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Good Old Chapter 11 in a Pre-Insolvency World: The Growth of Global Reorganization Options

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Since its enactment in 1978, chapter 11 of the United States Bankruptcy Code has been the prototype for what a corporate reorganization procedure should look like. And given the broad potential reach of the American Bankruptcy Code—applicable both to assets "wherever located,"[1] and debtors owning only a modest amount of assets in the United States—[2] chapter 11 also seems like it should be a leading tool for restructuring global businesses as well.[3]

But we use this short paper to examine why chapter 15 has instead become the preferred tool of global reorganization.[4] While chapter 15 represents a vital part of this new regime, it represents a smaller portion of the overall restructuring architecture as compared with a "pure" chapter 11 restructuring of global businesses. Whether that is good or bad largely depends on where one stands.[5]

As we discuss in closing, it is also possible that chapter 11's time will come, but that largely depends on deep changes in debt markets, which may or may not come to pass. For the present, chapter 15 is clearly dominant in America's contribution to global restructuring.

I. Introduction

In the United States, chapter 11 has dominated the corporate restructuring landscape largely because it has never required that the debtor-firm show its own insolvency to commence proceedings.[6]

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1 11 U.S.C. § 541(a).

2 *Id.* § 109. Indeed, caselaw makes clear that any amount of property in the United States will satisfy the requirements of the section. As one New York bankruptcy court summarized, "Section 109(a) says nothing about the amount of such property nor does it direct that there be any inquiry into the circumstances surrounding the debtor's acquisition of the property." *In re* Suntech Power Holdings Co., Ltd., 520 B.R. 399, 413 (Bankr. S.D.N.Y. 2014) (quotation omitted).

3 *See generally* Oscar Couwenberg & Stephen J. Lubben, *Corporate Bankruptcy Tourists*, 70 BUS. LAW. 719 (2015) (analyzing foreign corporate debtors' use of the United States Bankruptcy Code).

4 For an overview of chapter 15 of the Bankruptcy Code, which was actually enacted in 2005, see Jay Lawrence Westbrook, *Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1, 18–21 (2002).

5 American restructuring professionals, for example, are apt to have a different take on this as compared with management of debtor-companies. Bondholders are apt to have yet another view.

6 *In re* Integrated Telecom Express, Inc., 384 F.3d 108, 121 (3d Cir. 2004).

This stands in contrast to every other corporate reorganization system.[7]

As such, in the American system, there has largely been a binary choice between bankruptcy—chapter 11 or the rare corporate chapter 7 case—[8] and non-bankruptcy workouts.[9] The latter are largely a matter of contract, although they can be structured with strong doses of coercion.[10] And should the latter fail, chapter 11 stands ready to backstop the effort, again because there is little to keep a debtor-firm from using the Bankruptcy Code whenever it might be useful.

Other developed jurisdictions have embraced "pre-insolvency" procedures, which lie somewhere between formal bankruptcy and contractual workouts.[11] The prototype here is the English Scheme of Arrangement, which resides within corporate law, rather than

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7 For example, under the Canadian Companies' Creditors Arrangement Act ("CCAA")—often said to be the closest analog to American chapter 11—the basic term "debtor company" is defined to mean a firm that:

> (a) is bankrupt or insolvent,
>
> (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,
>
> (c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or
>
> (d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent; (compagnie débitrice)

Canadian Companies' Creditors Arrangement Act, R.S.C. 1985, c C-36, § 2(1) (Can.). *See generally* VIRGINIA TORRIE, REINVENTING BANKRUPTCY LAW: A HISTORY OF THE COMPANIES' CREDITORS ARRANGEMENT ACT (2020).

8 Henry T. C. Hu & Jay Lawrence Westbrook, *Abolition of the Corporate Duty to Creditors*, 107 COLUM. L. REV. 1321, 1372 (2007) ("Most corporations that invoke the bankruptcy system file for Chapter 11 bankruptcy reorganization.").

9 State governments have recently enacted a series of bankruptcy-like receivership and assignment procedures, the Constitutional viability of which is unclear. STEPHEN J. LUBBEN, THE LAW OF FAILURE: A TOUR THROUGH THE WILDS OF AMERICAN BUSINESS INSOLVENCY LAW, ch. 3 (2018).

10 William W. Bratton & Adam J. Levitin, *The New Bond Workouts*, 166 U. PA. L. REV. 1597, 1608–11 (2018).

11 For ease, we use "bankruptcy" in the American sense (rather than the European sense, where bankruptcy refers only to what Americans would call personal bankruptcy, while "insolvency" refers to what Americans call business bankruptcy). Our focus throughout is on the financially distressed firm, and not on individuals.

insolvency law.[12] This is a straightforward procedure, whereby a majority of creditors in a single class can agree to bind all creditors to a deal.[13]

Because a scheme is done under corporate law, rather than bankruptcy or insolvency law, the normal European rules that prohibit filing away from a firm's "center of main interests" are inapplicable,[14] and thus schemes are open to those businesses with but a slight connection to England or Wales.[15] Debt issued under English law, or a small office in London will usually do the trick.[16]

Schemes, like chapter 11, are thus available to most global businesses. Standing alone, their reach is more modest, applicable to foreign incorporated debtors, yet courts will hesitate to approve the schemes unless assured that the result will be accepted abroad.[17]

Chapter 15 provides for the commencement of a bankruptcy case in the United States that is ancillary or complementary to an insolvency proceeding pending in some other country.[18] The chapter 15 case will support the foreign case and will not be a "full" bankruptcy case like a chapter 7 liquidation or a chapter 11 reorganization.[19] Rather chapter 15 allows for the imposition of an automatic stay within the United States,[20] and the potential

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12 Companies Act 2006, c.46, pt. 26 (Eng.) [hereinafter Companies Act]. *See generally* Adam Gallagher & Victoria Cromwell, *English Schemes of Arrangement: A Tool for European Restructuring*, AM. BANKR. INST. J. 38 (2012).

13 A scheme requires approval by at least 75% in value of each class of the members or creditors who vote on the scheme, being also at least a majority in number of each class. Companies Act, *supra* note 12, § 899(1).

14 Horst Eidenmüller, *What Is an Insolvency Proceeding?,* 92 AM. BANKR. L.J. 53, 57–58 (2018).

15 Susan Block-Lieb, *Reaching to Restructure Across Borders (Without Over-Reaching), Even After Brexit*, 92 AM. BANKR. L.J. 1, 9 (2018). If schemes of arrangement were governed by the EU Insolvency Regulation, companies not incorporated in the United Kingdom would need to shift their COMI to the United Kingdom to use a scheme. *Id.* at 4–5.

16 *See generally Re* Rodenstock GmbH [2011] EWHC (Ch) 1104 (Eng.) (sanctioning an English Scheme of Arrangement to restructure a company with a German COMI).

17 *See id. See generally Re* Stronghold Insurance Company Ltd [2018] EWHC (Ch) 2909 (Eng.).

18 Andrew B. Dawson, *Modularity in Cross-Border Insolvency*, 93 CHI.-KENT L. REV. 677, 678 (2018).

19 William J. Moon, *Tax Havens as Producers of Corporate Law*, 116 MICH. L. REV. 1081, 1094–95 (2018).

20 11 U.S.C. § 1520(a)(1).

enforcement of a foreign bankruptcy plan by the U.S. bankruptcy court.[21]

And thus chapter 15 often provides the missing ingredient that allows a scheme to successfully reorganize a non-U.K. corporation.

A global business thus has a choice of reorganization tools. At a basic level, this choice involves chapter 11 as contrasted with the U.K. scheme-chapter 15 combination package. But in recent years, leading jurisdictions have enacted enhanced "pre-insolvency" procedures that graft more the features of a full chapter 11 process onto the basic scheme architecture. Provisions that allow for termination or assignment of ongoing contracts or "cramdown" of a plan on a dissenting class are among those.

We thus use this paper to consider the wide variety of restructuring options available to a global business, with the specific focus on how traditional chapter 11 stacks up against the newer options. In Part 1 of the paper, we look at the basic chapter 11-English scheme dynamic. As we have noted in prior work, chapter 11 both benefits and suffers from being the "gold standard" in corporate reorganization.[22] It provides a flexible process that supports such disparate insolvency cases as the (relatively) orderly liquidation of Lehman Brothers, the sale-reorganization of General Motors and Chrysler, and the more traditional reorganizations of most of the nation's larger airlines. But with regard to more mundane businesses, chapter 11 is complex, somewhat formalistic, and seemingly expensive.

In Part 2 we turn to three newer systems that have been recently adopted: namely, the pre-insolvency procedures of the Netherlands, Singapore, and England's own proposal for a new Part 26A insolvency system. The Dutch and British systems were only adopted in 2020, whereas Singapore enacted its statute in 2017.[23] In general terms, these new systems push the pre-insolvency or scheme

21 *In re* Lupatech S.A., 611 B.R. 496, 502 (Bankr. S.D.N.Y. 2020).

22 Oscar Couwenberg & Stephen J. Lubben, *Essential Corporate Bankruptcy Law*, 16 EUR. BUS. ORG. L. REV. 39, 39–41 (2015).

23 The amendments to Singapore's Companies Act came into force on May 23, 2017. *See* Companies (Amendment) Act of 2017, Bill No. 25/2014 (Sing.) [hereinafter Companies (Amendment) Act of 2017]. As described further below, the British system was adopted in 2020 in response to the COVID-19 crisis, and the Dutch system is effective the 1st of January 2021. *See generally* Corporate Insolvency and Governance Act 2020, c.12 (Eng.) [hereinafter Corporate Insolvency and Governance Act]; Art. 370.1 FW (Neth.) [hereinafter FAILLISSEMENTSWET].

process a bit closer to chapter 11, without going so far as to approach some of the drawbacks of the more established U.S. reorganization chapter. Combined with an American chapter 15 filing, any of these new systems would offer yet another option for reorganizing a global business. And given the uncertainty that attends the U.K. scheme process in light of Brexit, the Singapore and Dutch statutes have the potential to usurp the role current played by schemes. And presumably these techniques could and would also be paired with a U.S. chapter 15 filing to provide further global reach.

