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BATTLE OF THE BRILLIANT IDEAS: FOUR JURISDICTIONS, FOUR RESTRUCTUING REFORM PROPOSALS

Jason Hufendick,[1] Rachel Nicholson,[2] Nienke Lillington,[3] and Richard Woodworth[4]

Introduction

This article explores four proposed "brilliant ideas" — pointed regime changes in the insolvency and restructuring landscapes of the United States, Canada, the Cayman Islands, and Hong Kong. While each proposal addresses a distinct procedural or substantive issue, they share a common theme: modern restructuring systems must evolve to reduce unnecessary cost and friction while preserving legitimacy and stakeholder protection.

The proposals considered in this article are intentionally ambitious. They are not presented as fully formed legislative blueprints, but rather as reform-oriented discussion points intended to provoke debate. The authors consider whether insolvency regimes can become more targeted, commercially realistic, and procedurally efficient without undermining judicial oversight or creditor protections.

The proposal herein examine (i) whether the United States Bankruptcy Code should include a streamlined "funded debt-only" restructuring pathway for sophisticated financial creditors, (ii) whether Canada should adopt a limited cross-class cramdown mechanism to reduce the veto power of economically out-of-the-money creditor classes, (iii) whether the Cayman Islands should modernize its liquidation framework by allowing official liquidators to exercise core powers without repeated court sanction applications, and (iv) whether court-appointed valuers in Hong Kong restructuring processes could improve confidence, transparency, and efficiency in liquidation analyses.

Pitch One: A "Funded Debt-Only" option in the United States's Bankruptcy Code

Starting with the United States, this section seeks to explain the need for an elective "funded-debt-only" track within Chapter 11 ("**Chapter 11**") of Title 11 the United States Bankruptcy Code (the "**Bankruptcy Code**") and outlines specific guidelines as a starting point.

Three recent situations help to illustrate the need for an elective "funded debt-only" option.

In November 2023, Atento, a U.S. public company listed on the NYSE with no material operating presence in the United Kingdom, sanctioned two restructuring plans under Part 26A of the *English Companies Act 2006*, eliminating more than $650 million of funded debt outside Chapter 11.[5] Two years later, in November 2025, Fossil Group followed suit, using its English subsidiary to combine an up-tiering exchange with a single-class Part 26A plan that cancelled its 2026 senior notes and

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[1] Jason Hufendick is a senior managing associate at *Sidley Austin LLP* (Chicago, United States).
[2] Rachel Nicholson is a partner at *Thornton Grout Finnigan LLP* (Ontario, Canada).
[3] Nienke Lillington is counsel at *Conyers Dill & Pearman LLP* (Cayman Islands).
[4] Richard Woodworth is a partner at *Linklaters LLP* (Hong Kong and United Kingdom). The views in this discussion paper are of the author personally and do not represent the views of any other person or institution.
[5] See Sidley Austin LLP, Sidley Represents Atento in its Successful UK Restructuring Plans (Nov. 2023); *In re Atento UK Ltd.* [2023] EWHC 2911 (Ch). The plans removed more than $650 million of funded debt and provided $76 million of exit financing, with creditors taking the majority of the post-restructuring equity.

issued new secured paper.[6] Four months after that, in March 2026, New Fortress Energy committed to restructure approximately $5.8 billion of funded debt — by some accounts the largest consensual English restructuring plan ever — through Part 26A, with Chapter 15 recognition in the United States.[7]

Three substantial issuers — each U.S.-listed, the latter two U.S.-headquartered, and all three with overwhelmingly U.S.-syndicated funded debt — chose the English court as the principal forum for restructuring. This trend, first started by Atento in 2023, combined with the wave of out-of-court liability management transactions over the last decade, warrants a fresh look at the Bankruptcy Code.

Chapter 11's One-Sized Fits all Regime

Chapter 11 is a one-size regime for medium and large companies.[8] Its disclosure statements, schedules of assets and liabilities, statements of financial affairs, section 341 meetings, U.S. Trustee oversight, mandatory creditors' committees, and elaborate solicitation procedures are calibrated for the entire potential creditor universe that ordinary Chapter 11 cases present: trade vendors, landlords, employees, taxing authorities, tort claimants, and dispersed retail bondholders alongside institutional lenders. While critics can gripe at the margins, these protections – that essentially result in a debtor "living in a fishbowl" – are tailored to ensure the integrity of the chapter 11 process and to provide protection to the broad universe of potential creditors.

