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Compare and contrast the use of an English scheme of arrangement or restructuring plan with the use of a US Chapter 11 “pre-pack” to restructure a single class of bond debt while leaving other creditors and equity holders unaffected

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Table of Contents

I. Introduction

II. Overview of Insolvency Laws in the UK and US

A. Explanation of the English Scheme of Arrangement (or Restructuring Plan) - Key features and objectives

B. Explanation of the US Chapter 11 Bankruptcy - Key features and objectives and Summary of Pre-packaged Chapter 11

III. Comparison of English and US Approaches

A. Similarities in the use of schemes of arrangement and Chapter 11 "pre-packs"

B. Differences in the legal frameworks and procedures

IV. Analysis and Evaluation

A. Assessment of the advantages and disadvantages of the English approach

B. Assessment of the advantages and disadvantages of the US approach

C. Thoughts on the comparative analysis and potential considerations for selecting the appropriate approach

V. Conclusion

I. Introduction

Restructuring plays a vital role in insolvency cases as it offers a strategic and organised approach to address the financial distress of a company. When a company faces insolvency, restructuring becomes crucial for several reasons. Firstly, it provides an opportunity to rehabilitate the company and restore its financial health, allowing it to continue operations and fulfil its obligations to creditors, employees, and other stakeholders. Secondly, restructuring allows for the efficient management and resolution of the company's outstanding debt. By renegotiating or modifying the terms of existing obligations, such as bond debt, the company can alleviate the burden of excessive debt payments, improve its cash flow, and enhance its ability to meet financial obligations moving forward.

This essay delves into a comparative analysis of two prominent approaches used in the United Kingdom and the United States: the English scheme of arrangement (or restructuring plan) and the US Chapter 11 "pre-pack". The focus of this essay lies on examining their effectiveness in restructuring a single class of bond debt while safeguarding the interests of other stakeholders. Since this essay specifically addresses the restructuring of a single class of bond debt (and thus only one class of creditors is concerned), it will not extensively cover the intricacies of cross-class cram down under Part 26A of the 2006 Act and Chapter 11.

II. Overview of Insolvency Laws in the UK and US.

A. Explanation of the English Scheme of Arrangement (or Restructuring Plan) - Key features and objectives

The English scheme of arrangement is a formal statutory procedure governed by Part 26 of the UK Companies Act 2006 ("Part 26" and the "2006 Act"). It allows a company to enter into a compromise or arrangement with its members or creditors, or any class of them, regardless of the company's solvency status. The English scheme of arrangement can be used independently or in conjunction with a formal insolvency procedure.

Similarly, the English restructuring plan is a legal framework created by legislation to facilitate the restructuring and reorganisation of a company's debt by reaching an agreement with its creditors and shareholders. It operates under Part 26A of the 2006 Act, which was introduced during the

COVID-19 pandemic through Schedule 9 of the Corporate Insolvency and Governance Act 2020. Part 26A serves as an additional restructuring tool designed to complement the existing schemes of arrangement under Part 26 of the 2006 Act.

There are very considerable similarities between an English scheme of arrangement under Part 26 and a restructuring plan under Part 26A. Both types of procedure apply where a *"compromise or arrangement"* is proposed between a company and its creditors (or any class of them) or its members (or any class of them)[1].

As summarised in paragraph 5 of the Court of Appeal decision in Strategic Value Capital Solutions Master Fund LP and others v AGPS BondCo PLC [2024] EWCA Civ 24) ("**Adler Appeal Decision**") which upheld a challenge launched by dissenting creditors to overturn Adler's restructuring plan previously approved by Leech J under Part 26A of the 2006 Act, both Part 26 and Part 26A procedures involve a three-stage process consisting of[2]:

(i) Convening Hearing, Court Order and Direction: The company proposing the scheme or plan must seek a court order convening creditor and/or member meetings to vote on the proposed scheme. The company should also provide a statement to all parties required to attend the meeting, outlining the key aspects of the scheme or plan. A convening hearing will then be held at which the court considers (among other things) the appropriate composition of the classes of creditors that are to be invited to meetings to vote on the proposed scheme or plan and to receive a statement explaining its effect.

(ii) Class Meeting, Voting and Approval: There will be the holding of the class meetings where attendees are separated into classes based on their rights and interests. Classes must consist of persons whose rights are not so dissimilar that they cannot consult together with a view to their common interest[3]. The determination of the question of class will rely on an analysis of two key factors.[4] Firstly, an examination of the rights that are intended to be released or modified under the scheme. Secondly, an assessment of the new rights, if any, that the scheme offers as a

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[1] See sections 895(1) and 901A(3) of the 2006 Act

[2] See sections 896 - 899 and 901C-901F of the 2006 Act and Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006) (or "Practice Statement")

[3]See Sovereign Life Assurance v Dodd [1892] 2 QB 573 at 583 per Bowen LJ. David Richards J indicted in his judgment in Telecast Communications plc (No.1) [2004] EWHC 924 (Ch), [2005] 1 BCLC 752 at [37] that the application of this test requires an exercise of judgment on the facts of each case. The authorities show that the differences in rights may be material, certainly more than de minimus, without leading to separate class.

