as a necessary measure to prevent the frequent abuses perpetrated in the past against the interests of creditors, as the pre-pack proposal tool was used as a means for the debtor to re-purchase the business (directly or indirectly) under a different commercial name or to extract private advantages from a disposal on terms more favourable than those obtainable in the market. Such abuses could rarely be successfully opposed by the dissenting minority as, very often, the conditions of the pre-pack offers, notwithstanding they were not the best possible in the market, were sufficient to pass the Neutrality Test.

Given the above-mentioned reform, as of today, a pre-pack scheme can be implemented in the Italian system only in the context of pure consensual procedures, that is to the extent that the conditions of the sale are accepted by all the affected creditors, while the dissenting creditors shall be paid in full in order to avoid any challenge (and a potential filing for bankruptcy, with the associated claw-back risk).

It is worth noting, however, that a potential flexibility in the system might be represented by the very recent (August 2021) introduction, in the Italian restructruing system, of a new procedure named *Composizione Negoziata per la soluzione della crisi di impresa* (Negotiated Composition) and the relevant sub-procedure of *Concordato Semplificato*

anyone. However, this question is actually debated, and some scholars and case law construe the expression as also embracing the scenario of a different restructuring plan with liquidation purposes, because it is considered as an alternative scenario which, exactly as the bankruptcy scenario, could be rationally based upon a solid historical series and statistical basis.

(Simplified *Concordato*). The Negotiated Composition procedure allows the debtor in potential distress to apply to the Chamber of Commerce for the appointment of an independent expert having the task of providing assistance in the negotiation with the creditors, acting as an impartial mediator and on a confidential basis. Different ancillary measures can be requested by the debtor in the context of the Negotiated Composition (including a general stay of claims and super-senior financing) even if it remains, essentially a consensual procedure that could be succesfully completed only on the basis of an agreement with the relevant creditors.

However, if such an agreement is not achieved, and provided that the negotiations were carried out fairly and in good faith, the debtor is allowed to submit to the court a Simplified *Concordato* proposal for the liquidation of all the assets of the company[3] within the following 60 days. The proposal shall be notified to the creditors, but they are not required to vote thereon, being only allowed to file an opposition with the court. Notwithstanding the filing thereof, the court can homologate the plan if it passes the Neutrality Test.

The liquidation plan to be filed with the Simplified *Concordato* proposal may include a pre-pack offer and, in this procedure, the court is not required to run a mandatory auction process but the liquidator[4] is allowed to accept the pre-pack offer provided that "no better solution is available on the market".[5]

The first commentators have interpreted this procedure as an implicit return to pre-2015 flexibility about pre-packs, as the liquidator is substantially allowed "to measure" in their own opinion and at their own discretion, efforts at finding better solutions on the market. In many cases the liquidator will have no specific interest in furthering the analysis, thereby accepting the pre-pack without inviting interest from other parties. However, it is not possible for the courts to exclude the requirement that liquidators adhere to a higher standard of transparency and competition, similar to that provided for in the ordinary *Concordato Preventivo*. In this respect, only the practial application of the Simplified *Concordato* by case law will provide a final answer about the effective flexibility of the new procedure.

---

3 The proceeds of the liquidation of the assets under the plan shall be distributed among the creditors (who can be divided into different classes) according to the absolute priority rule which, however, as to secured creditors, is applicable within the value-limit of the collateralised assets. In other words, the junior creditor will be allowed to receive distributions out of the liquidation proceeds to the extent that the senior creditor has been paid (not in full but) at least the amount recoverable by the sale of the assets underlying its lien.
Another limit is that any creditor, even if unsecured, shall receive some kind of recovery out of the liquidation plan, regardless of how little.
In light of the foregoing, a complete disenfranchisement of the unsecured creditors seems not possible and, if the necessary respect of the absolute priority rule does not allow distributions to them, the debtor shall be required to fund the payment of the unsecured creditors with external resources.

4 Or the expert appointed by the court to assess the proposal in case the liquidation of the assets is envisaged before the homologation decree.

5 Crisis Code, s 25-*septies*, para 2.

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

As explained above, Italian law does not include a proper pre-pack tool, even if the Simplified *Concordato*, as recently introduced, might provide a similar mechanism. The Simplified *Concordato* is a tool that is only available following the failure of negotiations for a Negotiated Composition scheme and, it is still untested in its practical application by the courts.

One of the main advantages of a pre-pack solution typically lies in the mitigation of the risk of assets depreciating, as the sale is negotiated immediately prior to the formal application for commencement of restructuring proceedings. Similar (but more limited) advantages can be acheived under Italian regulation by entering in a pre-pack proposal prior to applying for a consensual restructuring scheme, such as a rescue plan pursuant to section 56 (56 Plan) of the Crisis Code or a Restructuring Agreement pursuant to section 57 of the Crisis Code.

Consensual schemes maintain the debtor in possession and, so, in principle, any disposal of assets can be performed without any consent by the creditors. Nonetheless, it is clear that substantial transactions, such as the disposal of the entire business (or significant units thereof), in a context where creditors are also required to support the debtor with turnaround measures, is normally something that is to be negotiated with the affected creditors as part of the rescue / restructuring plan. In this regard, we note that a 56 Plan requires the approval of all affected creditors, which means that a pre-pack solution cannot be imposed by the debtor on dissenting creditors (without facing significant risks of failure of the negotiations), whereas a higher degree of flexibility is provided under Restructuring Agreement scheme.

A Restructuring Agreement scheme consists of a private agreement that is entered into between the debtor (that remains in possession) and (at least) 60% of its creditors.[6] It is aimed at restructuring the indebtedness of the company together with a plan aimed at business continuity or with liquidation purposes. Under such a scheme, any affected creditor is entitled to participate in the agreement, while those that do not wish to particpate in it must be paid in full. Payments to such non-adhering creditors, however, are subject to a legal moratorium of 120 days from the homologation date or from the original maturity date, if it falls after the homologation date.

Furthermore, under the Restructuring Agreement scheme, a debtor is allowed to subdivide the creditors into classes (which must include creditors homogeneous in terms of economic position and legal status)[7] and, provided that a majority of 75% of the

[6] Pursuant to s 60 of the Crisis Code, the relevant percentage is reduced to 30% if the debtor neither requires the 120 days legal moratorium for the payment of the non-adhering creditors nor interim protective measures (such as a stay of claims).

[7] Pursuant to IBL, s 182 *septies*, subdivision in classes is admissible for any typology of creditors only if the plan underlying the Restructuring Agreement is aimed at preserving the business as a going concern, while

members of the relevant class agree to the Restructuring Agreement, the dissenting 25% are subject to a cram-down mechanism whereby they may be forced to accept the conditions of the Restructuring Agreement. The Restructuring Agreement must also be sanctioned by the court by way of an homologation decree. Dissenting creditors, subject to the cram-down mechanism described above, may successfully oppose the homologation only if they prove that the recovery offered to them, under the Restructuring Plan, does not satisfy the Neutrality Test. Therefore, through such a scheme it is possible to impose a Restructruing Agreement based on a pre-pack offer to dissenting creditors, provided that they do not exceed 25% of the relevant class (no cross-class cram-down is allowed).

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

Directors who deal with the assets of a distressed company are subject to specific duties for the protection of the interests of the creditors as a whole.

From a general standpoint, directors of a company that are facing a potential crisis / distress must act in the best interest of the creditors as a whole and, according to the standard accepted by prevailing case law, they must act expeditiously to access the most appropriate restructuring tool, in order to handle the situation of distress. This can be done by way of a plan that allows, either, the continuity of the business (also indirectly, by way of disposal of the business as a going concern); or a liquidation of the assets in terms satisfactory to all of the affected creditors (with the exception of the limited possibilities of cram-down referred to above).

If a restructuring solution is not viable, directors are under a duty to file for self-bankruptcy of the company.