In Part 3 of the paper we address the central reason why the "chapter 15 plus" approach to reorganization will tend to prevail over chapter 11, at least in the near term. Among other things, we note that most of the foreign procedures that will pair with chapter 15 entail substantially less "process" than chapter 11 itself, which is quite abundant in process. Whether the "chapter 15 plus" package has too little process, or simply less process, is unclear.

While a reduction in the formality of the process might be unattractive from the creditor perspective, from the debtor perspective there are obvious advantages. Namely, the less procedural, and court-focused "pre-insolvency" procedures greatly reduce both the time and transparency associated with restructuring.[24] And it is the debtor, after all, who will largely drive the choice of procedures, inasmuch as all of the procedures we study are largely "voluntary."[25] Moreover, we observe that debtors are not apt to pay for such moves *ex ante*—inasmuch as the pricing mechanism is apt to have difficulty transmitting the costs of reorganization back to the point of issuance in any meaningful way.[26]

The 2005 adoption of chapter 15 of the Code allows for global businesses to pick from among a broad array of business reorganization procedures, and then have that procedure enforced within the United States. We ultimately conclude that, at least at

24 *See* Michelle M. Harner & Jamie Marincic, *Behind Closed Doors: The Influence of Creditors in Business Reorganizations*, 34 SEATTLE U. L. REV. 1155, 1156 (2011).

25 Most of the pre-insolvency procedures are voluntary, and while an involuntary chapter 11 case is theoretically possible, all indications are that such are quite rare. Susan Block-Lieb, *Why Creditors File So Few Involuntary Petitions and Why the Number Is Not Too Small*, 57 BROOK. L. REV. 803, 804–05 (1991).

26 The result might be different if the costs were truly substantial, but in any of the developed economies we address herein, that is not the case.

present, for many global businesses the combination of a pre-insolvency procedure with a chapter 15 filing represents a more attractive offer than a chapter 11 case standing alone.

II. Chapter 11 and English Schemes

In this part of the paper, we examine the traditional methods of restructuring a global business. One common method is to use chapter 11 to cover the entire corporate group. Another method, historically favored by many European debtors, is to reorganize the group's outstanding indebtedness under an English scheme of arrangement. The efficacy of a scheme can be enhanced by obtaining recognition of the scheme under chapter 15 in the United States, thus extending the restructuring into the other leading financial center (New York). We examine each in turn.

A. Chapter 11 for the Global Debtor

Section 109 of the Bankruptcy Code provides that "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 this title."[27] Unpacking this a bit, we see that either a person or a municipality can be a debtor under the Code. A person must meet one additional requirement, in that they have to either reside in the United States or have their domicile, do business, or own property in the United States. Under the Code, "persons" include corporations.[28]

Note what section 109 does not say: there is no requirement that the entity be formed under American law. Indeed, each year dozens of foreign corporations and other foreign entities file bankruptcy petitions in the United States.[29]

There is also no requirement that the entity be insolvent.[30] This stands in stark contrast to the laws in most other jurisdictions, where bankruptcy and insolvency are synonymous.[31]

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27 11 U.S.C. § 109(a).

28 *Id*. § 101(41).

29 Couwenberg & Lubben, *supra* note 3.

30 *In re* Marshall, 403 B.R. 668, 686 (C.D. Cal. 2009), *aff'd*, 721 F.3d 1032 (9th Cir. 2013).

31 For example, in England, Scotland, and Wales, a court can only open Administration proceedings against a firm if the court "is satisfied that [the] company is or is likely to become unable to pay its debts. Insolvency Act 1986, c.45, § 8(1) (Eng.).

A non-U.S. entity, contemplating bankruptcy in the United States, must have a place of business or property in the United States—simply doing business in the United States is not enough.[32] But it is easy to satisfy this rule—any property in the United States will do: no matter the value or type.[33] And the property could take many forms: contracts with New York choice of law clauses have been held sufficient.[34] Same for retainers held by the debtor's bankruptcy attorneys—which means this requirement could almost be self-fulfilling: a foreign company hires an American law firm, gives it a retainer, and *presto*! —its contingent rights in that retainer constitute property in the United States.[35]

Thus, many global businesses will be able to file to reorganize under chapter 11. Filing is not the same as enforcing the terms of the resulting restructuring, however.[36] As a general rule, most jurisdictions will not recognize the results of an American bankruptcy case filed by a non-American corporate entity.[37] For example, the reorganization of a German corporation under chapter 11 would likely get little respect in a German court.

Some jurisdictions also will not recognize an American bankruptcy proceeding that purports to restructure debt issued under non-American law. England provides the most notable example of this, following the "*Gibbs* rule," which holds that English law debt can only be revamped in an English proceeding, save when a creditor voluntarily submits to a foreign proceeding.[38]

As a result, the ability to reorganize a global business, whether

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32 *In re* Head, 223 B.R. 648, 651 (Bankr. W.D.N.Y. 1998).

33 *Suntech Power Holdings*, 520 B.R. at 413.

34 *In re* Berau Capital Res. Pte Ltd., 540 B.R. 80, 84 (Bankr. S.D.N.Y. 2015).

35 *In re* B.C.I. Finances Pty Ltd., 583 B.R. 288, 293 (Bankr. S.D.N.Y. 2018).

36 David P. Stromes, *The Extraterritorial Reach of the Bankruptcy Code's Automatic Stay: Theory vs. Practice*, 33 BROOK. J. INT'L L. 277, 284–85 (2007).

37 *See* Lucas Jullian, *Grasping at Straws: Exploring PDVSA's Access to Debtor Relief Under Restructuring Regimes*, 20 U. PA. J. BUS. L. 863, 901 (2018).

38 The rule comes from *Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399 at 406 (Eng.). For a recent application, see *Bakhshiyeva v. Sberbank of Russia* [2018] EWHC (Ch) 59, [44]–[53] (Eng.). Interestingly, the United States followed a kind of "internal *Gibbs* rule" during the nineteenth century–and perhaps even later. *See e.g.*, Hornick, More & Porterfield v. Farmers' & Merchants' Bank, 227 N.W. 375, 379 (S.D. 1929) (holding that state insolvency laws apply only to contracts created under the same state's law); *see also* Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319, 357–58 (2013).

an individual firm or a group, turns on the ability to apply chapter 11 extraterritorially. While some argue otherwise,[39] most commentators and courts have taken the Code's statement that a bankruptcy estate is comprised of the debtor's property "wherever located and by whomever held," to be a clear indication that Congress intended a worldwide reach.[40]

The bankruptcy court can itself enforce a chapter 11 plan against any party over which it has jurisdiction.[41] Given the United States' status as a financial center—New York City's status as such, in particular—many institutional investors will be within the court's reach.

Chapter 11 thus operates to reorganize a global business on a "pretty good" basis: creditors without ties to the United States will be immune from the process, and will only be bound if they voluntarily participate.[42] But larger bondholders and most banks will be bound by the chapter 11 plan.

The drawbacks of chapter 11 are primarily the same as for a domestic, American debtor. In particular, chapter 11 is a fairly formal process, that largely takes place in open court.[43] The degree of transparency is far beyond what even publicly traded firms are accustomed to, and perhaps puts already distressed debtors at a disadvantage relative to their non-bankruptcy competitors. In addition, while the cost of American chapter 11 is often overstated because of this transparency (which makes the cost very apparent), the formality of the process does entail some cost.[44]

Closely related to cost and formality is the question of duration:

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39 Shlomo Maza, *Yes, No, or Maybe: The Presumption Against Extra-Territoriality in the Bankruptcy Context*, 23 AM. BANKR. INST. L. REV. 601, 621–22 (2015).

40 *Cf.* Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 726 (1999) ("Most national bankruptcy systems, including those of the United States, Canada, and the United Kingdom, claim jurisdiction over the assets of a filing debtor wherever located, including assets located in other nations.").

41 Lauren L. Peacock, *A Tale of Two Courts: The Novel Cross-Border Bankruptcy Trial*, 23 AM. BANKR. INST. L. REV. 543, 558 (2015).

42 Kurt A. Mayr, *Enforcing Prepackaged Restructurings of Foreign Debtors Under the U.S. Bankruptcy Code*, 14 AM. BANKR. INST. L. REV. 469, 471 (2006).

43 *See* Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. REV. 1609, 1624–29 (2009).