These requirements start to create friction when the only creditors whose rights a Chapter 11 plan proposes to compromise are sophisticated holders of syndicated loans, indenture notes, and other heavily negotiated funded-debt instruments. The institutions that hold these instruments have priced their risk, retained restructuring counsel, and do not necessarily require the full gamut of procedural shielding the Bankruptcy Code supplies as a matter of course.

The mismatch is not just academic; it is economic. The cost of complying with such procedures can be significant and is primarily borne by a debtor's largest creditors. Not surprisingly, sophisticated debtors and their advisors increasingly observe that the procedural overlay can be avoided abroad as first illustrated by Atento and, where avoidance is not feasible there, can be circumvented out of court through coercive liability management transactions.

Existing accelerations of the Chapter 11 process do not close the gap. The prepackaged plan compresses the calendar but leaves a significant portion of the procedural overlay intact: robust first day motion practice, a section 1125 disclosure statement must still be approved (in substance),

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[6] Press Release, Fossil Group, Inc., Fossil Announces Grant of Sanction Order (Nov. 10, 2025).

[7] Press Release, New Fortress Energy Inc., New Fortress Energy Signs Restructuring Support Agreement (Mar. 17, 2026); Insolvency Insider, *New Fortress Energy Targets Balance Sheet Reset Through UK Restructuring Plan and Brazil Spin-Off* (Mar. 2026).

[8] Small businesses have access to a streamlined reorganization process under Subchapter V of Chapter 11, added by the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. Subchapter V is available to debtors with aggregate noncontingent liquidated debts below a statutory threshold and is designed to reduce the cost and complexity of the standard Chapter 11 process — for example, by eliminating the requirement for a disclosure statement, permitting the debtor to retain equity interests without satisfying the absolute priority rule, and providing for a standing trustee to facilitate plan confirmation. See 11 U.S.C. §§ 1181–1195.

the U.S. Trustee retains its monitoring role, and creditor-committee formation and the requirement to file schedules and statements remains the default (unless waived).

Bankruptcy Courts throughout the United States, for their part, have significantly reduced these obligations where feasible. For example, in 2024, the United States Bankruptcy Court for the Southern District of New York issued amended procedural guidelines that formally recognize a "Rapid Prepackaged Chapter 11 Case" and contemplate plan confirmation between one and fourteen days after the petition date.[9] That order, and the Local Rule amendments that followed it later in the year, are an instructive index of the Court's recognition that the procedural overlay imposes real costs on cases for which it is not properly calibrated.[10] But local procedural innovation can compress only what the Code permits to be compressed; it cannot disable the section 1125 disclosure regime, the section 341 meeting, the U.S. Trustee fee, or the absolute priority rule.

Douglas Baird's recent essay *Bankruptcy Minimalism* identifies the conceptual problem with precision.[11] Drawing on Thomas Jackson's creditors-bargain tradition, Baird argues that reorganization law exists to solve the collective-action problem that arises when too many creditors face a debtor with too few assets, and that nonbankruptcy rights should be altered only to the extent necessary to that end.[12] The minimalist account, in his words, is "most compelling when only funded debt is being restructured."[13]

Chapter 11's increased costs are, at least in part, responsible for the rise in liability management transactions over the last decade. Liability management transactions rarely impact creditors other than sophisticated funded debt parties. Moreover, the success of such transactions is heavily debated. Mark Roe and Vasile Rotaru's recent dataset of eighty-nine coercive liability management transactions has found that such transactions do not tend to fix the balance sheet or avoid bankruptcy altogether.[14] Roe and Rotaru find that at least three years of post-deal experience, 71% have filed Chapter 11 anyway, and roughly 93% have either re-defaulted or filed.[15] Median time from LME to bankruptcy is fifteen months.[16] Given the purported lack of success, a debtor may decide a "funded debt only" chapter 11 case that can extend maturities and bind holdouts to be a more efficient option and provide for an opportunity to implement a more comprehensive fix to its balance sheet.