If the directors fail to comply with these duties and the company is declared bankrupt, they are accountable from both a civil and criminal perspective. In particular, they may be subject to a damages action by the bankruptcy receiver and to a potential indictment for worsening the insolvency of the company by the Public Prosecutor.

A specific aspect of directors' duties is that they must act diligently in order to maximise the value of the recovery for the creditors as a whole and, in particular, in order to dispose of the assets (along with a certified restructuring plan, see below) at the best conditions available on the market and avoiding any conflict of interest.

These duties are complemented by specific procedural rules, applicable within the different restructuring tools, and are aimed at protecting the rights of the creditors, with

with a liquidation plan it is only admissible if banking creditors represent at least 50% of the total indebtedness and only within such group of creditors.

specific regard to the results of asset disposals. Among such rules it is worth noting the following:

(a) Pure consensual restructuring tools, such as Plan 56 and Restructuring Agreements (except in the case of class cram-down) cannot adjust the rights of creditors except with their consent. As a result, any asset disposal will be negotiated with the creditors requesting sacrifices from them (usually the banks), and whose consent is therefore required to implement the plan. Residual creditors are not included in the negotiations and as a result they will have to be paid in full. The negotiations regarding the plan, including the asset disposal, are normally based on independent appraisals of the assets which are being disposed of, provided by professional valuers which may be selected (and usually are) in agreement with the key creditors. Furthermore, any restructuring plan underlying a Plan 56 and Restructuring Agreement has to be validated by an independent expert who certifies the genuineness of the underlying accounts and the feasibility of the restructuring. The independent expert is subject to criminal liability if they do not comply with the best standards of evaluation.

(b) As to a Restructuring Agreement with cram–down, in addition to the rules mentioned above, the debtor may subdivide the creditors into homogeneous classes and, within any class it is possible to effect a cram-down of the minority, provided that 75% of the members of the relevant class agree to the plan. In this context, an asset disposal (also by way of a pre-pack proposal) may be "imposed" on the minority but, in order to avoid a successful challenge by the compromised creditors, the recovery offered under the plan must satisfy the Neutrality Test. To address this, the directors will normally procure professional appraisals in order to demonstrate fulfilment of the Neutrality Test, even if it is not explicitly required by law; and the independent expert will normally be required to include in its report on the feasibility of the plan, a section comparing the convenience of the plan against a liquidation scenario. In addition, the court, which is required to verify the fulfilment of the Neutrality Test, would likely appoint its own expert to validate the conclusions made by the directors.

Pre-pack solutions are in principle excluded from *Concordato Preventivo* and, in general, as opposed to consensual schemes, the relevant level of protections for the interests of the creditors is substantially increased by the direct involvement of the court and the commissioner (Judicial Commissioner) appointed thereby in order to supervise the proceedings.

The debtor is required to file a restructuring plan (to be certified by the independent expert) which shall guarantee the respect of the absolute priority rule in the distributions among creditors (the relative priority rule is also applicable, subject to specific conditions). The debtor must obtain the approval of the required majority of creditors (see above) and by the court with the homologation decree.

With respect to asset disposals, it is to be noted that, in *Concordato Preventivo* proceedings, the debtor remains in possession only for ordinary business matters; in light of the aforegoing, certain rules apply, namely that after the:

(1) filing of the petition and before the homologation, any disposal of significant assets of the debtor (with the exception of disposals resulting as part of the ordinary trading activity) must be authorised by the court and effected through competitive procedures, including auction processes, on the basis of professional appraisals on the value of the assets. Pre-pack offers are subject to the mandatory auction process described above; and

(2) approval of the plan, the court, as a default rule, will appoint a liquidator to carry out a competitive disposal process.[8]

Disposals effected under these rules, in the context of *Concordato Preventivo*, are subject, in terms of effects, to the same rules of those performed under the Bankruptcy liquidation process (Judicial Sales) and benefit from the same advantages.[9]

The rules above entail the ordinary necessity for the directors to procure professional appraisals on the value of the assets (normally to be provided by experts who are independent from the debtor) subject also to the potential scrutiny of the court and Judicial Commissioner.

Similar rules are applicable also in the context of Simplified *Concordato* where, however, pre-pack offers might be subject to a more flexible approach (as seen above).

4. What level of involvement does a court have in a pre-pack?

The court's involvement is not required for a Plan 56, and it is limited in Restructuring Agreements, where the court's involvement is required only if there is opposition from dissenting creditors and the court must apply the Neutrality Test.

---

[8] According to the prevailing case law, the appointment of the liquidator by the court is not mandatory if the restructuring plan approved by the creditors provides differently. However, it is worth noting that, in *Concordato Preventivo* with liquidation plan, the debtor is required to offer a recovery to unsecured creditors equal to at least, 20% of the face value of their claims. In light of the aforegoing, the risk of mismanagement of the debtor, in performing the sales, is reduced, even if the debtor does not fully comply with the competitive procedures applicable as a default rule.
Furthermore, it is deemed that disposals performed by the debtor without applying the competitive procedures required under the default rule cannot be considered as Judicial Sales and cannot benefit of the related (most favourable) discipline.

[9] In Judicial Sales, subject to the payment of the price by the purchaser, the assets assigned can cleaned by any charge by decree of the court and without need of approval of the relevant chargee. In addition, in the case of disposal of the business, the relevant purchaser is not liable for the debts of the business arisen prior of the transfer.

There is a significant level of court involvement in the *Concordato Preventivo*, which is run and supervised by the court and which, in respect of a pre-pack proposal, also runs the mandatory auction process.

A Negotiated Composition, in principle, does not require any involvement of the court unless the debtor asks for specific protections, such as a partial or general stay of claims, the access to super-priority financing or intervention to rebalance the conditions of contracts affected by the impact of Covid-19 pandemic.

Finally, the court's involvement is limited in Simplified *Concordato*, unless there is opposition by dissenting creditors and a necessity for the court to apply the Neutrality Test.

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

As explained above, officeholders, such as Judicial Commissioners and liquidators, are involved in asset disposals only in the context of *Concordato Preventivo* (and Simplified *Concordato*), as well as in bankruptcy proceedings where the entire process of liquidation is run by a bankruptcy receiver appointed by the court. In these cases, pre-packed dispolsals are generally not allowed and the relevant officeholders must conduct any disposal by following a competitive process.

6. How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?

The officeholder in charge of asset disposals is entitled to rely on appraisals provided by professional experts.

No specific rules prescribe the process for the selection of such experts; however, it is normally required that they operate as experts of recognised standing in the market and they are independent from the debtor.[10]

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

Under Italian law, pre-packs are generally allowed only with the consent of the affected creditors, with the limited exceptions highlighted above. In *Concordato Preventivo*, where the plan can be imposed to dissenting minorities with a cram–down mechanism, pre-packs are not applicable and, if included in the plan, can be unwound through a mechanism of mandatory auction supervised by the court.

---

[10] Independence is normally excluded when the expert maintains a commercial or professional relationship with the debtor of such importance that may affect the fairness of the relevant judgement.

JERSEY

1. What measures are available in your jurisdiction to allow struggling businesses to enter into a "pre-pack"?

Jersey does not have a formal administration regime and neither the Companies (Jersey) Law 1991 nor any other legislation provides for a specific rescue remedy equivalent or similar to administration. The one Jersey statutory route closest to administration is the *remsie de biens*. That requires the applicant to have Jersey *situs* real property, to be able to realise it to pay off secured creditors in full and is an old remedy not designed nor suited for the rescue of a going concern. Notwithstanding the lack of a specific rescue tool under Jersey law, practitioners have utilised and developed the process around the statutory just and equitable winding up (just and equitable) so that on a number of occasions it has been used in effect to conduct a quasi-pre-pack.[1] The court has shown itself to be quite comfortable in hearing applications made under the just and equitable jurisdiction both for financial services and non-financial services Jersey companies.