44 *See* Nicholas L. Georgakopoulos, *Through Jevic's Mirror: Orders, Fees, and Settlements*, 72 BUS. L. 917, 936 (2017).

because chapter 11 is a court-focused reorganization mechanism, questions of due process prevent too much compression of the process. Even in Lehman Brothers—undoubtedly involving the most extreme facts—the bankruptcy court provided one week of notice before the sale to Barclay's could proceed.[45] Most normal chapter 11 cases will take substantially longer than that—traditional reorganizations often about two years.[46]

B. English Schemes of Arrangement (and Chapter 15)

Traditionally, the global debtor's leading alternative restructuring option to an American chapter 11 case has been an English scheme of arrangement. A scheme of arrangement is a procedure under Part 26 of the Companies Act 2006 under which a company may enter into a compromise or arrangement with its members or creditors (or any class of them).[47] There is no need for a company to be insolvent to use a scheme.[48]

Under an English scheme, creditors must be divided into classes, depending on their rights and interests.[49] While the caselaw on scheme classification is not nearly as developed as that in chapter 11, the general rule seems to be that courts draw a distinction between differing rights (which could split a class) and differing interests (which should not).[50] Unlike chapter 11, there is no "cramdown" power in a scheme, and is not possible to proceed if even one class votes against the overall reorganization. As a result, the debtor-firm has some incentive to group creditors into as few classes as possible. Moreover, not all creditors will necessarily be affected by a scheme, and unaffected creditors will not be asked to

45 Alla Raykin, *Section 363 Sales: Mooting Due Process?*, 29 EMORY BANKR. DEV. J. 91, 95 (2012).

46 Foteini Teloni, *Chapter 11 Duration, Pre-Planned Cases, and Refiling Rates: An Empirical Analysis in the Post-BAPCPA Era*, 23 AM. BANKR. INST. L. REV. 571, 586 (2015).

47 Schemes have their roots in an 1870 statute, and before the enactment of federal reorganization procedures during the 1930s, some American commentators advocated enactment of a scheme statute in the United States. *See, e.g.*, James N. Rosenberg, *New Scheme of Reorganization*, 17 COLUM. L. REV. 523, 529–30 (1917).

48 Eidenmüller, *supra* note 14, at 56.

49 *See generally* Practice Statement (Companies: Schemes of Arrangement) [2002] WLR 1345, [1] (Eng.).

50 *See Re* Lehman Brothers International (Europe) Ltd [2018] EWHC (Ch) 1980, [5] (Eng.).

vote on the scheme.

Lockup agreements are frequently used in connection with schemes, and courts have held that creditors who sign such agreements do not need to be separately classified.[51] Similarly, it is common to pay consent fees to creditors who agree to be "locked up" by a specific deadline, and payment of such fees also does not automatically result in separate classification of creditors.[52] As noted before, the overall goal is to get at least 50% in number constituting 75% in value of each relevant class of creditors in favor of the scheme of arrangement, and only then can it proceed to court approval (or "sanction").[53]

Foreign corporations can use the process if there is a "sufficient connection" between the foreign company and England for the English courts to have jurisdiction to sanction the scheme.[54] Debt instruments governed by English law provide one basis for finding such a connection, but other factors, including a presence in the United Kingdom, could form the basis for a scheme.[55] As discussed further below, often the kind of presence that will support a scheme will also provide the basis for finding that the debtor has an "establishment" in the United Kingdom for purposes of 1502(2) of the U.S. Bankruptcy Code.

For example, in *Re Stripes U.S. Holdings Inc.*,[56] a Delaware corporation, whose primary asset was the equity of another U.S. corporation, filed a scheme. Its credit facility that was the subject of the scheme was governed by English law and accordingly the "sufficient connection" test was satisfied.[57] Likewise, in *Primacom Holding GmbH v. Credit Agricole*,[58] a German firm, with no English creditors, was able to obtain court approval for a scheme because the intercreditor agreement and all finance documents were

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51 Primacom Holding GmbH v. Credit Agricole [2011] EWHC (Ch) 3746, [98] (Eng.).

52 *Re* Seat Pagine Gialle SPA [2012] EWHC (Ch) 3686, [16], [18]–[21] (Eng.).

53 *See* Companies Act, *supra* note 12, § 899(1).

54 *Id*. § 895(2) (defining "company" as any company liable to wound up under the Insolvency Act of 1986, which includes "unregistered" companies such as foreign corporations).

55 *Re* Noble Group Ltd. [2018] EWHC (Ch) 3092, [100]–[101], [109]–[111] (Eng.).

56 *Id*.

57 *See id*. (discussing how, with sufficient creditor support, the governing law of a debt instrument could be changed to facilitate a scheme).

58 *See Primacom Holding*, EWHC (Ch) 3746, [98].

governed by the law of England & Wales and the parties had submitted to the English courts' jurisdiction.[59]

Given London's status—at least for the present—as an important financial center, the scheme itself is apt to be binding on the many institutional creditors that have a substantial presence in the City.[60] But to expand the effects of a scheme, particularly with regard to debtors that have either U.S. operations or significant U.S. based creditors, it has become common to seek "recognition" of the scheme under chapter 15 of the Bankruptcy Code.[61]

Chapter 15 provides for the commencement of a bankruptcy case in the United States that is ancillary or complementary to an insolvency proceeding pending in some other country.[62] The chapter 15 case will support the foreign case and will not be a "full" bankruptcy case like a chapter 7 liquidation or a chapter 11 reorganization.[63] The chapter is based on the Model Law on Cross-Border Insolvency prepared by the United Nations Commission on International Trade Law ("UNCITRAL").[64]

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59 *Id.*

60 Adam Gallagher & Victoria Cromwell, *English Schemes of Arrangement: A Tool for European Restructuring*, 31 AM. BANKR. INST. J. 38, 91 (2012) ("A creditor based in England and Wales that took action in contravention of the terms of the scheme would find that not only was its claim rejected by the court, but it might also be liable for contempt of court in breaching the scheme.").

61 For examples of schemes recently recognized under chapter 15 in the United States, see *In re* Lecta Paper U.K. Ltd., No. 1:19-BK-13990 (Bankr. S.D.N.Y. Feb. 4, 2020) (order recognizing foreign proceeding, U.K. scheme of arrangement, and granting relief); *In re* Syncreon Automotive U.K. Ltd., No. 1:19-BK-11702 (Bankr. D. Del. Sept. 11, 2019); *In re* NN2 Newco Ltd., No. 7:19-BK-23277 (Bankr. S.D.N.Y. July 30, 2019) (order recognizing foreign proceeding, U.K. scheme of arrangement, and granting relief); *In re* PLC New Look Secured Issuer, No. 1:19-BK-11005 (Bankr. S.D.N.Y. May 3, 2019) (order granting foreign proceeding and granting related relief); *In re* Bibby Offshore Servs. PLC, No. 1:17-BK-13588 (Bankr. S.D.N.Y. Jan. 18, 2018) (order granting petition for recognition of foreign main proceeding and motion for related relief); *In re* B.V. Metinvest, No. 1:17-BK-10130 (Bankr. D. Del. Feb. 8, 2017); *In re* Ocean Rig UDW Inc., 570 B.R. 687 (Bankr. S.D.N.Y. 2017); *In re* PLC EnQuest, No. 1:16-BK-12983 (Bankr. S.D.N.Y. Nov. 17, 2016); *In re* Codere Finance (U.K.) Ltd., No. 1:15-BK-13017 (Bankr. S.D.N.Y. Nov. 11, 2015).

62 Young Hye 'Martina' Chun, *Cross-Border Insolvencies: To "Universalize" or to Arbitrate?*, 17 PEPP. DISP. RESOL. L.J. 65, 70 (2017).

63 *See* Lia Metreveli, *Toward Standardized Enforcement of Cross-Border Insolvency Decisions: Encouraging the United States to Adopt UNCITRAL's Recent Amendment to Its Model Law on Cross-Border Insolvency*, 51 COLUM. J.L. & SOC. PROBS. 315, 325 (2017).

64 *Id.* at 326, 335–36. Section 1501(a) of the Bankruptcy Code sets forth the purpose

After notice and hearing, section 1517 provides that the bankruptcy court must enter an order recognizing the foreign proceeding if the proceeding is a foreign main proceeding or a foreign non-main proceeding within the meaning of section 1502.[65] A foreign main proceeding is one pending in the country where the debtor has the center of its main interests (or "COMI"), while a foreign non-main proceeding is one pending in a foreign country where the debtor has an "establishment."[66] Cases with but tenuous links to England would presumably proceed under the latter approach.

The scheme plus chapter 15 package has the advantage—when compared to chapter 11—of being far less transparent. For example, while professionals working in a chapter 11 case are subject to extensive disclosure requirements, and their compensation must be approved by the bankruptcy court, there are no such requirements in either chapter 15 or schemes. Likewise, in a scheme the debtor only need provide creditors with information about the proposed reorganization, and even that information can be provided in password protected internet sites.[67] In chapter 11, on the other hand, the disclosure obligations are substantial, and all must be made publicly available on the court's docket.[68]

On the other hand, schemes themselves provide none of the tools that chapter 11 provides to reject unwanted contracts,[69] recover pre-insolvency payments,[70] or sell assets "free and clear"

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and the following five objectives of chapter 15: (i) to encourage cooperation between courts of the United States (including the United States trustee and appointed fiduciaries) and foreign courts in cross-border insolvency cases; (ii) to provide greater legal certainty for trade and investment; (iii) to promote the fair and efficient administration of cross-border insolvencies in a way that protects the interests of all creditors, the debtor and other interested entities; (iv) to protect and maximize the value of the debtor's assets; and (v) to facilitate the rescue of financially troubled businesses with the goal of protecting investments and preserving employment. 11 U.S.C. § 1501(a).

65 *See* 11 U.S.C. § 1517.

66 *See* John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT'L L. 935, 964–65 (2005) (discussing how Section 1502 defines "establishment" as "any place of operations where the debtor carries out a non-transitory economic activity").

67 *See* Companies Act, *supra* note 12, § 897.

68 Hon. Alan S. Trust, *Bankruptcy as a Fish Bowl of Disclosure*, AM. BANKR. INST. J. 48, 48 (2010).

69 *See* 11 U.S.C. § 365.

70 *See id*. § 547.

of claims.[71] These limitations are addressed in the newer means of reorganizing a global business that we examine in the next part of this paper.