[4] Hawk Insurance Co Ltd [2001] EWCA Civ 241, [2001] 2 BCLC 480 at [30] and [34], per Chadwick LJ

compromise or arrangement to those whose rights are subject to release or modification[5]. In his convening judgment in Virgin Atlantic Airways Limited [2020] EWHC 2191 (Ch) at [41]-[48], Trower J confirmed that the same principles of class composition that apply to schemes under Part 26 should apply to restructuring plans under Part 26A.[6]

(iii) Court Sanction: Once the scheme or plan is approved by the requisite majority of each class (or the relevant class for a plan), the company applies to the court to seek its sanction for the scheme or plan. At the sanction hearing, the court has a discretion whether to sanction the scheme or plan. If satisfied, the court will issue a sanction order. The scheme or plan becomes effective upon delivery of the sanction order to the Registrar of Companies in England & Wales[7]. The scheme or plan binds all creditors of each relevant class, even those who voted against it or did not vote at all.

In the Adler Appeal Decision, Snowden LJ summarised the four (4) key distinctions between the provisions of Part 26 and Part 26A. These include:

First, a company intending to propose a restructuring plan under Part 26A must meet two threshold conditions outlined in section 901A of the 2006 Act. These conditions limit the usage of Part 26A plans to companies that have experienced or are projected to experience financial difficulties that impact their ability to continue operating as a viable business entity.[8] There is no such requirement in Part 26, which can also be used by solvent companies to promote schemes of arrangement to implement takeovers and other changes to their capital structures.[9] Under Part 26A of the 2006 Act, section 901G states that:

> ***"901G Sanction for compromise or arrangement where one or more classes dissent***
>
> *(1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.*

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[5] Hawk Insurance Co Ltd [2001] EWCA Civ 241, [2001] 2 BCLC 480 at [30] and [34], per Chadwick LJ

[6] See also Zacaroli J's judgment in Gategroup Guarantee Limited [2021] EWHC 304 (Ch) at [181]-[182]; Virgin Active Holdings Limited [2021] EWHC 814 (Ch) at [61]-[69]; this approach was confirmed by the English Court of Appeal in the Adler Appeal Decision: see [109]-[114]

[7] see sections 899(4) and 901F(6) of the 2006 Act

[8] See paragraph 7 of the Adler Appeal Decision

[9] Ibid

(2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.

(3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).

(4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.

(5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative." (emphasis added)

Secondly, unlike in Part 26, where all members or creditors whose rights against the company will be impacted by a scheme of arrangement must be summoned to a meeting or class meeting to vote on the scheme, section 901C(4) in Part 26A grants the court the authority to *exclude* any class of plan creditors or members from being summoned to a meeting. This exclusion can occur if the court determines that none of the creditors or members within that particular class possess a genuine economic interest in the company[10].

Thirdly, the court can approve a restructuring plan under section 901F(1) in Part 26A if it receives the approval of 75% in value of those present and voting (either in person or by proxy) at the respective class meeting or meetings. Unlike schemes of arrangement under section 899(1) in Part 26, there is no additional requirement to secure a majority in number of those present and voting at each class meeting[11].

Fourthly, and most significantly, a scheme of arrangement under Part 26 can only be approved by the court if each class of creditors or members has voted in favour of the scheme, meeting the required majorities at their respective class meetings. This grants each class a potential right to veto the scheme. However, under section 901G in Part 26A, the court retains discretion to sanction a restructuring plan under section 901F even if the plan has not received the necessary approval from one or more classes of creditors or members.[12].

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[10] See paragraph 8 of the Adler Appeal Decision

[11] See paragraph 9 of the Adler Appeal Decision

[12] See paragraph 10 of the Adler Appeal Decision

Thus, section 901G of Part 26A outlines two pre-conditions that must be met before the cross-class cram down power can be exercised. The first condition, known as "Condition A," requires that none of the members of the dissenting class would experience a worse outcome compared to the relevant alternative if the plan were to be approved. This condition is commonly referred to as the "*no worse off*" test.[13]

The second condition, known as "Condition B," requires that the compromise or arrangement has obtained approval at a class meeting by a class that would receive a payment or hold a genuine economic interest in the company in the event of the relevant alternative. It is important to note that "*the relevant alternative*", as defined in section 901(G)(4), is a statutory concept concerning the exercise of the court's cross-class cram down power[14].