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

As we note above, there is no formal rescue remedy in Jersey so there is nothing to compare a just and equitable with. The only real option therefore is for the court to consider granting a just and equitable on terms that very closely resemble a pre-pack. The court will have the interests of the creditors at the fore. If it can be shown that a quasi-pre-pack just and equitable is likely to benefit the creditors, then the applicant has a good chance of success. The applicant needs to be the company, a member or a director. In certain cases, the Jersey Financial Services Commission can apply in respect of a regulated financial services business. A creditor cannot be an applicant. If the application is successful, the court will order the appointment of a liquidator and make such further or other orders as it considers just and equitable. Frequently, those orders mirror what the law would prescribe for an insolvent winding up but tailored so as to permit the liquidator to consider the pre-pack option. Notably though, there is no notice period nor notice requirement for the making of such an application so the court can make orders very swiftly. It would be usual for the court to make provision for the liquidator to consider the pre-pack offer, rather than be bound to implement it, but at the same time to provide comfort to the liquidator to proceed with the pre-pack in the liquidator's discretion.

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

The position will be very much the same as for directors considering entering into any form of insolvency. The directors will need to carefully consider their duties (with the benefit of

[1] See *In the Matter of the Representation of Collections Group* [2013] JRC 096.

appropriate independent legal and financial advice) to act in the best interests of the company's creditors as a whole and to minimise loss.

4. What level of involvement does a court have in a pre-pack?

With just and equitable being the only route, there is (i) no out of court route; and (ii) the just and equitable route involves making a court application. The court can, and may want to, remain actively involved in the process or, more likely, appoint a liquidator, give the liquidator significant powers and then rest on the duly appointed liquidator coming back to court when deemed appropriate by the liquidator. The court will, normally, readily hear a creditor(s) during the course of a just and equitable if they wish to complain and / or otherwise make representations about the conduct of the just and equitable.

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

A great deal will depend on the terms of the proposed just and equitable and such orders as the court might make when granting the application. It would be usual for the liquidator to be specifically guided towards acting in the best interests of creditors. It is usual for the court's attention to be drawn also to the relevant UK SIP(s). SIP 16 has been considered previously with a liquidator required to observe its contents.[2]

6. How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?

In short, the liquidator will be required to comply with the orders of the court. The court may rest on the liquidator continuing with the just and equitable, but it will hear complaining parties readily and will require the liquidator to come back to court to close off the liquidation. There is no specific Jersey guidance on valuations, but the court would expect to see sworn affidavit evidence (including in terms of valuations) before ordering a just and equitable and / or otherwise granting powers to the liquidator to carry out the sale.

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

In a just and equitable winding up, the conduct of the liquidator remains subject to court oversight at all times. As noted above, the court will frequently be content for the liquidator to continue with the just and equitable process. It will hear creditors and others it thinks might have a legitimate interest in the just and equitable winding up and it will review the liquidator's closing report, at which point it will scrutinise the liquidator and its overall conduct of the just and equitable winding up.

[2] *Ibid*.

THE NETHERLANDS

1. What measures are available in your jurisdiction to allow struggling businesses to enter into a "pre-pack"?

1.1 Introduction

The pre-pack in the Netherlands is a restructuring tool which was introduced in the aftermath of the global financial crisis. It currently has no formal legal basis. The Dutch pre-pack practice allows a company in financial distress to request a Dutch court to appoint in silence (*aanwijzen in stilte*) a "silent trustee" (*beoogd curator)* and a "silent delegated judge" (*beoogd rechter-commissaris*) and negotiate and prepare an asset deal as an alternative to filing for bankruptcy. The silent trustee will work with and supervise the company in the negotiations and preparations for the transaction and the silent delegated judge will closely monitor the process. Once the negotiations with a potential purchaser are close to being finalised, the company will file for bankruptcy, and the court will appoint the silent trustee and silent delegated judge as the actual bankruptcy trustee and delegated judge, respectively. The bankruptcy trustee will then sign and close the transaction that was prepared prior to the bankruptcy. The objective of a pre-pack is to continue (partially or in full) the business of a financially distressed company and to avoid the negative impact on the value of the business, its employees and creditors when pursuing a sale of a financially distressed business through a bankruptcy process. By using a pre-pack, enterprise value is preserved as much as possible, and the business (or parts of it) may be sold as a going concern for the maximum value.

1.2 Current (legislative) status

A legislative proposal (the *Wet Continuïteit Ondernemingen I* (Act on business continuation I, (the *WCO I)* was introduced in 2015 to provide a legal basis for the pre-pack in the Netherlands. However, the *WCO I* has been on hold since 2019 due to case law which effectively defeated the purpose of using the pre-pack in the Netherlands. Therefore, another legislative proposal (the *Novelle WCO I*) was introduced in 2021 to accellerate the introduction of a legal basis for the pre-pack in the Netherlands by limiting the type of business that can use the pre-pack (whereby only a legal basis will be created for the use of the pre-pack method in the case of distressed companies which serve a public interest). A third legislative proposal concerning the transfer of a company in insolvency proceedings (*Wet overgang van onderneming in faillissement)* is currently also on hold as it was awaiting the outcome of the European Court of Justice (ECJ) in the *Heiploeg* case,[1] which will be discussed in question 2 below.

[1] *Federatie Nederlandse Vakbeweging v Heiploeg Seafood International BV*, Case C-237/20.

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

2.1 How do pre-packs work in practice in your jurisdiction?

We refer to the introduction paragraph in question 1 above.

2.2 What are the advantages and disadvantages of pre-packs when compared with other options that are available?

The Dutch Bankruptcy Act allows for a suspension of payments (*surseance van betaling)* and bankruptcy (*faillissement*). The objective of a suspension of payments is to allow the debtor to reorganize its business or restructure its debts to avoid bankruptcy. Although – similar to a pre-pack – a suspension of paments is aimed at the continuation of a business, in practice a suspension of payments almost always ends in a filing for bankruptcy. As such, it should not be considered as a practical alternative for the pre-pack. A debtor can be declared bankrupt if it is no longer able to pay its debts. Under the Dutch Bankruptcy Act, a bankruptcy proceeding is aimed at liquidating the assets of the debtor for the purpose of distributing the proceeds among its creditors. The continuation of the business is explicitly not an objective of a Dutch bankrutpcy proceeding (whereas that is the primary objective of a pre-pack).

The main advantages of a pre-pack compared to a suspension of payments or bankruptcy is that a potential sale of the business can be prepared before filing for bankruptcy. That additional time allows for the debtor and the silent trustee to prepare a potential deal without having to deal with the likely disruption to trading following, and during a bankruptcy. It also allows for more time for the silent trustee, during which it will receive more information in comparison to a bankruptcy proceeding where a trustee has limited time to act. Research has shown that the proceeds of a pre-pack sale are also often higher than the proceeds that are collected by a trustee during bankruptcy, and that the value of the business is better preserved.

A disadvantage of a pre-pack compared to bankruptcy and suspension of payment is that creditors cannot take immediate enforcement measures during a pre-pack. Another disavantage of the pre-pack and the main reason why it has not been used as much in the Netherlands in recent years, is the uncertainty regarding employee rights during a transfer of the undertaking. If a company is transferred to a new owner by way of a pre-pack, it is uncertain whether the contracts of the employees are transferred to the new owner by operation of law or whether the new owner is not required to hire those employees. Due to this uncertainty, preliminary questions have been asked to the ECJ on the applicability of the Transfers of Undertaking Directive[2] in the pre-pack procedure. Under this directive, the transfer of an undertaking means that all employees are automatically transferred to the transferee, but this does not apply in bankruptcy procedures. The Dutch Supreme

[2] 2001/23/EC.