III. New Offerings Abroad

We use this part of the paper to note three potential competitors to the existing methods of reorganizing a transnational firm. Two were enacted just as this paper went to print, but one has been law for almost three years now. As with traditional schemes, all of the following procedures could presumably be paired with a U.S. chapter 15 filing to give broader reach to the restructuring. We sketch each in turn.

A. Dutch Scheme

The Netherland's current bankruptcy proceedings have many different qualities in comparison to Anglo-American law. In short, under the current Netherlands bankruptcy act, known as the Dutch Bankruptcy Act, there are three official proceedings: (1) a bankruptcy process that applies to companies, other legal entities, and natural persons; (2) preliminary and definitive 'suspension of payments'; and (3) debt reorganization of natural persons.[72]

The Dutch government is to add two new procedures aimed at restructuring a firm to the current Dutch Bankruptcy Act. The two draft bills are called: (1) The Continuity of Enterprises Act I, and (2) The Act on the Confirmation of a Private Plan ("ACPP").[73] The Enterprise Act I aims to facilitate and provide a statutory basis for U.K.-style pre-packs (which Americans would instead call 363 sales) and the Act of a Private Plan—often referred to by its Dutch initials WHOA—[74] introduces a scheme-like instrument in the

71 *See id.* § 363(f).

72 *Insolvency Proceedings in the Netherlands*, TEN: EURO. NETWORK OF L. FIRMS, https://www.ten-law.net/knowledge/insolvency-proceedings-in-the-netherlands/ [https://perma.cc/WLX6-GDZ3] (last visited Dec. 19, 2020); *see also* Oscar Couwenberg & Stephen J. Lubben, *The Costs of Chapter 11 in Context: American and Dutch Business Bankruptcy*, 85 AM. BANKR. L.J. 63, 67–68 (2011).

73 Nicolaes Tollenaar & Thomas Bil, *Netherlands*, GLOB. RESTRUCTURING REV. (June 24, 2019), https://globalrestructuringreview.com/review/europe-middle-east-and-africa-restructuring-review/2019/article/netherlands [https://perma.cc/Y999-LX7G].

74 WHOA stands for "Wet Homologatie Onderhands Akkoord." Below, we follow the new article numbering in the Dutch Bankruptcy Act and not the one in the proposal for the WHOA procedure. *See* FAILLISSEMENTSWET, *supra* note 23, arts. 369–387.

Netherlands sometimes called "The Dutch Scheme" or even the Dutch "Chapter 11." The latter procedure has been approved by the Dutch Parliament and is effective as of the 1st of January 2021.

It is the Dutch Scheme that resembles the United States current chapter 11 proceedings (and, of course, U.K. schemes), however, both proposed Acts are aimed at creating a stronger "safe-haven" for those going into in insolvency proceedings. Our focus in this paper is on the "Dutch Scheme."[75]

Under the WHOA, or Dutch Scheme, all types of creditors and shareholders, can be bound.[76] This is in contrast with existing Dutch reorganization law, which is rarely used because it "only binds unsecured creditors, making it ineffective against shareholders or secured or preferential creditors."[77]

The debtor will have the choice of treating the restructuring as a public or a private process.[78] The public version would trigger automatic EU cross-border recognition, under the EU insolvency regulation. However, under the EU insolvency regime the Dutch Scheme only applies to debtors with their COMI in the Netherlands.[79] Or the debtor may request a private process,[80] in which case the Dutch scheme becomes subject to recognition under any applicable treaties or the domestic private international law of the countries in which recognition is sought, including national implementation of the UNCITRAL Model Law, such as chapter 15 of the U.S. Bankruptcy Code.

The prevailing view, and indeed the view of the Dutch government, is that the public version of the Dutch Scheme will not fall within the ambit of the EU regulations on judgments, as it is expressly construed as an instrument of insolvency law.[81] This is in

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75 See N.W.A. Tollenaar, *Het Wetsvoorstel Homologatie Onderhands Akkoord onder de loep genomen [Scrutinizing the Homologation Private Agreement Bill]*, 32 WETENSCHAP [SCI.] 217, 218 (2019), (providing a critical overview of the WHOA).

76 *See* FAILLISSEMENTSWET, *supra* note 23, art. 370.1.

77 Tollenaar & Bil, *supra* note 73 (discussing the previous failures of Articles 143, 145, and 157 of the previous bankruptcy law in the Netherlands).

78 *See* FAILLISSEMENTSWET, *supra* note 23, art. 369.6.

79 *See id.*, art. 369.7; Commission Regulation 2015/848, 2015 O.J. (L 141) arts. 3.1, 3.2 (EC).

80 *See* FAILLISSEMENTSWET, *supra* note 23, art. 371.2.

81 *See* P. M.Veder, *Internationale Aspecten Van de WHOA: de Openbare en de Besloten Akkoordprocedure Buiten Faillissement [International Aspects of the WHOA: The Public and Private Agreement Procedure Outside Bankruptcy]*, 6 TIJDSCHRIFT

contrast to U.K. schemes, which are not characterized as insolvency proceedings and thus have been argued to fall within the scope of the judgment regulations.[82] For the private version, the debtor in a Dutch Scheme has to seek recognition of the procedure under the law of other jurisdictions, even within the European Union.

That is, the private proceedings—which are heard "in chambers"—would receive no automatic recognition under the EU insolvency regulation.[83] These proceedings would appear to be attractive when there are small numbers of holdouts or non-responsive creditors to an otherwise consensual deal, or—more importantly—to international groups of companies with COMI's or assets in different jurisdictions. In such cases, the EU insolvency regulation may cease to be effective.[84] The deal could be announced upon court approval, thereby minimizing the potential disruption to the operating business.

The Dutch Scheme engrafts several key chapter 11 provisions onto its framework, making it far more powerful than the traditional U.K. scheme of arrangement.[85] For example, plans can be "crammed down" on dissenting classes, provided that the dissenters are getting their share—measured by the absolute priority rule—[86] of the reorganization value of the company.[87] The plan must be

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FINANCIERING ZEKERHEDEN EN INSOLVENTIERECHTPRAKTIJK [MAG. FUNDING SEC. & INSOLVENCY L.] 53, 53–54 (2019); Kamerstukken II 2018/2019, 35 249, nr. 3 (Neth.).

82 *See Re* Metinvest BV [2016] EWHC (Ch) 79, [31] (Eng.).

83 Commission Regulation 2015/848, *supra* note 79, art. 1 (stating that it is only applicable to public restructuring regimes).

84 *See id.* art. 8.1; Veder, *supra* note 81, at 61; Tollenaar, *supra* note 75, at 242. If used to bind actively objecting dissenters, interesting questions of due process might arise if the proponents sought to obtain recognition in the United States. *See* 11 U.S.C. § 1506 ("Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.").

85 *WHOA! New Dutch Scheme Set to Position the Netherlands as a Restructuring Hub*, DLA PIPER (Dec. 20, 2019), https://www.dlapiper.com/en/us/insights/publications/2019/12/global-insight-issue-31/whoa-new-dutch-scheme-set-to-position-the-netherlands-as-a-restructuring-hub/ [https://perma.cc/XW4T-MQZS].

86 That is, liquidation priority. *See* Harvey R. Miller & Ronit J. Berkovich, *The Implications of the Third Circuit's Armstrong Decision on Creative Corporate Restructuring: Will Strict Construction of the Absolute Priority Rule Make Chapter 11 Consensus Less Likely?*, 55 AM. U. L. REV. 1345, 1347 (2006).

87 *See* FAILLISSEMENTSWET, *supra* note 23, arts. 384.3, 384.4.

approved by at least one creditor class subject to the plan.[88] A class accepts the plan if at least two-thirds of the value of the class favors the plan.[89]

The proposed plan can be filed by the debtor at the start of the case, or the process can be initiated by creditors, shareholders, employee council or labor unions.[90] If the debtor files the case, as in chapter 11, there is no court review of the debtor's eligibility to file. Where someone other than the debtor files the case, the petitioning party can ask for the appointment of a restructuring expert to help conduct the process.[91] The actual in court part of the process could be as short as three to five weeks.

The law allows for the possibility of a temporary stay of four months, extendable up to eight months, and the debtors ability to "prematurely terminate[]" some contracts while keeping valuable contracts.[92] As summarized by one group of commentators:

> Plans under the WHOA are in essence free in form and content. The intention of the legislator is to minimize the involvement of the court and leave a large amount of freedom to the parties involved. Apart from some essential safeguards, the WHOA provides for a flexible and customizable procedure. Furthermore, the court has the power to issue tailored rulings during the process aimed at safeguarding the interests of shareholders and/or creditors.[93]

Notably, the confirmation of a plan is not appealable.[94]

In addition to the company itself, creditors can initiate a reorganization by requesting the court to appoint an expert, who could offer a composition to creditors and shareholders of the company.[95]

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88 *See id*. art. 383.1.

89 *Id*. art. 381.7.

90 *Id*. art. 371.1.

91 *Id.*

92 *Id*. art. 373.1.

93 *WHOA the New Dutch Scheme*, ALLEN & OVERY (Oct. 6, 2020), https://www.allenovery.com/en-gb/global/news-and-insights/publications/whoa--the-new-dutch-scheme [https://perma.cc/MTB2-PYE3].

94 *Id*.