The other key features of the legal principles applicable to the court's exercise of its discretion under Part 26 schemes and Part 26A plans include:

1. Adequate time should be allocated for the Court to thoroughly review and consider the scheme or plan: To prevent undue or excessive delay and expense, a plan company must (subject to the giving of any necessary confidentiality undertakings) make available in a timely manner all the relevant and pertinent materials that underlie the valuations upon which it relies.[15] If an amicable agreement cannot be reached, the court should assertively exercise its authority to order the disclosure of crucial information and utilise its other case management powers.[16] It has been held that the court's willingness to expedite cases in order to assist companies facing genuine and urgent financial difficulties should not be taken for granted and in situations where a restructuring is aimed at addressing the upcoming maturity of financial instruments and negotiations are underway among sophisticated investors regarding the distribution of anticipated benefits, it is essential to allocate sufficient time for a contested Part 26A process to be conducted properly.[17] This includes adhering fully to the Practice Statement, allowing

[13] See paragraph 12 of the Adler Appeal Decision

[14] See paragraph 12 of the Adler Appeal Decision

[15] Paragraph 64 of the Adler Appeal Decision

[16] In paragraph 63 of the Adler Appeal Decision, Snowden LJ held that, "*[i]t is clear that to be of real value, the cross-class cram down power should be capable of being deployed swiftly and decisively when a genuine need arises. However, just as schemes under Part 26 have long been regarded as exercising "*a most formidable compulsion upon dissentient, or would be dissentient creditors" *(per Bowen LJ in Sovereign Life Assurance Co. v Dodd [1892] 2 QB 573 at 583) so it must be appreciated that plans under Part 26A, which offer the possibility of cross-class cram down, are capable of exerting an even more formidable compulsion and potential injustice upon dissenting creditors.*"

[17] Paragraph 65 of the Adler Appeal Decision

interested parties ample time to prepare for hearings, granting the court adequate time to hear the case and deliver a well-reasoned decision, and allowing for the resolution of any applications for permission to appeal.[18] Failure to do so means the parties cannot complain if the court decides to adjourn hearings and take the necessary time to render its decision.[19]

2. The principle of *pari passu* distribution is a fundamental principle of corporate insolvency law, and that it is important in the exercise of the cross-class cram down power under Part 26A for the court to take account of the "horizontal comparison" – i.e. the relative treatment of the classes of creditors inter se.[20]

3. The court will adhere to the established principles that guide a court in the exercise of discretion to sanction a scheme of arrangement under Part 26 and Part 26A . In other words, when exercising its power of sanction, the court will ensure that the requirements of the statute have been met. Additionally, the court will verify that the class was fairly represented by those present at the meeting, and that the statutory majority is acting in good faith and not coercing the minority to further their own interests at the expense of the represented class. Furthermore, the court will evaluate whether the arrangement is one that a reasonable and informed person, who is a member of the class in question and acting in their best interest, would reasonably approve.[21]

B. Explanation of the US Chapter 11 Bankruptcy - Key features and objectives and Summary of Pre-packaged Chapter 11

Chapter 11 bankruptcy is a section of the United States Bankruptcy Code (or the "Code") that primarily focuses on the reorganisation of businesses, including corporations and partnerships, that are facing financial distress. The key features and objectives of Chapter 11 bankruptcy have been summarised by Bracewell & Giuliani[22] as follows:

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[18] Paragraph 65 of the Adler Appeal Decision

[19] Paragraph 65 of the Adler Appeal Decision

[20] Paragraph 70 of the Adler Appeal Decision

[21] David Richards J in his sanction judgment in Telewest Communications plc (No.2) [2004] EWHC 1466 (Ch), [2005] 1 BCLC 772 at [20]-[22]; see also Plowman J in Re National Bank Limited [1966] 1 WLR 819 at 829 by reference to a passage in Buckley on the Companies Acts (13th ed., 1957) page 409; Noble Group, at [17]

[22] Bracewell & Giuliani, *Chapter 11 of the United States Bankruptcy Code: Background and Summary 2012*

a. Reorganisation: Chapter 11 bankruptcy is designed to provide a framework for the reorganisation of a financially troubled business. The debtor, typically the business itself, proposes a plan of reorganisation to restructure its debts, operations, and assets in a way that allows it to continue its operations and become financially viable again. A business need not be insolvent to obtain Chapter 11 relief, and individuals can also file for Chapter 11 relief.[23] Substantive consolidation is allowed under Chapter 11 and it is a court-created doctrine that combines the bankruptcy estates of related debtors within a group of companies to pay the claims of creditors from the separate entities. The consolidation requires a strong equitable basis, with the entities having a substantive identity and compelling reasons for consolidation to prevent perceived injustices arising from interconnected affairs or creditor reliance on a unified economic unit.

b. Debtor in Possession: In a Chapter 11 case, the debtor usually remains in possession and control of its assets and continues to operate its business as a "debtor in possession." This means that the existing management retains control of the business during the bankruptcy process, subject to court supervision.

c. Automatic Stay: When a Chapter 11 bankruptcy petition is filed, an automatic stay goes into effect, which halts most collection actions and legal proceedings against the debtor. This provides the debtor with a breathing space to develop and propose a reorganisation plan without the immediate pressure of creditors' claims.