Court has asked questions to the ECJ in the Heiploeg-case. The ECJ ruled that the Dutch pre-pack procedure may fall under the liquidation exception of the Transfer of Undertaking Directive[3] provided that this procedure is regulated in statutory or administrative provisions. The ECJ ruled that if the pre-pack is executed under the supervision of a (prospective) delegated judge and the primary objective of a pre-pack procedure followed by bankruptcy proceedings is to obtain the highest possible payment to the joint creditors, the procedure does fall under the liquidation exception. According to the ECJ, it should be examined in each individual situation whether the pre-pack and bankruptcy proceedings concerned are aimed at the liquidation of the company after it has been established that the transferor is insolvent, or the continuation / reorganisation of that company and whether the pre-pack and bankruptcy proceedings concerned are in the best interest of all stakeholders.

A third (more recent) option available is the possibility to bind creditors to a pre-insolvency compulsory composition when there is a reasonable expectation of illiquidity. The Dutch Act on Court Confirmation of Extrajudicial Restructuring Plans (*Wet Homologatie Onderhands Akkoord,* (*WHOA)*) entered into force on 1 January 2021. The WHOA introduces the possibility of a debt restructuring plan outside of formal bankruptcy proceedings, with the objective of preventing unnecessary bankruptcies. The formation of the compulsory composition occures pre-insolvency, which means that secured creditors can continue to enforce their security rights. If the compulsory composition is approved it binds the creditors and shareholders of the company to the agreement. The advantages of a pre-pack compared to a compulsory composition is that the WHOA cannot address employee-related issues; if there is a high level of employee absences or another employee-related problem a compulsory composition will not help. A compulsory composition cannot change employee rights, whereas an insolvency declaration, which is needed to execute the preparations made under a pre-pack, can. A disadvantage of the pre-pack compared to the compulsory composition is that the compulsory composition occurs before insolvency, whereas the preparations made under the pre-pack method can only be executed when bankruptcy of the company is declared by the relevant court and the silent trustee and prospective delegated judge become the trustee and delegated judge.

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

In general, directors must always (reasonably) act in the interest of the company and all stakeholders (as part of directors liability provisions under Dutch law). Under the *Novelle WCO I*, a provision is included in that legislative proposal which deals with the liability of directors when the director, in the request for the appointment of a silent trustee, has deliberately provided false information about the added value of the pre-pack method with the goal to use the pre-pack method for improper purposes. In addition, the debtor must prove to the court that there is added value to the pre-pack, which must relate to a

[3] *Ibid.*

controlled winding up of its business, thereby protecting the interests of those for whose benefit the activities are carried out. The "silent preparation phase" of a pre-pack should in any case contribute to preventing a chaotic start to the bankruptcy and to a careful winding up of the activities.

Furthermore, under the *Novelle WCO I,* the directors of a company have to anticipate imminent bankruptcy and, when fulfilling this task, such directors have to exercise care and take into account the interests of all stakeholders. This duty of care can be satisfied by having the objective to continue the business (rather than liquidating assets) when the company deals with financial problems. The request for a pre-pack method can be a part of this objective to continue the business. With companies serving a public interest, the duty of care exercised by directors can entail that the request for silent preparation has to be made to prevent harming the public interest (for example, a hospital filing for bankruptcy which will affect all patients in that hospital). A better result is typically realised under a pre-pack compared to other insolvency proceedings. Directors should therefore investigate whether the company could benefit from a pre-pack procedure in comparison to another insolvency procedure. If they fail to investigate the option of a pre-pack, directors could potentially be held liable by an involved creditor, shareholder, employee or customer of the company.

4. What level of involvement does a court have in a pre-pack?

The court must be involved to initiate a pre-pack procedure. The court appoints a silent trustee and silent delegated judge if the debtor has succesfully argued that there will be added value to preparing the relevant deal in relation to the business in silence by way of a pre-pack. The court is also the competent authority to declare insolvency and appoint the trustee and delegated judge in the insolvency proceedings. The trustee performs its duties under the supervision of the delegated judge and the court. Therefore, the court is also (indirectly) involved in the pre-pack and insolvency proceedings.

The delegated judge has a supervisory role and ensures that the trustee acts in accordance with the relevant (insolvency) laws. The permission of the delegated judge is also required if the trustee wants to sell certain assets or terminate employment contracts. The delegated judge can also dissaprove suggestions of the trustee or order the trustee to act. If creditors do not agree with a decision of the trustee, they can raise it with the delegated judge.

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

The proposed silent trustee will often be involved at an early stage to advise the debtor on all applicable restructuring options. The silent trustee must be independent of the debtor. Under Dutch law the silent trustee is always appointed by the court. This supervision of the court ensures that the silent trustee will not be able to favour preferential creditors, as a result of which the position of the unsecured creditors is better guaranteed.

Moreover, the independence of the silent trustee is strengthened by the fact that they are not bound by the instructions of the debtor.

Although the silent trustee is limited in their possibilities to exercise power, as they are not authorised to manage and dispose of the estate, the proposed legislative framework does allow them to participate actively in the process of preparing the transfer of the undertaking. For example, the silent trustee will have to act when the preparation process threatens to put the interests of the joint creditors at a disadvantage. In addition, they are expected to play an active role in the sales process of the troubled company: they shall ensure a fair process, they must identify potential purchasers and they have to come up with a reasonable sales price. Moreover, they have to assess the effects of the transaction on creditors. Lastly, the silent trustee has a duty to monitor for bankruptcy fraud, and they are expected to intervene when fraudulent behaviour occurs. At the request of the debtor they may even play a more active role.

If the silent trustee has performed their duties improperly, creditors are able to hold the trustee liable for their actions. The silent trustee cannot be held liable in their capacity (*qualitate qua*) since they are not authorised to manage and dispose of the estate as an official bankruptcy liquidator. The silent trustee must be guided by the interests of the creditors and must also take social interests into account, including the interest of employees. As such, a silent trustee should act in the same way as what may reasonably be expected from a silent trutee who has the sufficient insight and experience and who should perform their duties with precision and diligence.

The silent delegated judge is tasked with supervising the silent trustee with all of the aforementioned tasks and duties. In addition, the silent delegated judge must supervise the progress of the pre-pack and their approval is required for any deal prepared between the silent trustee and the company.

6. How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?

As the pre-pack currently has no formal legal foundation in the Netherlands, it is entirely based on market practice and rules derived from case law. As such, the pre-pack has not been uniformly applied and therefore there are no hard-and-fast rules (yet) for the procedure that must be followed by a silent trustee in conducting a sale. The debtor is under an obligation to provide the silent trustee with all information that they need to safeguard the interests of the joint creditors. In two ways the silent trustee can enforce obtaining this information. Firstly, they can resign from their position when they are being hampered in the performance of their duties. It is not in the interests of the debtor to obstruct the intended trustee in such a way that the pre-pack procedure will be ended, mostly due to the fact that the silent trustee has been designated at his request. Secondly, a liquidator in a regular bankruptcy proceeding may request the court for an injunction to ban the debtor from the board, when they seriously fail in their duty to cooperate with the liquidator. It can be argued that this also applies to a silent trustee in pre-pack procedures as soon as the relevant legislative proposals enter into force. Furthermore, the silent delegated judge is tasked with supervising the silent trustee with all of its tasks and duties

In addition, *INSOLAD* (Association of Insolvency Lawyers) has, in anticipation of the legislative proposals, already provided a number of useful guidelines for the activities of the silent trustee in the (preparation of the) relaunch on the basis of which the fear of an unfair process with a prejudicial result for the creditors can be eliminated. If there is a sale to a related party, the silent trustee should be extra careful in agreeing that a proper bidding process does not have to be followed. Certainly, in the case of sale to a related party, the silent trustee must make sure that external parties who might be interested have had sufficient opportunity to make a bid, or are granted such opportunity under a duty of confidentiality, unless this would adversely affect the value of the company and lead to a substantially lower price. If the silent trustee is involved at such a late stage that they cannot prepare the relaunch in compliance with, among other things, the above-mentioned rules, then they will not cooperate in a relaunch before the bankruptcy.

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

In order to initiate a pre-pack, a court and court officials must be involved. As such, there is a level of legal supervision. The silent trustee which will be appointed by the court is in charge of supervising and guiding the relevant entrepreneurs during a potential deal, and the silent trustee is in turn supervised by a silent supervisory judge.