95 *Id.*

B. Singapore's "Supercharged" Scheme of Arrangement

On March 10, 2017, Singapore's Parliament approved the Companies (Amendment) Bill 2017 (the "Act") to enhance the country's corporate debt restructuring framework.[96] The Act focuses on corporate "safe-guarding" and "includes major changes to schemes of arrangement, judicial management, and cross-border insolvency."[97]

The Act modified Singapore's traditional schemes of arrangement to add many features more commonly associated with chapter 11.[98] In a rather bold attempt to attract cases that might now otherwise file in New York or London, the Act provides that "any corporation liable to be wound up under this Act" may use the scheme process and expands the scope of the "liable to be wound up" test to include foreign chartered companies with a "substantial connection" to Singapore.[99]

The Act allows the debtor to seek a stay or moratorium against creditors even in advance of seeking court approval of a scheme, and throughout the court process.[100] It is expressly contemplated that the moratorium might apply extraterritorially, provided the court has jurisdiction over affected creditors or their assets.[101] Thus, just as an American chapter 11 court can bind most financial institutions because of their connections with New York, a court in Singapore might obtain a similar global reach, at least with regard the major financial institutions, all of which are apt to have some

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96 Corinne Ball et al., *Singapore Enacts New Corporate Bankruptcy Law in Bid to Become Center for International Debt Restructuring*, JONES DAY (June 2, 2017), https://www.jdsupra.com/legalnews/singapore-enacts-new-corporate-61737/ [https://perma.cc/KGJ8-52CX].

97 *Id.* The revised schemes legislation was originally enacted as part of the corporate law (or the Companies Act) in Singapore. *See generally*, Companies (Amendment) Act of 2017, *supra* note 23. On July 30, 2020, the Insolvency, Restructuring and Dissolution Act 2018 ("IRDA") came into effect. The existing statutory regime for Schemes, as amended in 2017, has been transplanted into the IRDA, with minor modifications. IRDA §§ 63(3), 246 (Sing.).

98 *Singapore Enacts New Corporate Bankruptcy Law to Promote International Debt Restructuring*, JONES DAY (Apr. 2017), https://www.jonesday.com/en/insights/2017/04/singapore-enacts-new-corporate-bankruptcy-law-to-promote-international-debt-restructuring [https://perma.cc/L6TA-636X].

99 Previously schemes had been limited to entities incorporated under Singapore law. IRDA, *supra* note 97, § 63(3).

100 *Re* IM Skaugen SE and other matters [2019] 3 SLR 979, [78]–[79] (Eng.).

101 *See generally* IRDA, *supra* note 97.

connection to the island city-state.[102]

Courts may now authorize the debtor to incur priority unsecured, secured, or super-priority secured financing, provided such financing is deemed necessary to enable the debtor to continue as a going concern.[103]

A "cram-down" provision allows for reorganization over the objection of a class of dissenting creditors if, among other things, creditors representing a majority in number and holding at least 75 percent in value of the total claims against the debtor (for which votes are actually cast) vote in favor of the proposed scheme.[104] In a direct echo of chapter 11, the court must also find that the scheme is "fair and equitable" to dissenting creditors and does not "discriminate unfairly" between two or more classes of creditors.[105]

The Act even includes procedures to promote American-style prepackaged schemes of arrangement.[106] The court may approve a scheme of arrangement without any meeting of creditors if, among other things: (i) the debtor-company has provided creditors with a statement, accompanied by adequate information, explaining the effects of the scheme; (ii) notice of the application seeking approval of the scheme is provided to every affected creditor and published; and (iii) the court is convinced that, if a meeting of creditors were convened, the scheme would be approved by the required majorities at the meeting.[107] While American prepacks involve a pre-filing voting process, this latter requirement seems to contemplate something a bit less formal.

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102 REPUBLIC OF SING. DEP'T OF STAT., MINISTRY OF TRADE & INDUS., YEARBOOK STATISTICS OF SINGAPORE 218–19 (2019), https://www.singstat.gov.sg/-/media/files/publications/reference/yearbook_2019/yos2019.pdf [https://perma.cc/3Q3V-MLV8].

103 IRDA, *supra* note 97, § 67.

104 *Id.* § 70(3).

105 *Cf.* 11 U.S.C. § 1129(b). Interestingly, unlike American law, the IRDA does not provide for a way to extinguish existing and outstanding shares, and thus the absolute priority rule as codified in the statue provides that:

> where the creditors in the dissenting class are unsecured creditors, the terms of the compromise or arrangement must not provide for any creditor with a claim that is subordinate to the claim of a creditor in the dissenting class, or any member, to receive or retain any property *of the company* on account of the subordinate claim or the member's interest.

IRDA, *supra* note 97, § 70(4)(b)(ii)(B) (emphasis added).

106 IRDA, *supra* note 97, § 71(1).

107 *Id.* § 71(3).

C. English Chapter 11?

Although delayed by other, Brexit-related dramas for several years, the U.K. government has long shown some awareness that a substantial gap exists between the traditional scheme of arrangement, on the one hand, and its other corporate insolvency mechanisms, on the other.[108] The collapse of several high-profile debtors reinvigorated the effort to reform the restructuring laws, albeit only to see the same be swamped by a new round of governmental distraction.

In short, a few prime ministers ago, the government announced that it would seek to enact a new "restructuring plan" procedure, which looks like the old scheme of arrangement process combined with specific elements of chapter 11.[109] Some had taken to referring to this new procedure as "chapter 11 lite."

Then, in response to the economic disruption caused by the COVID-19 pandemic, the Johnson government quickly pushed through a series of insolvency reforms.[110] Among these, is a new Part 26A of the English law Companies Act 2006, now often referred to as the "Reorganization Plan" provision, which represents the realization of the earlier "chapter 11 lite" proposal.[111]

The Reorganization Plan is a new restructuring tool available to companies in financial distress that might "affect [] its ability to carry on trading as a going concern."[112] There is no insolvency requirement. An application to court in respect of this new process

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108 Irit Mevorach & Adrian Walters, *The Characterization of Pre-Insolvency Proceedings in Private International Law*, EUR. BUS. ORG. L. REV. 855, 857 (2020) ("This current vogue for pre-insolvency proceedings is the latest phase of a global effort to fashion a comprehensive range of debt resolution tools for use at various stages of what accountants sometimes refer to as the demise curve of the corporate life cycle.").

109 DEP'T OF BUS., ENERGY, & INDUS. STRATEGY, INSOLVENCY AND CORPORATE GOVERNANCE 67 (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version__with_Minister_s_photo_and_signature__AC.pdf [https://perma.cc/Z7WQ-HQ37].

110 *See generally The Corporate Insolvency and Governance Bill Receives Royal Assent*, GOV.UK (July 1, 2020), https://www.gov.uk/government/news/corporate-insolvency-and-governance-bill-receives-royal-assent [https://perma.cc/DR7T-8JG7] [hereinafter *Corporate Insolvency Bill*] ("The bill was only introduced to the House of Commons on May 20, 2020. This paper focuses only on new Part 26A, as discussed in the text.").

111 Corporate Insolvency and Governance Act, *supra* note 23, sch. 9.

112 *Id.* § 901A.

may be made by the company, any creditor or a member of the company, or by a liquidator or administrator of the company.[113]

In broad terms the new Part 26A is like its scheme predecessor—codified in Part 26—save for certain provisions that mirror American chapter 11. Most notably, a Reorganization Plan can be imposed on dissenting classes—this is undeniably a cramdown provision—unlike traditional schemes, which must be approved by each class addressed by the plan.[114]

The court will have to find that the plan meets two requirements before the cramdown power can be invoked. First, at least one impaired class has to approve the plan.[115] This requirement tracks a similar requirement in American chapter 11 cramdowns, sometimes referred to as the "somebody has to like it" principle,[116] and also seen in the Dutch Scheme discussed above. In addition, the court has to find that the plan is better than the "next best alternative."[117] The court has broad discretion to determine what the relevant alternative might be.[118] This requirement has some similarity to the chapter 11 requirement that dissenting creditors receive at least as much as they would in a hypothetical chapter 7 liquidation—[119] often called the "best interests of the creditors" test—[120] but the British version does not limit the comparison to liquidations.

In schemes of arrangement, and presumably thus also when considering a Reorganization Plan, the court has absolute discretion over whether to refuse to sanction a Plan even though the necessary procedural requirements have been met.[121] This may be, for example, because a plan is not "just and equitable."[122]

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113 *Id.* § 901C.

114 *Id.* § 901G.

115 *Id.* §§ 901G(2), (5).

116 Or at least one of the authors refers to it as such. STEPHEN J. LUBBEN, AMERICAN BUSINESS BANKRUPTCY: A PRIMER 148 (2019).

117 *Corporate Insolvency Bill*, *supra* note 110, §§ 901G(2), (3).

118 *Id*. § 901G(4).

119 11 U.S.C. § 1129(a)(7).

120 LUBBEN*, supra* note 116, at 148.

121 *See* Companies Act, *supra* note 12, § 901F(4)(c) ("Where the court makes an order under this section . . . the court may by the order impose any requirements . . . which the court thinks appropriate for facilitating the compromise or arrangement.").

122 *See id.* The Explanatory Notes to the Corporate Insolvency and Governance Act 2020 suggest that the court has absolute discretion and will draw on the well-established

The "next best alternative" aspect of the new Reorganization Plan potentially opens up the process to the kind of valuation disputes that American bankruptcy courts routinely handle in chapter 11. As one commentator notes,

> if our extensive experience in such proceedings is anything to go by, there seems every likelihood that mezzanine and junior creditors, and other creditors in the capital structure such as noteholders and bondholders, will seek to deploy aggressive litigation tactics to leverage their positions. This will all be a new experience in U.K. restructurings and any company contemplating a Plan will need to be ready for challenges in court should it be contemplating this new procedure and seeking to cram down certain classes of creditors or members.[123]

As this article goes to print, Virgin Atlantic Airlines filed the first Part 26A proceeding in London,[124] and quickly filed for recognition of the proceeding in the Southern District of New York.[125]

IV. Tools for Restructuring a Global Business

Firms with global operations are likely to run into additional coordination issues, on top of the normal ones that occur whenever shareholders and creditors of a firm fight over the residue in a bankruptcy. A global business has to deal with a multitude of jurisdictions in which its assets are positioned and the same is true for creditors of the business, who might be scattered over the planet, but who can be bound by one or a diverse set of legal arrangements.[126] Furthermore, the business and its stakeholders may face a bankruptcy procedure in only one of the jurisdictions or multiple bankruptcies procedures originating in various jurisdictions in which the business operates, hindering the

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principles that apply in relation to schemes of arrangement. Corporate Insolvency and Governance Act, *supra* note 23, Explanatory Notes.