d. Plan of Reorganisation: The debtor in possession, with the assistance of professionals such as bankruptcy attorneys and financial advisors, formulates a plan of reorganisation. This plan outlines how the debtor intends to restructure its debts, modify contracts and leases, raise new capital, and make payments to creditors over a specified period. The plan must be approved by the creditors and confirmed by the bankruptcy court.

e. Creditors' Committees: In Chapter 11 cases, a committee of creditors may be appointed to represent the interests of various classes of creditors. The committee plays a role in negotiating and approving the reorganisation plan and acts as a liaison between the creditors and the debtor.

f. Voting by Creditors: Creditors whose rights are affected by the reorganisation plan have the right to vote on the plan. The plan must be approved by the creditors holding at least a majority (more than one-half) in number and two-thirds in amount of the claims in each "impaired" class of creditors for it to be confirmed by the court.

g. Discharge and Fresh Start: Upon successful completion of the reorganisation plan, the debtor receives a discharge, which releases it from most of its pre-bankruptcy debts. This allows the business to start fresh and operate without the burden of past financial obligations.

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[23] See Bracewell & Giuliani, Chapter 11 of the United States Bankruptcy Code: Background and Summary 2012

The legal framework and procedure for Chapter 11 Bankruptcy in the United States can be outlined as follows[24]:

1. Filing the Petition: The debtor, typically a business entity, files a voluntary petition for Chapter 11 bankruptcy with the bankruptcy court serving the area where the debtor has a domicile, residence, a place of business or property. In some cases, creditors can also file an involuntary petition against the debtor under specific circumstances.
2. Eligibility of the Petitioner (section 109(a) of the Code): Only a person that resides or has a domicile, a place of business or property in the United States, or a municipality may be a debtor under the Code. The test of eligibility is as of the date of the filing of the bankruptcy petition: In re Axona International Credit & Commerce Ltd., 88 B.R. 597, 614-15 (Bank.S.D.N.Y. 1988). The test must be applied to each debtor: Bank of America v. World of English, 23 B.R. 1015, 1019-20 (N.D.Ga. 1982) (even where parent is eligible to file, subsidiary must be tested separately to see if it is eligible). As the statue does not appear to be vague or ambiguous, and it seems to have a plain meaning as to leave the Court no discretion to consider whether it was the intent of the Congress to permit someone to obtain a bankruptcy discharge solely on the basis of having "*a dollar, a dime or a peppercorn located in the United States*" and so the Court ruled in In re Global Ocean Carries Limited, et al., 251 B.R. 31. that the language of paragraph 109(a) is clear and "*the Court does not have discretion to look behind the language and declare that the quantity of property in the United States will be decisive of eligibility to be a debtor under the Code*".[25] The Court determined that bank accounts are considered property in the United States and qualify for eligibility under section 109. The existence of retainers paid by the debtors to their bankruptcy counsel serves as evidence of the required property in the United States.[26] The Court determined in In re Global Ocean that since the retainers were paid on behalf of all debtors, it was immaterial who made the payment as long as the retainer covers the attorneys' fees for all debtors.: see also Independent Engineering, 232 B.R. at 533.
3. Voluntary Petition Requirements: The voluntary petition must adhere to the format of Form B 101, which is one of the Official Forms prescribed by the Judicial Conference of the United States. It includes basic information about the debtor, such as its name, address, and type of entity.
4. Additional Filing Requirements: The debtor must also file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs.

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[24] Dennis F Dunne, Dennis C O'Donnell & Nelly Almeida, *"Pre-packaged Chapter 11 in the United States: An Overview"*, 11 December 2019

[25] Ibid

[26] See Bracewell & Giuliani, Chapter 11 of the United States Bankruptcy Code: Background and Summary 2012

5. Automatic Stay: Upon filing the Chapter 11 petition, an automatic stay goes into effect, halting most collection actions, lawsuits, foreclosures, and other legal proceedings against the debtor. This provides the debtor with immediate relief and a period of stability to develop and propose a reorganisation plan.
6. Debtor in Possession: The debtor usually remains in possession of its assets and continues to operate its business as a "debtor in possession" during the Chapter 11 process. This means that the existing management retains control of the business, subject to court oversight and certain limitations.
7. Development of the Reorganisation Plan: The debtor, with the assistance of professionals such as bankruptcy attorneys and financial advisors, formulates a plan of reorganisation. The plan outlines how the debtor intends to restructure its debts, modify contracts and leases, raise new capital, and make payments to creditors over a specified period.
8. Disclosure Statement: Along with the plan, the debtor must also prepare a disclosure statement that provides adequate information about the debtor's financial condition, the proposed reorganisation, and its feasibility. The disclosure statement is subject to court approval and is provided to creditors for their evaluation.
9. Creditors' Committees: The bankruptcy court may appoint one or more committees of creditors to represent the interests of various classes of creditors. The committees play a vital role in negotiating with the debtor, reviewing the reorganisation plan, and making recommendations to obtain the best possible outcome for the creditors.
10. Voting and Confirmation: The proposed reorganisation plan is submitted to the creditors for voting. Creditors whose rights are affected by the plan have the right to vote on its acceptance or rejection.
11. Confirmation Hearing: If the plan receives the required votes and satisfies the legal requirements, it is presented to the bankruptcy court for a confirmation hearing. Interested parties, including creditors and the U.S. Trustee, have an opportunity to object to the plan during the hearing.
12. Plan Confirmation: If the court determines that the plan is fair, equitable, and feasible, it will confirm the plan. Confirmation means that the plan becomes binding on the debtor and all parties affected by it.
13. Plan Implementation: Once the plan is confirmed, the debtor and its creditors must implement the terms outlined in the plan. This may involve restructuring debts, making payments to creditors, modifying contracts and leases, and taking other necessary actions to achieve the objectives of the reorganisation.
14. Discharge and Conclusion: Upon successful completion of the plan, the debtor receives a discharge, which releases it from most of its pre-bankruptcy debts. The discharge allows the