However, as the pre-pack currently has no formal legal foundation in the Netherlands, it is entirely based on market practice and rules derived from case law. As such, the pre-pack has not been uniformly applied by Dutch courts. Therefore, those opposing the pre-pack method point to the lack of a legal foundation and indicate that the pre-pack procedure set out in Dutch case law cannot be regarded as providing a framework and that the pre-pack method does not meet the requirement of legal certainty. In particular in relation to employment rights this has caused issues in practice, which have led to several court rulings. As a result of several court rulings, in particular the *Smallsteps* case[4] and the *Heiploeg* case, the pre-pack has become a less attractive restructuring tool over the past years. In its ruling in respect of the preliminary questions (in the *Heiploeg* case) on the applicability of Transfers of Undertaking Directive[5] to Dutch pre-packs the ECJ imposed a new requirement to secure legal certainty: the pre-pack must be regulated by statutory or regulatory provisions, although this is not prescribed by the Transfers of Undertaking Directive.[6] It has not been clearly defined what this may comprise. Currently, the aforementioned three legislative proposals are pending before the Dutch Senate and the timing is uncertain. The legislative proposals are in a position that they can be adopted quickly and would then promptly create the legal basis for future pre-packs. Nevertheless,

4 *Federatie Nederlandse Vakvereniging v Smallsteps BV* [2017] IRLR 852.

5 2001/23/EC.

6 *Ibid.*

this new requirement also leaves some uncertainty as to how this relates to prior pre-packs, such as in the *Heiploeg* case.

SINGAPORE

1. What measures are available in your jurisdiction to allow struggling businesses to enter into a "pre-pack"?

Singapore's new Insolvency, Restructuring and Dissolution Act 2018 (the IRDA) came into force on 30 July 2020. The IRDA consolidated insolvency provisions from the Companies Act 1967 (the Companies Act), including the provisions for a pre-packaged scheme of arrangement which were first introduced in the Companies Act in 2017 as section 211I before being re-introduced into IRDA as section 71. When section 211I was first introduced in the Companies Act, it was modelled on the provisions in Chapter 11 of the United States Bankruptcy Code, which involves the broad parameters of a restructuring plan being negotiated among the debtor's stakeholders / creditors, with the plan ultimately requiring court sanction.

The provision supports a process that allows the debtor company to dispense with both the applications for permission to convene a meeting of creditors and the creditors' meeting itself.

A debtor company may pursue the "pre-pack" scheme of arangement process if it is a registered company in Singapore or, where it is unregistered in Singapore, it has a substantial connection with Singapore or meets certain prescribed requirements. A debtor company may alternatively pursue this process before the Singapore International Commercial Court if the restructuring is international and commercial in nature and satisfies certain conditions prescribed by the Rules of Court.

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

The court may approve "pre-pack" schemes without meetings being held, provided that the debtor company has provided each creditor meant to be bound by the compromise with a statement setting out the details of the compromise.

The debtor company must also publicise the application for the court's sanction of the "pre-pack" and send a copy of the application to each creditor that will be bound under the "pre-pack" scheme.

On such an application, the court must be satisfied that a meeting of the creditors (or meeting for classes of creditors) had been summoned, and that the meeting would have obtained support of the requisite majority; that is a majority in number of creditors present and voting at the meeting holding at least three-fourths in value of the aggregate debt in each class of creditors.

Two of the more significant advantages of a "pre-packaged" scheme are cost and time savings. This is in contrast to the regular scheme process that is lengthy as it entails at least two applications to court (that is an initial application for directions to convene the meeting, and a final application to report the outcome of the meeting to the court and seek sanction of the scheme) as well as a meeting of creditors convened for the purpose of approving the scheme.

A "pre-pack" scheme also minimises the risk of damage to the debtor company's public image and potential loss of goodwill that could result from a normal scheme process, as a scheme processes can easily turn contentious.

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

As a debtor-in-possession procedure, the directors are under a duty to provide each creditor meant to be bound by the scheme with sufficient information to allow them to make an informed decision with respect to their vote when solicited. Such information includes information concerning (i) the debtor's affairs, its property, assets and activities; (ii) the debtor's financial condition and prospects; (iii) how the rights of creditors will be affected by the scheme; and (iv) any other information necessary to allow a creditor to make its decision.

The debtor must also provide an explanatory statement of the scheme which will address (i) the effect of the scheme on creditors; (ii) the material interests of the directors (including any interests arising in their capacities as creditors, shareholders or otherwise); (iii) the effect of the scheme on the interests of the directors; and (iv) the effect of the scheme on the rights of debenture holders and trustees for the debenture holders.

4. What level of involvement does a court have in a pre-pack?

A debtor company that is pursuing a pre-pack scheme of arrangment would ordinarily seek approval of the pre-pack after securing the necessary support from the intended scheme creditors. Upon that application, the court would consider if the requirements in section 71 of the IRDA are met and if the creditors have been provided with sufficient information before granting its approval.

Following the court's approval of a pre-pack scheme of arrangement, if sought by the debtor, the scheme manager or any creditor of the debtor, the court has the power under section 72 of the Act to consider if the scheme manager has committed any act or omission, or made any decision, which results in a breach of any term of the scheme; and if any decision of the company or scheme manager ought to be reversed or modified, or if a direction should be given to rectify the act, omission or decision of that company or scheme manager. The court is also empowered to clarify any term of the scheme, if necessary.

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

The directors who propose the pre-pack would need to ascertain if they would be able to negotiate and solicit votes to meet the requisite majority. They would also need to comply with their fiduciary duties and avoid trading in an insolvent or wrongful manner.

6. How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?

The directors may initially rely on their books and records for the valuation of creditors' debts and security. This is subject to negotiation between the company and its creditors.

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

Section 71 of the IRDA prescribes obligations on the part of the company to ensure that its creditors are given sufficient information of matters set out in section 71 of the Act, in order for such creditors to be able to make an informed decision with respect to their vote.

SPAIN

1. What measures are available in your jurisdiction to allow struggling businesses to enter into a "pre-pack"?

In Spain the term pre-pack is generally used to refer to the sale and purchase of a company's business, the terms of which are negotiated and finalised prior to the formal commencement of an insolvency proceeding in respect of that company with the assistance of an independent expert, but which is entered into and takes effect shortly thereafter within the framework of the insolvency proceeding.

The restated text of the Spanish insolvency law approved by Royal Legislative Decree 1/2020 of 5 May 2020 (as amended) (the Spanish Insolvency Law) regulated a procedure for the sale of business units within the insolvency proceeding. A business unit was defined for these purposes as a set of assets organised for the development of a business activity. This activity could be a core (essential) activity of the company or an ancillary activity and it could be the sole business activity of the company, or one of them. However, the law did not contemplate the possibility of pre-packs. Pre-packs were first introduced into Spanish practice in 2021, and there are some precedents by certain Spanish courts that approved sets of guidelines for the implementation of pre-packs in Spain (for example the guidelines of the Mercantile Courts of Barcelona of January 2021 or the guidelines of the Mercantile Courts of Madrid of January 2021, with significant differences between them).

In September 2022, the Spanish Insolvency Law was amended by Law 16/2022 of 5 September 2022 to implement Directive (EU) 2019/1023 on preventive restructuring frameworks in Spain (the Amendment Law). The amendment also updated other aspects of the Spanish Insolvency Law, including changes to the regulation of the sale of business units and a new regulation of pre-packs.

Subsequently, some Spanish courts have issued new guidelines for the application of pre-packs, adapted to the new regulation approved by the Amendment Law (including the guidelines of the Mercantile courts of Seville of October 2022 and the guidelines of the Mercantile courts of Madrid of February 2023 (the Madrid courts Guidelines)).

According to the new regulation of pre-packs, a company can request to the court the appointment of an independent expert to negotiate and obtain offers for the sale of a business unit. The appointment of the expert is confidential. This possibility is available to companies that are in a situation of insolvency, imminent insolvency or likelihood of insolvency.