123 Colin Ashford et al., *Part 26A Plans*, BROWN RUDNICK (June 26, 2020), https://brownrudnick.com/alert/part-26a-plans/ [https://perma.cc/G564-3VQQ].

124 *In re* Virgin Atlantic Airways Ltd. [2020] EWHC (Ch) 2376, [35], [74] (Eng.) ("[The court] was provided with detailed and persuasive expert evidence from Professor Stephen J. Lubben. . . .").

125 *In re* Virgin Atlantic Airways Ltd., No. 1:20-BK-11804 (Bankr. S.D.N.Y. Aug, 4, 2020).

126 *See* Irit Mevorach, *Modified Universalism as Customary International Law*, 96 TEX. L. REV. 1403, 1414 (2018).

operations of the group as a whole.[127]

A global business in financial distress thus faces challenges to keep its assets together, to prevent individual actions of creditors in different jurisdictions to lay claim to assets in specific locations and to coordinate jurisdictions' proceedings for its global operations. What is the best way for such a global business to proceed, or if a choice is available where to start the procedure to maximize the chance for a successful restructuring? Our focus here is on the extant law, and not how such law might be improved through idealized future legislation, agreements, or treaties.

To make such a choice not only the available jurisdictional options are important, but also what these have to offer the global business. In previous work we specified two essential elements for a bankruptcy proceeding:[128] asset stabilization and asset separation. In that paper we discussed the essential rules a jurisdiction needs to take up in its bankruptcy laws, but we did not look at global businesses in distress. In another paper we looked specifically at global businesses (large and smaller ones) that were using chapter 11 as a way out of financial distress.[129] Here we bundle our two papers and suggest two essential elements are to be added for global businesses: 1) worldwide recognition and enforcement, and 2) fair treatment of creditors. Even in a global setting, a reorganization option is not essential to the efficiency of a global resolution of financial distress, although, as we show in our second paper a reorganization option akin to chapter 11 is of interest to global businesses.

A. Multiplicity

We use the term "multiplicity" to address the specific situation in which a business with global operations finds itself: operating in a multitude of jurisdictions, owning assets in multiple locations in various legal organizational forms, and having financial relationships with a diverse and dispersed group of investors. Multiplicity encompasses the idea of multi-locality, that is the phenomenon that assets and debts are geographically dispersed, and that these assets and debts can be governed under a multitude of

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127 Stephen J. Lubben & Sarah Pei Woo, *Reconceptualizing Lehman*, 49 TEX. INT'L L.J. 297, 318 (2014).

128 *See* Couwenberg & Lubben, *supra* note 22, at 2.

129 *See* Couwenberg & Lubben, *supra* note 3, at 25.

jurisdictionally specific regulations.

Table 1 below specifies which insolvency or bankruptcy elements are needed to address the issue of "multiplicity", in assets, debts and jurisdictions.

Table 1 The issue of multiplicity

	Multi-locality of assets	Multi-locality of equity and debts	Multi-jurisdictionalism
Asset stabilization	Automatic stay Funding provision		
Asset separation		Claim transformation	
Fair treatment			Distribution rules Classification rules Binding creditors Cram down
World-wide effect	Recognition Enforcement	Recognition Enforcement	Recognition Enforcement

We proceed by discussing these cells column-wise. So, we start by addressing assets, then debts and finally jurisdictions.

B. Multi-locality of Assets

A key assumption in any reorganization procedure is that keeping assets together is better than letting the collection of assets fall apart.[130] If that is untrue, however, a (bankruptcy) liquidation proceeding is both sufficient and efficient. Assuming that keeping assets together is worth something and applying that to global businesses leads to several observations.

First, as bringing assets together is a board's business judgment to create value, it is a similar business judgment to distribute assets (tangible and intangible) and the build-up of network connections over various entities and various locations in a global business.[131] This conscious business decision to distribute assets in order to create value is thus of the same order compared to the decision to bring specific assets together. Obviously, boards make mistakes,

130 Couwenberg & Lubben, *supra* note 22, at 5 ("Given the conscious decision of the firm's management to bring this particular constellation of assets together, negating that decision upon financial distress would destroy any asset synergies.").

131 *See id.* at 5–6.

but negating that decision at the start of any bankruptcy procedure implies a liquidation approach.

Second, in a global business, having multiple asset pools that operate in a networked setting sets it apart from a business operating in a single jurisdiction.[132] If asset synergies are to be preserved in a global business, then this should encompass the protection of its pools of assets and network. Hence, the need for asset stabilization and the accompanying tools to make this possible:[133] a stay of creditors to prevent assets being withdrawn from these pools and disrupting the network. Next, such a stay needs to be accompanied with a way to free up funds to continue operations, either in the form of a procedure to award priority to post bankruptcy financing on existing assets or on future assets of the business.[134]

C. *Multi-locality of Debts*

The issue in managing corporate financial affairs in any firm is that creditors negotiate for preferential treatment—in and outside bankruptcy. This can take the form of higher rates or preferential contractual treatment. Among others, this leads to junior and senior debt structures and secured and non-secured positions, and myriad combinations of seniority and security.

A global business can issue debt in a variety of financial centers, in various coin and under various jurisdictional specific preferential legal schemes in which (pools of) assets can be contracted as security. Depending on the strictness of creditor protection laws in jurisdictions in which the firm is doing business, such security claims may offer a creditor the right to claim and withdraw assets from asset pool(s) in case of bankruptcy or non-payment, in the process destroying the asset synergies. To prevent this from happening asset stabilization is needed; it keeps the assets together.

However, in order to effectuate a sale of assets, these assets need to be sold without any claims attached. This implies a transformation of a creditor property-like claim into a monetary tort-like one.[135] Bankruptcy procedures routinely do so: separating the liabilities from the assets and transform a specific claim on an

132 *See id.* at 6.

133 *See id*. at 5.

134 *Id*. at 7.

135 *Id.* at 6.

asset to a monetary one, equivalent to the value of the asset.[136]

Together claim transformation and the ability to offer clean title to assets, yield the result that assets in one pool can be kept together or pools of assets can be sold as a bundle, potentially preserving synergies. In global businesses with financial affairs spanning financial centers, currencies, and jurisdictions, asset separation is difficult to achieve. This depends on how jurisdictions co-operate with respect to recognition of each other rules and enforcement methods.

D. Multi-jurisdictionalism

With multiple jurisdictions, asset stabilization and asset separation become problematic as local pools of assets and local creditors in a specific jurisdiction may act without regard to a global business' network synergies and asset pool dependencies.[137] Next, jurisdictions have obvious differences in contractual rules and policy preferences in bankruptcy. This multi-jurisdictionalism leads to additional coordination and creditor treatment issues. Illustrative in this respect are the cases of Hanjin Shipping and Swissair.

1. Hanjin Shipping, South Korea

Hanjin Shipping was the largest Korean container transporter and one of the 10 largest worldwide.[138] It became severely financially distressed due to long term excess capacity in the global shipping market.[139] After having tried for months to reach a debt restructuring with its largest creditors, Hanjin Shipping filed for receivership in August 2016 with the Korean Bankruptcy Court and sought court protection in more than 40 countries (including in the United States with a chapter 15 filing).[140]

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136 *See* 11 U.S.C. § 101(5) (1978) (defining claim as a "right to an equitable remedy . . .").

137 *See* Irit Mevorach, *A Fresh View on the Hard/Soft Law Divide: Implications for International Insolvency of Enterprise Groups*, 40 MICH. J. INT'L L. 505, 511 (2019).

138 *See* Costas Paris & In-Soo Nam, *Move by South Korea's Hanjin Shipping Roils Global Trade*, WALL ST. J. (Aug. 31, 2016), https://www.wsj.com/articles/troubled-hanjin-shipping-to-sell-healthy-assets-to-rival-1472611190 [https://perma.cc/S3RY-DYAV].

139 *See* U.N. CONF. ON TRADE & DEV., REVIEW OF MARITIME TRANSPORT 2016, at 52–53, U.N. Sales No. E.16.II.D.7 (2016).

140 *See* In-Soo Nam, *Hanjim Shipping Asks Creditor to Restructure Debt*, WALL ST. J. (Apr. 25, 2016) https://www.wsj.com/articles/hanjin-shipping-asks-creditor-to-

After the bankruptcy declaration became public, creditors all over the world tried to confiscate assets.[141] Hanjin vessels had trouble accessing ports as no promise could be given that fees and services could be paid.[142] Ships, goods and sailors were stuck in ports or at sea for weeks or even months.[143] Without financial support to help unlock its assets and goods, Hanjin Shipping's operations quickly withered away.[144] The company announced plans to shut down offices around the world, lay-off workers, sell assets, and dismantle its service network.[145] In February 2017, the Korean Bankruptcy Court declared Hanjin Shipping Co. declared bankrupt, with a court order to liquidate the company.[146]

In August 2017, the South Korean bankruptcy trustee reported that US$ 220 million was collected from the sale of Hanjin's assets.[147] In short, 2% of total debt of US$ 10.5 billion Hanjin owed to its creditors.[148]

2. Swissair, Switzerland[149]

Swissair, a Swish flag carrier, abruptly ceased flying on 2

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restructure-debt-1461582330 [https://perma.cc/LEE2-VB2G]; Joyce Lee & Se Young Lee, *Hanjin Shipping Files for Receivership, as Ports Turn Away Its Vessels*, REUTERS (Aug. 31, 2016) https://www.reuters.com/article/us-hanjin-shipping-debt-idUSKCN11603N [https://perma.cc/VP9U-FDJQ]; Minjee Kim, *Cross-Border Insolvency and Debt Restructuring Law Reform in Singapore: Reflections on the Hanjin Shipping Case*, 19 AUS. J. ASIAN L. 1–13 (2019).