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[9] See Bankr. S.D.N.Y., *Amended Procedural Guidelines for Prepackaged Chapter 11 Cases* (effective Feb. 1, 2024) (Gen. Order M-621); see also Skadden, Arps, Slate, Meagher & Flom LLP, *SDNY Amends Guidelines for Prepackaged Chapter 11 Cases* (Jan. 2024).

[10]See Bankr. S.D.N.Y., *Amended Local Bankruptcy Rules* (eff. Dec. 1, 2024); Skadden, Arps, Slate, Meagher & Flom LLP, *SDNY Amends Local Bankruptcy Rules to Streamline Chapter 11 Processes* (Nov. 2024) (describing amendments aimed at, *inter alia*, DIP financing, scheduling, and plan confirmation in mega cases).

[11]Douglas G. Baird, *Bankruptcy Minimalism*, 98 Am. Bankr. L.J. 493 (2024).

[12]Id. at 493–94 (citing Thomas H. Jackson, Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, 91 Yale L.J. 857 (1982)).

[13]Id. at 498.

[14]Mark J. Roe & Vasile Rotaru, Liability Management's Limited Runway: Corporate Restructuring Today, 136 Yale L.J. ___ (forthcoming 2026).

[15]Id. fig. 1.

[16]Id. at 13.

Proposed Amendment

The proposal is for a funded debt election is simple to implement in practice. For example, each Chapter 11 debtor may, at its option at the outset of a case, check a box on its petition to proceed with a "funded debt only" balance sheet restructuring. By checking the box, a debtor is electing for a streamlined, court-supervised restructuring of "funded debt only." This will place the debtor on a streamlined path, *provided* that the process may only bind "eligible debt" held by sophisticated parties. If a debtor would like to compromise other liabilities –such as general unsecured claims– the debtor may not check the box (or will have to restart its chapter 11 process if such box has been initially checked).

The drafting challenge is to translate the commercial intuition — funded debt held by sophisticated parties — into workable statutory text. This paper proposes the following:

***Statutory Eligibility*.**

"**<u>Qualified Financial Indebtedness</u>**": A debtor is eligible to elect the streamlined process if the proposed plan (a) seeks to only modify or impair "Qualifying Financial Indebtedness" and (b) provides for the payment in the ordinary course of all other claims. *Qualifying Financial Indebtedness* means indebtedness for borrowed money that is (i) evidenced by a credit agreement, indenture, note purchase agreement, or substantially similar instrument with an aggregate original principal commitment of not less than $100,000,000; (ii) at the time the money was borrowed, 95% of such Qualifying Financial indebtedness was held by "Qualified Holders."

"**<u>Qualified Holders</u>**" means: (A) qualified institutional buyers within the meaning of Rule 144A under the Securities Act of 1933; (B) accredited investors satisfying the institutional thresholds of Rule 501(a)(1)–(3) and (7) under that Act; (C) banks, registered broker-dealers, registered investment companies, business development companies, insurance companies, employee benefit plans with assets exceeding $25,000,000, and sovereign entities; and (D) any other person reasonably believed by the debtor to qualify as a sophisticated institutional investor under this section.

Benefits of Election: Election would suspend, for the duration of the case (or until converted to a standard chapter 11 case):

<u>Procedural Changes</u>:

This would include (i) the requirements of section 341 (meeting of creditors); (ii) section 1102 (creditors' committee, absent court order on cause); (iii) section 1125 (full disclosure statement, replaced by a streamlined offering-style disclosure to affected holders); (iv) the schedules and statements of section 521(a)(1); and (v) U.S. Trustee quarterly fees under 28 U.S.C. § 1930(a)(6) for any case under 90 days.

<u>Substantive Change</u>:

Eliminate the absolute priority rule. The "single-day-of-reckoning" valuation paradigm of section 506(a) and the absolute-priority backstop of section 1129(b) would be replaced by a Part-26A-style fairness inquiry preserving option value through the structure of takeback consideration.

Electing Debtors continue to benefit from:

(i) The automatic stay;
(ii) Judicial confirmation of chapter 11 plan;
(iii) Cross-class cramdown of dissenting funded-debt classes;
(iv) The right of any party in interest to seek conversion to plenary Chapter 11 or chapter 7 if the eligibility certification proves unfounded; and
(v) Ability to assume and reject contracts; *provided* that rejection damages shall be paid in full.