debtor to start afresh and operate without the burden of past financial obligations. The Chapter 11 case is then concluded, and the bankruptcy court closes the case.

Summary of Pre-packaged Chapter 11 in the US: An Overview

As summarised by Duane, O'Connell and Almeida[27], Prepackaged Chapter 11 cases have been used increasingly since the late 1980s, after Congress made changes to facilitate prepackaged plans[28]. Around half of all prepackaged bankruptcies in the US are now filed in Delaware. A prepackaged plan allows a company to negotiate the terms of a Chapter 11 plan with key creditors *before* filing for bankruptcy protection. The plan company solicits votes on the plan from creditors pre-petition. Only if it obtains the requisite votes does it then file for Chapter 11 while asking the court to quickly confirm the pre-negotiated plan.[29]

This eliminates the "holdout" problem that makes out-of-court restructurings difficult, as the Bankruptcy Code allows a plan to bind dissenting creditors if supported by the required majorities. It also aims to minimise the time spent in Chapter 11 by having substantial consensus on a plan before filing.[30]

However, securities laws may apply to solicitation of votes prior to filing. The relevant plan companies must take action to address disclosure requirements, such as conducting solicitations with the assistance of proxy solicitation firms. Furthermore, while a prepackaged plan provides advantages over a traditional Chapter 11 filing and an out-of-court restructuring, not all cases are suitable as it requires negotiations with creditors ahead of time.[31]

III. Comparison of English and US Approaches

A. Similarities in the use of schemes of arrangement and pre-packs

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[27] Dennis F Dunne, Dennis C O'Donnell & Nelly Almeida, *"Pre-packaged Chapter 11 in the United States: An Overview"*, 11 December 2019

[28] "*When the US Congress enacted the Bankruptcy Code in 1978, it consolidated the two reorganisation regimes into one overarching chapter: Chapter 11*": See Dennis F Dunne, Dennis C O'Donnell & Nelly Almeida, *"Pre-packaged Chapter 11 in the United States: An Overview"*, 11 December 2019

[29] Dennis F Dunne, Dennis C O'Donnell & Nelly Almeida, *"Pre-packaged Chapter 11 in the United States: An Overview"*, 11 December 2019

[30] ibid

[31] ibid

As the focus of this essay will be on the restructuring of a single class of bond debt, without considering multiple classes of creditors, the following discussion will refer to the English scheme, rather than the Part 26A restructuring plan.

The English scheme of arrangement and the US Chapter 11 Pre-pack are both utilised as restructuring mechanisms for financially distressed companies, specifically in the restructuring of a single class of bond debt. These two approaches share several similarities in their objectives and processes:

1. Restructuring Objectives/Preservation of Value: Both the English scheme of arrangement and the Chapter 11 Pre-pack aim to facilitate the financial restructuring of distressed companies and provide them with a viable path forward. The primary objective is to achieve a more sustainable capital structure, reduce debt burdens, and enhance the company's overall financial health. Both the English scheme of arrangement and the Chapter 11 Pre-pack focus on preserving and maximising the value of the distressed company's assets. This involves restructuring the company's debts and financial obligations in a way that allows it to continue its operations and maximise its value as a going concern.

2. Court-Sanctioned Process: Both processes require court approval. They are legal frameworks that allow companies to propose and implement a restructuring plan with the oversight and authorisation of the court. This ensures that the rights and interests of all stakeholders, including creditors and shareholders, are considered and protected.

3. Creditor Involvement: In both the scheme of arrangement and the Chapter 11 Pre-pack, creditors play a crucial role. The restructuring plans proposed under these processes require the consent or approval of the affected creditors. Creditors are grouped into classes, and their voting on the proposed plan determines its acceptance or rejection.