141 Stephen J. Lubben, *Lack of Planning Hampers Hanjin Shipping Bankruptcy*, N.Y. TIMES (Sept. 15, 2016) https://www.nytimes.com/2016/09/16/business/dealbook/lack-of-planning-hampers-hanjin-shipping-bankruptcy.html [https://perma.cc/3VFG-LUZ7]; Paris & Nam, *supra* note 138.

142 Peter Ryan, *Hanjin Shipping Collapse in South Korea Leaves Freight Stranded, Portends Weakening Global Economy*, ABC NEWS (Sept. 5, 2016) https://www.abc.net.au/news/2016-09-05/south-korean-shipping-collapse-leaves-freight-stranded/7814768?section=business [https://perma.cc/8XCS-CRS3].

143 *Stranded Hanjin Crew Denied Shore Leave*, MAR. EXEC. (Oct. 5, 2016) https://www.maritime-executive.com/article/stranded-hanjin-crew-denied-shore-leave-in-seattle [https://perma.cc/NWJ9-TFBK].

144 *See* Lee & Lee, *supra* note 140.

145 Paris & Nam, *supra* note 138.

146 In-Soo Nam, *Hanjin Shipping is Declared Bankrupt*, WALL ST. J. (Feb. 16, 2017) https://www.wsj.com/articles/hanjin-shipping-is-declared-bankrupt-1487296151 [https://perma.cc/B8XL-X5SM].

147 Paris & Nam, *supra* note 138.

148 *Id.*

149 The case of Swissair is taken and slightly adapted from Oscar Couwenberg &

October 2001.[150] It became financially distressed due to an aggressive acquisition strategy of smaller airline groups at the end of the 1990s, incurring large operational losses, a 1998 crash of a New York to Geneva flight in Nova Scotia, Canada which in turn resulted in reputational losses, and finally the September 11th 2001 attacks in the United States, causing an already impending liquidity crisis to spiral out of control.[151] At the specific date in October it was unable to pay for fuel and landing fees.[152] Tens of thousands of passengers, crew and planes were stranded worldwide.[153] Swissair's key figures show its size: it had total assets of € 11.2 billion, € 8.4 billion debts, sales of € 8.1 billion and 68,000 employees.[154]

The Swiss federal government decided to intervene and provide liquidity to Swissair in the form of bridge loans up to 450 million Swiss francs (€ 281 million).[155] This allowed Swissair to operate the days after bankruptcy and helped to prevent losing slots and gates at airports, save jobs, passengers to their destinations, crews and planes back home and keep Switzerland connected with the wider world.

In the weeks following the bankruptcy, an asset sale scheme was devised in which Crossair Ltd Co., the short-haul flight subsidiary

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Stephen J. Lubben, *Not a Bank, Not a SIFI; Still Too Big to Fail*, 35 EMORY BANKR. DEV. J. 53, 53–80 (2019).

150 Alistair Osborne, *Swissair Files for Bankruptcy*, TELEGRAPH (Oct. 1, 2001), https://www.telegraph.co.uk/finance/2735944/Swissair-files-for-bankruptcy.html [https://perma.cc/QC8U-AXGD]. Its debt restructuring moratorium was provisionally approved on October 5, 2001 by the district courts in Zurich and Bülach, Switzerland. *See Legal Status and Powers of the Administrator in the Swissair Group Provisional Debt Restructuring Moratorium,* LIQUIDATOR OF SWISSAIR, https://www.liquidator-swissair.ch/en/proceedings/important-questions.htm [https://perma.cc/S7LJ-A2RZ] (last visited Aug. 5, 2020).

151 *Swissair: Proud Past, Grim Future,* BBC NEWS (Oct. 2, 2001), http://news.bbc.co.uk/2/hi/business/1575798.stm [https://perma.cc/Z53T-MAGT].

152 *Id.*

153 *Thousands Stranded in Airline Crisis*, BBC NEWS (Oct. 3, 2001), http://news.bbc.co.uk/2/hi/europe/1577609.stm [https://perma.cc/CKF4-2ZD7].

154 *See generally* SAIRGROUP, ANNUAL REPORT (1999), http://www.sr692.com/misc/printed/reports/pdf/SWR1999.pdf [https://perma.cc/84TS-4ATQ]. Swiss francs are converted at an exchange rate of €/CHF = 0.625. *Id*. at 9.

155 *State Rescues Swissair*, BBC NEWS (Oct. 3, 2001), http://news.bbc.co.uk/2/hi/business/1576636.stm [https://perma.cc/Q9XZ-7FKN].

of Swissair, took over the bankrupt parent's operations.[156] Crossair was funded by the federal government, UBS and Credit Suisse.[157] Crossair was renamed to Swiss International Airlines.[158] In 2005 Swiss International Airlines was taken over by Germany's Lufthansa for 340 million Swiss francs (€ 212 million).[159]

The similarities between Hanjin Shipping and Swissair are worth noting. Both firms own expensive specialized assets (ships and planes), operate a global network of transport lines, are in need of liquidity to ensure operational continuity (port access and landing rights, and for both fuel costs), faced adverse market circumstances (overcapacity) and have their employees travel the globe. When the firms became severely financially distressed, the outcome differed dramatically. Swissair was kept alive the first weeks of the bankruptcy proceedings by a governmental line of credit and then rescued with the help of banks and a government backed asset sale. Hanjin Shipping was not offered such help in the early stages of bankruptcy and was also not able to arrange a debt restructuring, or an asset sale to save its business. In the end, for Hanjin Shipping a forced liquidation ensued.

E. Recognition, Enforcement and Fair Treatment

As the Hanjin Shipping case illustrates, value can easily be lost in a forced unorderly bankruptcy. The Swissair case shows how governmental involvement can mitigate such losses. However, it is not to be expected that just any global business in financial distress can rely on government help, even apart from the question which government should step up to such a rescue in a truly multinational business.[160]

To prevent the loss of value in the Hanjin Shipping case, the

156 Mark Milner, *Syndicate Agrees to Bail Out Swissair,* GUARDIAN (Oct. 23, 2001), https://www.theguardian.com/technology/2001/oct/23/internetnews.business2 [https://perma.cc/B2MZ-CSNE].

157 *Id.*

158 *Swiss International Air Lines Ltd. History,* FUNDINGUNIVERSE, http://www.fundinguniverse.com/company-histories/swiss-international-air-lines-ltd-history/ [https://perma.cc/HVC6-79GR] (last visited Dec. 19, 2020).

159 Kevin Done, *Lufthansa Pays €217m for Swiss Takeover*, FIN. TIMES (Mar. 25, 2008), https://www.ft.com/content/e1d4e966-fa89-11dc-aa46-000077b07658 [https://perma.cc/63K2-PMDH].

160 In other work we show how bankruptcies of large firms end, among others with governmental help. *See* Couwenberg & Lubben, *supra* note 149.

firm needed 1) a worldwide automatic stay and additional liquidity to free up ships and cargo to preserve value, 2) an ability to monetize claims and offer clean title to buyers, 3) a formal enforcement regime to act in various jurisdictions and 4) a form of insolvency oversight that ensures fair treatment of creditors. Asset stabilization and separation are not sufficient if these do not extend beyond a single jurisdiction, these need to extend over multiple jurisdictions.[161]

In that regard, it would already work if a jurisdiction, *e.g.*, Singapore, could project its stabilization and separation rules across borders and that those jurisdictions would recognize these powers and enforce decisions made by the bankruptcy controlling party.[162] However, this is not sufficient to solve the issue of fair treatment. As Melissa Jacoby has noted in the domestic context, "[t]he bankruptcy system's very premises—not enough to go around, changing legal entitlements without consent—make its procedures particularly vulnerable to public distrust."[163] These same basic concerns are, if anything, more extreme in the global setting.

With multiple jurisdictions involved, each with specific schemes of contractual security, creditors cannot be sure to be treated fairly according to their contractual rights, nor when proceeds have to be shared that their share is fair with respect to other creditors.[164] The risk of unfair treatment, or outright expropriation, generates an incentive to hold out, (local) asset runs, and (lengthy) legal battles in various courts.[165]

Fair treatment necessitates that a bankruptcy procedure in order to have global effect specifies classification rules, distribution rules and be able to bind creditors either willingly or involuntarily to the outcome of the distributive part of the bankruptcy procedure. In a single jurisdiction, this part of the procedure is part and parcel of a

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161 *See generally* Jay L. Westbrook, *Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court*, 96 TEX. L. REV. 1473, 1479 (2018).

162 A global insolvency regime might also do this trick, but this seems too much to ask for the time being. *See id.* at 1484.

163 Melissa A. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PENN. L. REV. 1715, 1739 (2018).

164 *Cf.* Sally McDonald Henry, *Chapter 11 Zombies*, 50 IND. L. REV. 579, 590 (2017).