Pitch Two: Cross-Class Cramdowns in Canada

In Canada, debtor companies with over CAD$5 million in debt that are insolvent may seek an initial order under the Canadian *Companies' Creditors Arrangement Act* (“**CCAA**”)[17], providing for a temporal stay of proceeding, appointment of a Court-appointed Monitor, and ability to operate as a debtor-in-possession going concern or elected wind down, among other things, all under the supervision of the Court. Also, under the CCAA, a debtor may present a plan of compromise or arrangement to its creditors at a meeting in which the creditors are separated into classes (based on their commonality of interest) and are given the opportunity to vote on the plan. Each class must vote in favour of the plan in order for the plan to be binding. Intra-class cramdown is permitted and dissenting creditors within an approving class are bound once the statutory double majority is met. However, there is no “cross-class cramdown” in Canada.

Under the CCAA, every affected class must approve a plan before the court may sanction it. By contrast, in the United States under Chapter 11, confirmation over a dissenting impaired class is provided under 11 U.S.C. § 1129(b),[18] and in the United Kingdom, Part 26A[19] allows a restructuring plan to be sanctioned despite a dissenting class if the “no worse off” and “in-the-money approving class” conditions are met. Therefore, this section proposes adoption in Canada of a limited version of that power, subject to enhanced valuation evidence, unfair-discrimination review, and robust judicial supervision.

Double Majority Rule

Under the CCAA, a debtor may propose a compromise or arrangement, identify the affected creditors, and seek court approval of any class composition before the creditors' meeting. To determine how a class of creditors is classified (i.e., which group of creditors will vote in which class), the creditors in a class must have a “commonality of interest.” In assessing this, the Court will consider (i) the nature of the debt, (ii) the rank of any security, and (iii) the remedies and likely recoveries available if the plan is not sanctioned.[20] Generally, creditors should vote as a common class so long as their rights “are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.[21]

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[17] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.
[18] *United States Code*, title 11, § 1129(b).
[19] *Companies Act 2006* (UK), c 46, pt 26A.
[20] CCAA, section 22.
[21] *Re Canadian Airlines Corp.*, 2000 CanLII 28185 (ABKB) at paras 17 and 18 [“***Canadian Airlines***”]; leave to appeal refused, 2000 ABCA 149.

Each affected class votes separately, and approval requires a majority in number representing two thirds in value of the creditors in that class who are present and voting.[22] Even where those thresholds are met, sanction remains discretionary. The court must still be satisfied that the plan is fair, reasonable, and feasible.

However, the CCAA does not contain any mechanism to allow the court to impose a plan on a dissenting class. Canadian law is therefore built on a consensus-across-classes model. Courts have attempted to manage the hard edges of that model through anti-fragmentation class doctrine and through close supervision of voting abuse, but those tools do not eliminate the underlying problem: if an affected class says "no", the plan cannot proceed. In practice, this ultimately means that a debtor is unlikely to present a plan of compromise or arrangement unless it is certain that it has the requisite creditor support.

Cramdowns in other Jurisdictions

This is in contrast to Chapter 11 in the U.S. where a "cram down" refers to confirmation of a Chapter 11 plan over the rejection of one or more impaired classes. The cross-class cramdown is an inter-class extension of the intra-class sanctioning of plans despite the objections of entire class(es) of dissenting creditors, on the condition that it does not unfairly discriminate and is fair and equitable. This power is derived from 11 U.S.C. § 1129(b) of the Bankruptcy Code.[23] This test is applied differently depending on the nature of the claims of the dissenting class (i.e., secured creditors, versus unsecured creditors, versus equity).

A cram down does not let a debtor skip the normal confirmation requirements. In general, the court must still be satisfied that the plan complies with the applicable provisions of Chapter 11, was proposed in good faith, is feasible, and satisfies the "best interests of creditors" test. The main requirement that cramdown is designed to overcome is section 1129(a)(8), which ordinarily requires each impaired class either to accept the plan or be left unimpaired.