4. Compromise of Claims: Both processes provide a mechanism for compromising the claims of creditors. They allow for the reduction, modification, or restructuring of debts owed by the distressed company. This can involve changes to the repayment terms, interest rates, or even partial debt forgiveness.

5. Fairness and Equality: Both processes aim to ensure fairness and equality among creditors. The restructuring plans must be designed in a manner that treats the creditors fairly, taking into account their respective rights and priorities.

B. Differences in the legal frameworks and procedures

The initiation and approval processes for the English scheme of arrangement and the US Chapter 11 pre-pack differ due to variations in the legal frameworks and procedures.

In the English scheme of arrangement, the initiation process typically begins with the company proposing a restructuring plan to its creditors or shareholders. The company must then seek approval from the court to convene meetings of the affected classes of creditors or shareholders. The court will review the proposed scheme and determine if it meets the necessary legal requirements. Once the meetings are held, the scheme requires approval from the majority in number and 75% in value of the relevant class of creditors present and voting (in person or by proxy). If the scheme is approved, the company will apply to the court for its sanction, and if granted, the scheme becomes binding on all creditors or shareholders, including those who voted against it.

On the other hand, the US Chapter 11 pre-pack process is a specific variant of Chapter 11 bankruptcy that involves negotiating and preparing a reorganisation plan before filing for bankruptcy. The pre-packaged plan is typically agreed upon by the company and its key creditors prior to filing.[32] Once the plan is finalised, the company files for Chapter 11 bankruptcy and submits the pre-packaged plan for court approval. The court reviews the plan to ensure it meets the legal requirements, including fairness and feasibility. If the court approves the plan, it can be confirmed without the need for extensive creditor voting or a lengthy confirmation process. This allows for a faster and more streamlined approval process[33] compared to a traditional Chapter 11 case.[34]

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[32] See Dennis C O'Connell & Nelly Almeida, "*Fast Fashion: The Case of FullBeauty Brands*", 11 December 2019

[33] See Dennis F Dunne, Dennis C O'Donnell & Nelly Almeida, *"Pre-packaged Chapter 11 in the United States: An Overview"*, 11 December 2019; Dennis C O'Connell & Nelly Almeida, "*Fast Fashion: The Case of FullBeauty Brands*", 11 December 2019

[34] FullBeauty Brands Holdings Corporation ("FullBeauty") and its affiliates voluntarily filed for reorganisation under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "Court"). Alongside the filing, they presented a prepackaged plan of reorganisation, which implements the terms outlined in the Restructuring Support Agreement (RSA). Remarkably, the Court confirmed the Plan in less than 24 hours, establishing a then new record for the fastest Chapter 11 case, surpassing the previous record held by Blue Bird Body Co., a school bus manufacturer, which confirmed its reorganisation plan in under two days. Following the Court's confirmation, FullBeauty emerged from bankruptcy a mere three days later.

Secondly, the key difference between the initiation and approval processes of the two procedures lies in the level of creditor involvement and approval required. In the English scheme of arrangement, the approval process involves obtaining the consent of the affected classes of creditors or shareholders through voting. The scheme requires approval from a majority in number and 75% in value of the class in the meeting convened pursuant to the pertinent court order. On the other hand, the US Chapter 11 pre-pack process involves negotiating and obtaining the consent of key creditors before filing for bankruptcy, thereby streamlining the approval process and reducing the need for extensive creditor voting.[35]

IV. Analysis and Evaluation

A. Assessment of the advantages and disadvantages of the English approach

The English Scheme approach, utilising schemes of arrangement as restructuring tools, offers several advantages and disadvantages. One key advantage is its flexibility and adaptability. Schemes allow for the variation of rights of creditors and shareholders, making them suitable for a wide range of restructuring scenarios, including takeovers and mergers. Additionally, schemes can be used by both solvent and insolvent companies, providing a mechanism for early-stage restructuring before reaching a point of no return. The English courts have shown a willingness to accept innovative arguments regarding the establishment of a "sufficient connection" with England, expanding the applicability of schemes to foreign companies without a UK centre of main interests (COMI).

Another advantage of the English Scheme approach is its binding effect on all creditors and shareholders once approved by the statutory majorities and sanctioned by the court. This ensures that the scheme's terms are enforceable and provides a mechanism for achieving consensus even when consensual changes to rights cannot be negotiated. Furthermore, the scheme process allows for parallel and inter-related schemes, facilitating the restructuring of multiple companies within a group.

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[35] See Dennis F Dunne, Dennis C O'Donnell & Nelly Almeida, *"Pre-packaged Chapter 11 in the United States: An Overview"*, 11 December 2019; Robert J Dehny & Matthew B Harvey, "*Seeing the Future: The Case of Seegrid Corporation*", 11 December 2019

However, there are also disadvantages to consider. One potential drawback is the complexity and cost associated with implementing schemes. The process involves two court applications and may require expert evidence to satisfy the courts on recognition and enforceability. This can result in lengthy and expensive proceedings, which may not be practical for all companies, especially smaller ones with limited resources.