If a binding offer is obtained, the company can request the declaration of insolvency, including in the request the offer that has been obtained. In the insolvency proceedings, the independent expert can (and should normally) be appointed as the insolvency administrator of the company. The binding offer shall include a commitment of the offeror to maintain or re-start the activity of the business unit for a period of at least two years.

The insolvency court shall follow a short procedure for the approval of the offer. Secured creditors, the representatives of the workers and other interested parties can make allegations. The regulation is not sufficinetly clear in this respect but it seems that the court will not accept other offers if the expert informed in favour of the sale (see in this respect the Madrid Courts Guidelines and our comments below) and the company followed a procedure to obtain offers for the sale of the business unit that was transparent, admitted different offers and increases and was sufficinetly advertised.

Without prejudice to this regulation, there are other possibilities for the sale of a business unit in the context of an insolvence proceedings: (a) the sale of the business unit can be included in a restructuring plan, or (b) a company can negotiate and obtain a binding offer for the sale of a business unit before the commencement of an insolvency proceeding without the intervention of an independent expert for the subsequent approval of the sale within an insolvency proceedings. In this case the requirements are more stringent (for example the binding offer shall include a commitment of the offeror to maintain or re-start the activity of the business unit for a period of at least three years) and the approval procedure admits the submission of new competing offers., Alternatively, after the declaration of insolvency the sale of a business unit can be approved at any time during the insolvency proceeding, in the common (preliminary) phase, as part of an arrangement with creditors (*convenio*) or in the liquidation of the company.

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

As mentioned above, the Spanish regulation of pre-packs has been approved very recently (in September 2022) and there are still no significant precedents of application of the new rules. Generally speaking, a sale of business units has two significant advantages:

(a) it facilitates a quick sale of the business unit, avoiding the impact of a lengthy insolvency proceeding and the subsequent deterioration in the value of assets, loss of customers and suppliers, etcetera. This effect will benefit from the the new regulation of pre-pack if the intervention of the external expert restricts the subsequent involvent of the court in the procedure for the approval of the sale and the possibility of new competing offers; and

(b) the sale of the business unit will automatically assign the contractual relations of the business unit (subject to special rules for administrative contracts and for employement contracts (in respect of which please see below)) without the need of counterparty consent. The offeror can however exclude from the sale specific contacts if it is not interested in acquiring them. Further, outstanding liabilities are not passed to the acquirer.

Historically, the sale of business units in Spain had been hampered by the risk that the buyer had to assume all the labour and social security liabilities of the debtor, including those that were not transferred with the business unit. The Amendment Law tried to mitigate this risk. The sale of the business unit will imply a "business succession" and the transfer of the employees affiliated to the business unit. However, the insolvency court should have jurisdiction to determine the perimeter of the business unit and the employees affected by it. It should also have jurisdiction in relation to any measures to readjust the employees of the business unit. This notwithstanding, there is still a risk that the buyer may need to assume social security liabilities of employees of the debtor not included in the business unit perimeter.

Further, the new rules for pre-packs may have benefited from a more clear or detailed regulation of some matters such as the relationship between the options for the obtention of a binding offer before the declaration of insolvency (with or without the intervention of an independent expert) for their approval in the insolvency proceedings; the role of the court in each case and the procedure for the approval of the offer; the role of the external expert, etcetera. In this respect, until there is more case law in relation to these matters, guidelines such as the Madrid Courts Guidelinescan be helpful in the interpretation of the rules and the development of a market practice for the sales of business units.

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

Spanish law does not establish specific duties for directors of companies in financial difficulties. Directors have the duties that are proper to them under the Spanish companies law: they have the duty to act with the diligence of an orderly businessman, to adopt the measures necessary for the proper management and control of the company, and to obtain the information necessary for the fulfilment of their obligations.

In the exercise of their office, directors have a duty of loyalty to the company – to act in the best interests of the company. The duty of loyalty oblige the directors to act in good faith, oriented towards what is most favourable to the company under their management. Furthermore they must take measures to avoid conflicts of interest.

Directors may incur liability in insolvency proceedings if, in the performance of their duties, their actions, through fraud and bad faith or gross negligence, they contributed to the creation or the worsening of the insolvency.

In this respect, without prejudice to other measures that may be adopted in the event of financial difficulties in their various stages (including a restructuring, the orderly sale of production units, etcetera), the administrators have the duty to request the declaration of insolvency within two months from the date on which they knew or should have known of the insolvency situation. This obligation remains even if the company has requested the appointment of an independent expert for a pre-pack.

Alternatively, the Spanish Insolvency Law gives debtors the possibility of notifying the competent court of the existence of negotiations with its creditors, or the intention to start them immediately, in order to reach a restructuring plan to overcome the insolvency situation. If they are unable to do so within three months of the notice to the court, the directors must request the declaration of insolvency within one month from the end of that period. In principle, if the requirements for this notice are met by the company, it can also be used in the context of a pre-pack for the sal of sale of a business unit.

4. What level of involvement does a court have in a pre-pack?

In a pre-pack, the court is involved at various stages.

The independent expert is appointed by the court. The appointment is made at the request of the debtor. The expert must be a natural or legal person, Spanish or foreign, with specialised legal, financial and business knowledge and experience in the field. The expert must meet the requirements to be appointed as a restructuring expert or as insolvency administrator. When the operation has particularities (either because of the sector in which the debtor operates, or because of the size or complexity of the assets or liabilities, or because of the existence of cross-border elements), these particularities must be taken into account by the court for the appointment of the independent expert.

The court will establish the duration of the assignment and will appove the remuneration of the independnet expert, taking into account the value of the business unit. The remuneration may be conditioned fully or partially on the result of the process.

The binding offer shall be submitted to the court together with a request of declaration of insolvency. The offer will then need to be approved by the court within the insolvency proceeding. As mentioned above, however, the new regulation is not sufficiently clear about the level of involvement of the court in the approval of the offer. In any insolvency proceedings, after the declaration of insolvency, the insolvency administrator has the duty to preserve the assets of the debtor and any transfer of these assets will generally require the authorisation of the insolvency administrator. In line with this, the Madrid Courts Guidelines for pre-packs provide that it will be a necessary requirement for the approval of the sale that the independent expert (appointed as insolvency administrator after the declaration of insolvency) has issued a favourable report on the sale.

Before authorising the sale, the court must allow a period of three to 10 days for the interested parties to present their arguments, in particular the privileged creditors (creditors with secured claims on assets that form part of the production unit) and the workers' representatives (if any). In principle, it seems that the judge should not open a new bidding process to allow new bids for the acquisition of the production unit. This is established in the Madrid Courts Guidelines for pre-pack sales of production units and in the guidelines of the Seville courts.

5. **What duties must officeholders comply with when deciding whether to enter into a pre-pack?**

Under the Spanish Insolvency Law, the role of the independent expert is to obtain offers for the sale of the business unit. The law does not set out what this role entails or how it should be developed. According to the Madrid Courts Guidelines, the duties of the independent expert include, without limitation, to:

(a) assist the debtor in the preparation of the operations to define the perimeter of the production unit;

(b) verify that the value of the business unit exceeds the market value of the individual assets within the perimeter;

(c) know and become familiar with the activity of the business unit;

(d) verify and supervise that the sale process is open, objective, competitive and transparent, and provide assistance and recommendations to this end;

(e) assist in the obtention and selection of offers;

(f) if there are assets within the perimter of the business unit that secure secured claims, the guidelines consider that it is advisable that they are aware of the sale process, and the same for the representatives of the employees;

(g) prepare and submit to the court a report documenting how the sale process was carried out and its outcome, and, where appropriate, describing the offer tha has been selected and if it is in accordance with market value and the interests of the creditors, and

(h) issue such reports as may be required by the court.