165 Edward J. Janger, *Reciprocal Comity*, 46 TEX. INT'L L.J. 441, 457 (2011); *see* Ian Fletcher, *Cross-Border Cooperation in Cases of International Insolvency: Some Recent Trends Compared*, 6 TUL. CIV. L.F. 171, 173 (1991).

local jurisdiction legal contractual make-up. It is part of the reason why foreign companies find chapter 11 or the English scheme of arrangement attractive: it specifies such rules and is able to bind creditors in other jurisdictions.[166] However, that might not happen in an insolvency of a global business as multiple classification and distribution schemes can be applicable. And these may very well conflict one another.[167]

This leads to the follow-on observation that to secure such a fair treatment, the procedure needs to offer creditors an impartial supervisor—a trustee, judge, monitor, or creditors' committee—to oversee debtor and creditor behavior, and to coordinate and steer legal actions in the various jurisdictions to secure fair treatment. This especially relates to asset separation as selling assets, releasing assets or leaving them to creditors needs a supervisor to secure outcomes that benefit all.

Having such rules to ensure fair treatment is then only a small step towards reorganization as the distributive rules may allow for a hypothetical sale to current claim owners. However, this is not essential for efficiency as asset synergies and network might be sold together to a bidder, even if finding such a bidder takes time.[168]

F. Procedural Contenders for Global Businesses in Distress

Table 2 below gives an overview of procedural contenders for global businesses in distress, specifying their main regulatory tools.

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166 *See* Westbrook, *supra* note 161, at 1480–81.

167 For example, a conflict may ensue with the U.K. scheme of arrangement concerning the *Gibbs* rule. *See* Kannan Ramesh, *The Gibbs Principle*, 29 SING. ACAD. L.J., 42, 74 (2017).

168 *See* Couwenberg & Lubben, *supra* note 22.

Table 2 Dealing with multiplicity in proceedings

	Ch. 11	U.K. Part 26A	Ch. 15+ U.K. Part 26A	Sing. Scheme	Ch. 15+ Sing. Scheme	Dutch Scheme	Ch. 15+ Dutch Scheme
Stay	Yes	No [169]	Yes	Yes	Yes	Yes	Yes
Priority funding	Yes	No	No	Yes	Yes	No	No
Trustee	No	No	No	Yes	Yes	No [170]	No
Clean title	Yes	No	No	Yes	Yes	Yes	Yes
Distribut-ion rules	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Classific-ation rules	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Binding creditors	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Cram down	Yes	Yes	Yes	Yes	Yes	Yes	Yes

The first thing to note is that many of the procedures either alone, or in combination with chapter 15, offer the same basic set of tools that chapter 11 provides. For example, Singapore's scheme offers essentially everything that chapter 11 does, and when combined with a chapter 15, it becomes binding in both Singapore and U.S. courts. It is easy to imagine that covering many business' creditors in full.

The United Kingdom's ongoing role in Europe is, of course, uncertain. But if London remains a global financial center, it may offer a wide jurisdictional reach for its new Part 26A, especially when combined with New York and chapter 15. If Amsterdam's role as a financial center grows post-Brexit, the new Dutch Scheme would seem to provide an obvious replacement for the U.K. process. Singapore offers a similar package focused on the Pacific.

Furthermore, the Singaporean and Dutch contenders offer a regulatory oversight element that chapter 11, chapter 15 and U.K. Part 26A lack. If such oversight would indeed prove to be instrumental in preventing or mitigating strategic expropriative

169 The United Kingdom has adopted a moratorium law, but it has little import for the larger businesses that we examine in this paper. *See* Corporate Insolvency and Governance Act, *supra* note 23, § A2.

170 A court appointed restructuring expert can be appointed on request of the petitioning party. *See* FAILLISSEMENTSWET, *supra* note 23, art. 42A.

behavior it adds to the *ex ante* attractiveness of these two schemes.

The "Gibbs rule" would seem to present a problem for both the Dutch and Singapore systems if bond debt continues to favor English law after Brexit. But the problem would seem to apply only to those creditors who are subject to jurisdiction in neither the location of the proceeding or the United States. For example, if a recalcitrant creditor did pursue action on English law debt in the English courts, and such action would be contrary to a worldwide moratorium imposed by a Singapore court, then, if the creditor is subject to the jurisdiction of the Singapore court, such a creditor would face the sanction of the Singapore court.

But the problem is also easily avoided by using (or changing over to) New York law in place of English law in the debt instruments, and then enforcing the Singapore proceeding through U.S. chapter 15, even if the creditor is not subject to personal jurisdiction in Singapore. Moreover, unless the debtor actually had significant assets in the United Kingdom, the prospect of a "rogue" judgment in the jurisdiction, simply based on a choice of law clause, would present little problem for the overall reorganization.

The table also makes clear why the traditional U.K. scheme, even when paired with a chapter 15 filing, might soon fade as a key tool in restructuring global businesses. The scheme plus chapter 15 approach offers greater flexibility than an old-fashioned chapter 11 case.[171] But a scheme itself offers a less robust restructuring tool than chapter 11, and once the United Kingdom is no longer part of the European Union, its attraction to European businesses might quickly fade in the face of other options.

On the other hand, the United Kingdom's proposed Part 26A might have some real advantages given the lead that the United Kingdom already has with traditional schemes. Any move away from schemes is not apt to benefit chapter 11 itself, but rather the combined package of "enhanced scheme" plus chapter 15 looks more likely to come out on top. Enhanced scheme reorganization systems—like the Dutch, Singapore, and new U.K. systems—benefit from offering the powerful features of chapter 11, without the necessarily embracing litigation-centric approach to restructuring seen in chapter 11.

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171 *In re* Avanti Commc'ns Grp. PLC, 582 B.R. 603, 606 (Bankr. S.D.N.Y. 2018).

G. And an Argument for Chapter 11 Versatility

Although the arguments above imply that chapter 11 will lose "market share" to these contenders, its versatility is often underestimated. We see two additional arguments that may give chapter 11 an edge over the others as the tool of choice for restructuring global businesses. First, at present, most chapter 15 petitions are presented to the courts in Delaware and New York without opposition. Indeed, the vast bulk of the creditors are likely contractually precluded from objecting under the terms of the lockup agreement they signed in connection with the scheme that undergirds the chapter 15 petition. It is not clear that these agreements actually preclude making arguments in American courts, but given that the contracts are enforceable under non-U.S. law, in foreign courts, no creditor has yet been willing to take that chance.[172]

Moreover, true dissenters are presently able to sell their positions in relatively deep and liquid distressed debt markets.[173] But if market conditions were to change—and liquidity in debt markets plainly cannot be taken for granted—[174] these dissenters might find their path to exit closed. As a result, they might take a more active (and contentious) role in both scheme and chapter 15 hearings. It also remains to be seen how U.S. bankruptcy courts will react to American debtor-firms using foreign procedures to reorganize their own capital structures. An unfavorable ruling on a chapter 15 petition, wherein an American company seeks recognition for its restructuring under Singapore law, for example, could have profound effects on the present global reorganization structure.

Thus, market conditions or abuse might lead to the development of unfavorable chapter 15 caselaw. Without the ability to make

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172 *See* Oscar Couwenberg & Stephen J. Lubben, *Private Benefits Without Control? Modern Chapter 11 and the Market for Corporate Control*, 13 BROOK. J. CORP. FIN. & COM. L. 145, 164 (2018).

173 Katherine Doherty & Allison McNeely, *Distressed Debt Traders Have Tons of Cash and Nothing to Buy*, BLOOMBERG (July 19, 2019), https://www.bloomberg.com/news/articles/2019-07-19/distressed-debt-traders-have-tons-of-cash-and-nothing-to-buy [https://perma.cc/VJ6W-SPEZ].

174 Andrew Osterland, *Investors Worry Liquidity Crisis Looms on Fixed Income Horizon,* CNBC (Dec. 3, 2018), https://www.cnbc.com/2018/12/03/investors-worry-liquidity-crisis-might-loom-on-fixed-income-horizon.html [https://perma.cc/Z5U3-HMMS].

foreign "pre-insolvency" procedures binding in the United States, the (near) worldwide reach of chapter 11 might overcome the current perception that chapter 11 is too complex and expensive.

Second, if future global debtors are more deeply distressed, they might also benefit from the use of chapter 11. At present most global debtors are able to reorganize their capital structures alone, since they key problem is simply over-indebtedness. But extreme liquidity in debt market, combined with the "cov light" phenomenon,[175] might mean that the next round of global debtors in distress are in need of something more, namely an operational *and* financial restructuring. That is, they might reach the point of restructuring either later in the cycle of distress, or only when the distress is otherwise quite severe. This too might make chapter 11 more attractive than any of the "stripped down" procedures we have examined in this paper. Indeed, chapter 11 is the only reorganization system presently on offer that could provide a full organizational restructuring of a global debtor.

V. Conclusion

Global debtors are seemingly on the verge of a wealth of choices with regard to their restructuring. While in the past the United States and the United Kingdom have dominated in this area, the combined effects of Brexit and the increasing ability to get the best features of chapter 11 without needing to embrace all of chapter 11 itself, mean that both jurisdictions are apt to lose some of this business going forward. If that so happens, the United States may then maintain a subsidiary role in global restructuring through chapter 15, and the bankruptcy court's broad willingness to recognize foreign proceedings thereunder. The United Kingdom's future role is largely dependent on market acceptance of the new Part 26A Reorganization Plan process, and its continued role in the global financial system post-Brexit. On the other hand, chapter 11 may still continue its dominating worldwide role in case global firms in distress need its operational and financial restructuring versatility that the others cannot not (yet) provide.

175 Christian Pilkington & Ian Wallace, *Restructuring the Next Wave of Cov-lite Debt*, WHITE & CASE (July 11, 2019), https://www.whitecase.com/publications/insight/restructuring-next-wave-cov-lite-debt [https://perma.cc/Q5XH-CE34].