Additionally, the power dynamics in scheme negotiations can pose challenges. Creditors holding security and enjoying priority in repayment have significant control over the restructuring process. On the other hand, junior creditors below the value break line may be excluded from voting on the scheme, even though their claims remain against the company. This dynamic can create imbalances and potential disputes over the fairness of the scheme.[36]

Finally, while schemes offer a flexible and effective restructuring tool, they are subject to court approval, which introduces an element of uncertainty. The court's discretion in sanctioning the scheme and interpreting the "sufficient connection" requirement could impact the outcome of the restructuring, especially in cases involving foreign companies.

Therefore, the English Scheme approach has distinct advantages, including flexibility, binding effect, and applicability to both solvent and insolvent companies. However, it also comes with challenges such as complexity, cost, power dynamics, and court discretion. Companies considering the use of schemes as a restructuring tool should carefully evaluate these advantages and disadvantages to determine the suitability of this approach for their specific circumstances.

B. Assessment of the advantages and disadvantages of the US approach

The US approach to prepackaged Chapter 11 cases offers several advantages and disadvantages.

One significant advantage is the well-developed and sophisticated nature of the process, which has been refined over four decades of experience. This depth of expertise within the US bar and bench provides a solid foundation for handling prepackaged cases effectively. Additionally, the US

[36] The US Chapter 11 procedure contains an "absolute priority rule" so that, in essence, no junior class should recover until a senior class has recovered in full, and no senior class should recover more than it is owed (see paragraph [158] of the Adler Appeal Decision). As pointed out in paper published by Sarah Paterson of the London School of Economics (*Judicial Discretion in Part 26A Restructuring Plan Procedures)*, given that consideration was given by the UK government to including a modified form of the absolute priority rule in Part 26A (see also Virgin Active at [289]), its exclusion must be taken to have been deliberate. see [158], Adler Appeal Decision; Houst Limited [2022] EWHC 1941 (Ch) at [29]-[31]

bankruptcy system allows for various options in structuring prepackaged plans, enabling debtors to tailor their strategies to address specific financial situations and creditor concerns. Moreover, the ability to solicit votes and file Chapter 11 plans prior to the commencement of a bankruptcy case streamlines the process and reduces the time spent under court supervision.

However, there are also potential drawbacks to the US approach. First, prepackaged Chapter 11 cases may not be suitable for all situations of financial distress. This approach is most practical when the primary cause of distress is burdensome funded debt levels and comprehensive restructuring of business operations is not required. If a company needs a more extensive overhaul, the use of other tools available under Chapter 11 may result in time-consuming litigation and undermine the time-saving benefits of a prepackaged case.

Moreover, the US approach's reliance on negotiations and solicitation of acceptances prior to filing can create challenges. Achieving consensus among creditors can be a complex and time-consuming process, especially when dealing with a large number of stakeholders or conflicting interests. The success of a prepackaged case depends on the debtor's ability to secure the necessary votes in favour of the plan before filing for bankruptcy protection.

In summary, the US approach to prepackaged Chapter 11 cases offers advantages such as well-established practices, flexibility in plan structuring, and reduced time under court supervision. However, it may not be suitable for all types of financial distress, and the success of a prepackaged case relies heavily on the debtor's ability to negotiate and secure creditor support prior to filing.

C. Thoughts on the comparative analysis and potential considerations for selecting the appropriate approach

When selecting the appropriate approach for restructuring a single class of bond debt while minimising the impact on other creditors and equity holders, it is respectfully submitted that several factors should be considered:

1. Jurisdiction and Legal Framework: The choice of jurisdiction may depend on the company's location and the legal framework that best aligns with its restructuring objectives. The English scheme of arrangement is well-established and offers international recognition, while Chapter 11 bankruptcy is specific to the US jurisdiction.
2. Time Sensitivity: If time is a critical factor, the US Chapter 11 "pre-pack" process may be more suitable due to its potential for faster restructuring. In May 2019, the United States Bankruptcy

Court for the Southern District of New York confirmed a prepackaged Chapter 11 plan in just 19 hours[37] and it was one of the "super speedy" pre-pack decisions[38].

3. Creditor Involvement: If maintaining a cooperative relationship with creditors and involving them in the restructuring process is essential, the English scheme of arrangement, with its structured voting system, may be preferred.
4. Stakeholder Protection: Consideration should be given to the level of protection provided to employees, creditors, and other stakeholders. Chapter 11 bankruptcy in the US has specific provisions to safeguard stakeholder interests.
5. Business Operations and Market Considerations: The impact on ongoing business operations and market confidence should be evaluated. Both approaches can contribute to preserving the value of the business, but the specific circumstances and market dynamics should be taken into account.

V. Conclusion and Final thoughts

The comparative analysis of the English scheme of arrangement or restructuring plan and the US Chapter 11 "pre-pack" reveals both similarities and differences in their approaches to restructuring a single class of bond debt while leaving other creditors and equity holders unaffected.