The independent expert shall refrain from providing any services, even without remuneration, other than those entrusted to him / her by the appointment, partcularly those which may compomises the impartiality, objectivity and independence of the expert.

6. **How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?**

As indicated above, the Spanish Insolvency Law does not regulate the manner in which the independent expert must perform his / her role and the new regulation is still in its early stages of application. In principle, the expert must ensure that the sale process is open, competitive and transparent, and that sufficient publicity has been given thereto. The expert must also ensure that the price obtained for the business unit is in line with market value and that it is not lower than the price that could be obtained for the separate sale of the different elements that comprise the business unit. For doing this, the expert shall rely on third party valuations carried out where relevant in accordance with applicable regulations.

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

As noted above, the rules provide for several levels of review and supervision to ensure that the pre-pack is sufficiently scrutinised.

The pre-pack requires the intervention of an independent expert appointed by the court who must ensure that the sale process is open, competitive and transparent and that the price offered is consistent with market value. The sale is also subject to the approval of the court, which must allow interested parties to make allegations in respect of the sale, including employees (unless they already approved the transaction in advance) and creditors of the debtor.

In addition, the rules provide for specific provisions to safeguard the rights of secured creditors if the assets that secure their credits are included in the business unit.

In this respect, if the asset is transmitted with the business unit free of charges, the secured creditor is entitled to the proportional part of the price obtained equivalent to the value that the charged asset represents with respect to the overall value of the business unit. If the price to be received is less than the value of the charged assets identified in the security documents, the transfer must be agreed to by secured creditors that represent at least 75% of the class of secured creditors affected by the sale.

If the asset is transmitted with the security interest that charges it and the buyer assumes the secured liabilities, the consent of the secured creditor to the sale of the business unit is not required, but the court shall ensure that the buyer has the financial solvency and the necessary means to assume the secured liability.

UNITED STATES OF AMERICA

1. What measures are available in your jurisdiction to allow struggling businesses to enter into a "pre-pack"?

While the term "pre-pack" has been employed as a catch-all term to refer to all manner of pre-planned bankruptcies, there are two types of pre-planned bankruptcies: a true "pre-pack", where the debtor solicits votes from creditors on a Chapter 11 plan of reorganisation prior to the petition date, and a "pre-arranged" or "pre-negotiated" bankruptcy, where the debtor negotiates the key terms of a Chapter 11 plan of reorganisation or an asset sale under section 363 of the Bankruptcy Code prior to the petition date.

In a "pre-pack" Chapter 11 case filed in accordance with the applicable statutes and court rules, the debtor negotiates and finalises the terms of a Chapter 11 plan of reorganisation, notices the plan to practically all creditors (by mail and or posting on a public website), and solicits the votes of impaired creditors prior to the filing of the petition. Once the Chapter 11 petition is filed with the bankruptcy court, the debtor moves to confirm the plan on an aggressive timeline. A successful pre-pack can dramatically minimise the amount of time and fees spent in the bankruptcy court. In the last three years, the bankruptcy courts in New York and Houston have confirmed "24-hour pre-packs". To this end, they have entered orders officially confirming a Chapter 11 plan within 24 hours of the debtor filing a Chapter 11 petition, with certain minor reservations.[1]

One of the most recent "24-hour pre-packs", *In re Belk, Inc*[2] is a prime example. In *Belk*, the debtors filed a pre-packaged plan of reorganisation that restructured millions in funded indebtedness, while leaving the operational aspects of the debtors' businesses, leases and contracts, obligations to vendors, customers, and employees, unaffected. In less than 24 hours, the debtors filed the Chapter 11 petitions, and the bankruptcy court entered orders confirming the plan of reorganisation. Had the *Belk* debtors used Chapter 11 to reject burdensome leases or contracts, or address trade creditors or employee issues, the pre-pack model would not have been viable.

Because the Bankruptcy Code provides that creditors whose claims are impaired by the plan are entitled to vote, a pre-pack is simply not feasible for plans that restructure a debtor's operations / leases, address employment issues, or impair trade creditors. Rather, pre-packs are generally only feasible where sophisticated entities hold the affected class of debt and can engage in high level negotiations prior to the petition date, and all other creditors, trade creditors, employees, etcetera, are paid in full and not entitled to vote on the plan.

1 *In re FullBeauty Brands Holding Corp*, Case No 19-22185 (RDD) (Bankr SDNY); *In re Belk, Inc*, Case No 21-30630 (MI) (Bankr SD Tex).

2 Case No 21-30630 (MI) (Bankr SD Tex 2021).

But for those debtors that are, operationally speaking, healthy, but whose capital structure is impaired, the "pre-pack" Chapter 11 bankruptcy has become increasingly popular in recent years. Pre-packs are an effective tool for a funded debt creditor whose claims are impaired but not totally underwater - that is, the fulcrum creditor - to affect a form of foreclosure on the debtor with minimal disruption to the debtor's business operations.

A "pre-arranged" bankruptcy may involve negotiating on the key terms of a plan of reorganisation or the terms of an asset sale under section 363 of the Bankruptcy Code. The key difference between pre-packs and pre-arranged bankruptcies is the timing of solicitation of votes on a plan of reorganisation: in a pre-packaged bankruptcy, the debtor solicits votes for confirmation of a Chapter 11 plan prior to the petition date; and in a pre-arranged bankruptcy, votes on a plan of reorganisation are solicited post-petition. In a pre-arranged bankruptcy, the debtor maynegotiate the key terms of an asset sale, or the key terms of a Chapter 11 plan with creditors in advance. While a pre-pack may not be feasible because the trade creditors' claims will be impaired under any plan, a pre-arranged bankruptcy may still be viable.

In addition to the Chapter 11 plan of reorganisation, a debtor may also sell all or substantially all of its assets under section 363 of the Bankruptcy Code under a court supervised auction process, with the proceeds of the sale typically liquidated and distributed to the debtor's creditors.

In a pre-arranged bankruptcy, prior to the petition date the debtor may work with one or more potential acquirers and may select one as the "stalking-horse-bidder" – a bid against which all other bids are measured. The debtor, typically in concert with a stalking-horse-bidder, will craft the terms and rules of the auction prior to the petition date. The debtor can seek approval of the bidding procedures on the first day of the case, which will set the terms of the auction and will include a sample asset purchase agreement (which may be that of the stalking-horse-bidder). And although the bankruptcy court approves the terms of the auction, and will approve the outcome of the auction and approve the sale, in reality the debtor will run the auction process. Bankruptcy courts will defer to the debtor's business judgment on many decisions concerning the auction process, and there are few practical remedies for disgruntled parties. If the debtor receives competing bids, the debtor will hold an auction, where it is required to select the offer that is highest and best, not simply the highest purchase price. If the debtor selects a winning bidder, the debtor will seek bankruptcy court approval of the sale, and the court will enter the "sale order".[3]

Unlike a pre-pack, which can be confirmed in as little as 24 hours, the section 363 sale process typically takes approximately two to six months. Although bidding procedures can be approved on the first day of the case, auctions are not typically conducted for at

[3] The timing of a sale transaction through a section 363 sale is different than that of an out of court asset sale, because a Chapter 11 debtor cannot enter into a transaction outside of the ordinary course of business – such as a sale of all of its assets – without bankruptcy court approval. Entry of the Sale Order by the bankruptcy court grants the debtor the authority to sign the purchase agreement with the winning bidder, with the closing of the sale to follow thereafter.

least 60 days, and court approval of a sale may take an additional 30 to 60 days. Importantly, in extremely exigent circumstances, for example the Chapter 11 cases of *In re Lehman Brothers Holdings, Inc*, and *In re General Motors Corporation*,[4] the respective bankruptcy courts shortened the time frame of the respective section 363 sale processes such that approximately 30 days passed between the petition dates, approval of the bidding procedures, approvals of the respective sales, and closing of the respective sales. These examples, occurring at the high-water mark of 2008 financial crisis, are extreme outliers.