Both the English scheme of arrangement and Chapter 11 bankruptcy provide formal mechanisms for companies to restructure their debt and avoid liquidation. In both approaches, the plan company must reach an agreement with its creditors and shareholders regarding the proposed restructuring plan. Both the English scheme of arrangement and Chapter 11 require court approval to ensure fairness and transparency in the process. Once approved, both mechanisms bind the relevant class of creditors, including those who voted against the restructuring plan. Both approaches allow for debt reduction and the modification of terms to make debt repayment more manageable for the company.

On the other hand, the English scheme of arrangement is governed by the UK Companies Act 2006, while Chapter 11 bankruptcy falls under the United States Bankruptcy Code. The US Chapter 11 "pre-pack" process generally offers a faster and more streamlined restructuring process compared to the English scheme of arrangement, which may involve more extensive court

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[37] See In Re Sungard Availabiity Services Capital Inc. No. 19-321112 (DRJ), SDNY, dated 11 May 2019

[38] Dennis F Dunne, Dennis C O'Donnell & Nelly Almeida, *"Pre-packaged Chapter 11 in the United States: An Overview"*, 11 December 2019

procedures. The English scheme of arrangement involves active creditor participation and voting, whereas the US Chapter 11 "pre-pack" may rely more on negotiations between the company and its key stakeholders before filing of the petition. The US Chapter 11 process places a significant emphasis on protecting the interests of all stakeholders, including employees and creditors, through extensive disclosure requirements and court oversight.

When restructuring a single class of bond debt while minimising the impact on other stakeholders, several factors should be considered. The choice of jurisdiction and legal framework, such as the well-established English scheme of arrangement or the US-specific Chapter 11 bankruptcy, should align with the company's objectives. If time sensitivity is crucial, the US Chapter 11 "pre-pack" process may offer a faster restructuring option. The involvement of creditors and maintaining a cooperative relationship can be facilitated by the structured voting system of the English scheme of arrangement. Furthermore, the level of stakeholder protection, including employees and creditors, should be evaluated, with Chapter 11 bankruptcy having specific provisions in place. Lastly, the impact on business operations and market confidence should be assessed, taking into account the unique circumstances and market dynamics at play.

End

1. Part 26, the UK Companies Act 2006

2. Part 26A, the UK Companies Act 2006

3. Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006)

4. United States Courts, "*Chapter 11 - Bankruptcy Basics*", at https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics

5. In re Global Ocean Carriers Ltd., 251 B.R. 31, 37 (Bankr. D.Del. 2000)

6. "*Note on Substantive Consolidation*", INSOL Global Insolvency Practice Course Material - Session 2 Materials - Overview of US Chapter 11

7. Chapter 11 of the US Bankruptcy Code and Federal Rules of Bankruptcy Procedure

8. The United States Bankruptcy Court for Southern District of New York (SDNY) Procedural Guidelines

9. Bracewell & Giuliani, "*Chapter 11 of the United States Bankruptcy Code: Background and Summary 2012*"

10. Jackqueline Ingram & Camilla, "*United Kingdom: Core Elements of a Pre-Pack Administration*", 11 December 2019

11. Robert J Dehny & Matthew B Harvey, "*Seeing the Future: The Case of Seegrid Corporation*", 11 December 2019

12. Dennis C O'Connell & Nelly Almeida, "*Fast Fashion: The Case of FullBeauty Brands*", 11 December 2019

13. Dennis F Dunne, Dennis C O'Connell & Nelly Almeida, "*Pre-Packaged Chapter 11 in the United States: An Overview*", 11 December 2019

14. Giles Boothman & Ru-Woei Foong, "*Stop Press: The Case of Johnston Press Plc*", 11 December 2019

15. John Yozzo & Samuel Star, "*For Better of Worse, Prepackaged and Pre-Negotiated Filings Now Account for Most Reorganisations*", ABI Journal, Vol. XXXVII, No.11, November 2018

16. Christian Pilkington & Will Stoner, "*Pilkington on Creditor Schemes of Arrangement and Restructuring Plans*", 3rd end (2022), Thomson Reuters, Sweet & Maxwell

17. Prudential Assurance Co Ltd v PRG Powerhouse Ltd [2007] EWHC 1002 (Ch)

18. Virgin Atlantic Airways Limited [2020] EWHC 2376 (Ch)

19. Virgin Atlantic Airways Limited [2020] EWHC 2191 (Ch)

20. Telewest Communications plc (No.2) [2004] EWHC 1466 (Ch), [2005] 1 BCLC 772

21. Re National Bank Limited [1966] 1 WLR 819

22. Gategroup Guarantee Limited [2021] EWHC 304 (Ch)

23. Virgin Active Holdings Limited [2021] EWHC 814 (Ch)

24. Strategic Value Capital Solutions Master Fund LP and others v AGPS BondCo PLC [2024] EWCA Civ 24