2. How do pre-packs work in practice in your jurisdiction? What are the advantages and disadvantages of pre-packs when compared with other options that are available?

Federal Rule of Bankruptcy Procedure 3018(b) specifically permits debtors to solicit votes on confirmation of a Chapter 11 plan of reorganisation prior to the filing of the Chapter 11 petition. And although Bankruptcy Rule 3017(a) requires at least 28 days' notice before the hearing to confirm the plan and approve the corresponding disclosure statement, courts have held that such notice can be given prior to the petition date.

However, because the debtor solicits votes on a Chapter 11 plan prior to filing a petition, a pre-pack is only workable in a balance sheet restructuring, where sophisticated entities hold the affected class of debt, and all other creditors, trade creditors, employees, etcetera, are paid in full and not entitled to vote on the plan of reorganisation. From a practical standpoint, this involves entering into a restructuring support agreement with the "fulcrum" creditors, whose claims are impaired and are entitled to vote on the plan. It also involves extensive pre-petition notice to all creditors including distributing fully negotiated documents far in advance of the petition date. And it is essential that the debtor has a close working relationship with the consenting creditor. In many ways, the pre-pack merely puts a bankruptcy court seal of approval on an out-of-court workout, and requires the same amount, if not more, of good faith negotiations between key creditors and the debtor.

A true pre-pack can minimise time in bankruptcy court, which in turn minimises business disruption, and professional fees. However, as noted above, a pre-pack is impracticable for a distressed business that requires restructuring of its operations, or that cannot pay general unsecured creditors in full.

Although pre-packs are contemplated by the Bankruptcy Rules which are uniform across the United States of America, in practice, there are few jurisdictions in which pre-pack Chapter 11 cases are filed: the Southern District of New York (New York, New York), Delaware, and the Southern District of Texas (Houston, Texas).

---

4 Case No 08-13555 (JMP) (Bankr. SDNY); Case No 09-50026 (REG) (Bankr SDNY).

3. What duties must directors of the debtor consider when deciding whether to proceed with a pre-pack?

A bankruptcy filing, even a pre-pack, does not modify the duties of a company's directors and officers. In fact, in contrast with the situation in many countries, in the United States of America, there is no duty to file a bankruptcy case for an insolvent company.

Under Chapter 11 of the Bankruptcy Code, the debtor and its pre-petition management continues to operate and manage the debtor's estate as a "debtor-in-possession". Where there is evidence of pre-petition mismanagement or misconduct, parties in interest may request that the bankruptcy court appoint a Chapter 11 trustee (a neutral third-party), to replace pre-petition management to administer the debtor's estate for the benefit of creditors. However, the appointment of a Chapter 11 trustee is a rare remedy, and highly unusual with sophisticated entities.

Under Delaware law, which is the predominant jurisdiction for most corporations within the United States of America, directors and officers of a solvent corporation owe a fiduciary duty to the company's shareholders. However, when the same corporation is insolvent, directors and officers are also often alleged to owe a fiduciary duty to creditors. In reality, however, directors and officers owe a duty to the entity, but creditors may be given standing to challenge the actions of those directors and officers on behalf of the entity itself.

Directors and officers of a distressed corporation that is contemplating a restructuring, whether via a pre-pack, pre-arranged, or other Chapter 11 filing, must consider all options and consider the best interest of creditors to make informed decisions.

4. What level of involvement does a court have in a pre-pack?

A pre-pack, like any other Chapter 11 case, is commenced with a petition under the United States Bankruptcy Code filed in a bankruptcy court and is supervised by a bankruptcy judge. Although the debtor will continue to manage its day-to-day affairs while the case is pending, court approval is required for any transaction outside of the ordinary course of business (such as the sale of all or substantially all of the debtor's assets under section 363 of the Bankruptcy Code), and court approval is required to confirm the plan of reorganisation.

A pre-pack Chapter 11 plan of reorganisation must comply with the other disclosure requirements of a traditional Chapter 11 plan of reorganisation. However, as noted previously, because the debtor solicits votes for a pre-pack prior to the commencement of the case, the terms of the plan are negotiated and distributed before the case is commenced.

A lodestar feature of the Bankruptcy Code is disclosure and transparency, and while the debtor is required to demonstrate that a plan of reorganisation satisfies the provisions of the Bankruptcy Code, creditors and other parties in interest have the opportunity to object and challenge the terms of a plan of reorganisation.

Although it is not a judicial officer, the United States Trustee, an office of the United States Department of Justice, exercises an independent watch-dog role over all bankruptcy cases in the United States of America. In pre-packs and pre-arranged cases where creditor (and specifically general unsecured creditor) involvement may be minimal, the United States Trustee frequently raises objections to attempt to ensure that unsophisticated creditors are provided with ample notice of the bankruptcy case and plan of reorganisation.

5. What duties must officeholders comply with when deciding whether to enter into a pre-pack?

Directors and officers of an insolvent company owe a fiduciary duty to the company. When contemplating restructuring options, in exercising their fiduciary duties, directors and officers must take steps that maximise the value of the entity (although courts will generally defer to the business judgment of officers and directors, provided that the decision was made in good faith, with the care that a reasonably prudent person would use, and in a manner that the directors and officers reasonably believe is in the best interest of the company). Importantly, it has been argued that directors have a duty to become informed about their options, including bankruptcy.

Because the decisions of directors and officers of an insolvent corporation will face greater scrutiny, directors and officers must take steps to ensure and document that decisions and actions are fair, fully informed, and in the best interest of the corporation.

6. How does the officeholder comply with their duties in practice? Can they rely on valuations? If so, what is regarded as an acceptable methodology?

Any transaction by an insolvent corporation will be subject to creditor or shareholder scrutiny. Directors and officers must take steps to ensure that the terms of any transaction are fair and in the best interests of the corporation. As a corporation slides into greater distress and approaches insolvency, financial distress distorts the value of assets, and determining whether the terms of any out of court transaction or restructuring are fair or reasonable is difficult. That a transaction will be subject to hindsight scrutiny by disgruntled constituencies, is a leading reason why directors and officers may determine that a bankruptcy case is in the best interests of a distressed corporation. That a Chapter 11 case is conducted in an open and transparent process in which creditors and other parties in interest may challenge the valuation or terms of a transaction, and any transaction or plan of reorganisation requires court approval, in effect insulates directors and officers from scrutiny. Because pre-packs are Chapter 11 cases, pre-packs are subject to the same disclosure and scrutiny of any other Chapter 11 case.

7. What measures, if any, have been taken or are proposed to be taken to ensure that pre-packs are properly scrutinised?

Because pre-packs are Chapter 11 cases filed with the bankruptcy court, pre-packs are subject to the same disclosure and scrutiny of any other Chapter 11 case.

GROUP OF THIRTY-SIX

AlixPartners LLP
Allen & Overy LLP
Alvarez & Marsal
Baker McKenzie
Baker Tilly
BDO
Brown Rudnick LLP
Clayton Utz
Cleary Gottlieb Steen & Hamilton
Clifford Chance LLP
Conyers
Davis Polk & Wardwell LLP
De Brauw Blackstone Westbroek
Deloitte LLP
Dentons
DLA Piper
EY
Freshfields Bruckhaus Deringer LLP
FTI Consulting
Galdino & Coelho Advogados
Grant Thornton
Greenberg Traurig LLP
Harneys
Hogan Lovells
Houthoff
Interpath
Jones Day
King & Wood Mallesons
Kirkland & Ellis LLP
KPMG LLP
Kroll
Linklaters LLP
Mayer Brown
McDermott Will & Emery LLP
Morgan Lewis & Bockius LLP
Norton Rose Fulbright
PwC
Quantuma
Rajah & Tann Asia
RSM
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
South Square
Teneo
Troutman Pepper
Weil, Gotshal & Manges LLP

INSOL International

6-7 Queen Street

London

EC4N 1SP

Tel: +44 (0) 20 7248 3333

Fax: +44 (0) 20 7248 3384