Similarly, in the United Kingdom, the *Corporate Insolvency and Governance Act 2020 - Part 26A* ("**CCCD**")[24] allows the court to use its discretion to bind dissenting creditors to a plan (see *s.901G*[25] - Sanction for compromise or arrangement where one or more classes dissent).

In general, the company proposes a plan, the court first deals with class composition and meeting directions, creditors then vote in separate classes, and each class that supports the plan must do so by 75% in value of those present and voting. If one or more classes vote against it, the court can still exercise discretion to sanction the plan under section 901G if two statutory conditions are met: being (A) none of the members of the dissenting class would be any worse off under the restructuring plan than they would be in the event of the "relevant alternative"; and (B) at least one class of creditors or members who would receive payment, or have a genuine economic interest in

[22] CCAA, section 6. This is commonly referred to in Canada as the "double majority" rule (since it requires approval by creditors of each class representing over 50% in number, representing more than 2/3 in value).
[23] 11 USC § 1129(b).
[24] *Companies Act 2006* (UK), c 46, pt 26A.
[25] *Companies Act 2006* (UK), c 46, pt 26A, s. 901G.

the company, in the event of "the relevant alternative" has voted in favour of the restructuring plan.[26]

Reform in Canada

The strongest argument for reform is that the current Canadian model gives a single creditor class too much veto power, even where that class is economically out of the money or would be no worse off in the liquidation or bankruptcy alternative. For example, in the CCAA proceedings of Just Energy Group Inc. et. al. (collectively, "**Just Energy**"), Just Energy announced a proposed CCAA plan that would eliminate (through equity offerings) over CAD$400 million in secured debt and provide a CAD$10 million pool for unsecured creditors, which required approval by two classes of creditors (i) a secured class, and (ii) an unsecured class. The unsecured class contained contingent litigation creditors that were asserting class claims against Just Energy, which was disputed by Just Energy (and in which no recovery would be received in a liquidation or bankruptcy scenario). Just Energy sought to value those litigation claims at $1 for voting purposes.[27] However, the Court held that doing so would unfairly disenfranchise claimants whose claims could not be treated as worthless on record.[28] Since a pre-vote valuation process would cause additional costs and delay, the plan sponsor (being the largest secured creditor) ultimately withdraw support for the plan. Just Energy pivoted its proceedings to a sale process and ultimately a stalking horse transaction with the plan sponsor was implemented through a reverse vesting order.[29] In effect, the plan sponsor achieved through a reverse vesting transaction, without requiring a creditor vote, what it could not achieve directly through a plan of arrangement, and the unsecured creditors were worse off for it as they received zero recovery under the sale transaction.

Cross class cramdown could have preserved a plan path in Just Energy by reducing the veto power of a dissenting class of contingent litigation creditors. A cram down regime would not have made those claims irrelevant, but it could have allowed the court to sanction the plan over unsecured class dissent if the plan satisfied appropriate fairness, priority, and best interests safeguards. In that sense, cram down might have avoided the need to abandon the plan structure and pivot to a sale process and reverse vesting order.

A Canadian cross-class cramdown would also reduce the system's reliance on workarounds that can be less transparent from a creditor-democracy perspective. A voted plan under a cramdown regime still requires disclosure, class meetings, valuation evidence and court scrutiny. By contrast, where a case shifts into a sale transaction or reverse vesting order structure (which has become more commonplace in Canada as opposed to a plan of compromise or arrangement), the value may still be preserved, but without the same direct class-based acceptance mechanism. Just Energy is a particularly strong example of that policy trade off.

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[26] Ajinderpal Singh & Debby Lim, "*The Cross-class Cramdown – Global Perspectives*" (14 December 2022), online: Dentons.
[27] In the Matter of a Plan of Compromise or Arrangement of Just Energy Group Inc et al, Court File No CV-21-00658423-00CL (August 13 2022); FTI Consulting Canada Inc, Tenth Report of the Monitor.
[28] *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al*., 2022 ONSC 3470.

[29]Ibid, Eleventh Report of the Monitor.

There are, however, legitimate objections. A cramdown power can shift leverage toward senior lenders or plan sponsors if courts are overly deferential on valuation or fairness. It can also increase litigation and cost. Those concerns are real, but they support a narrow and carefully supervised model rather than rejection of the concept altogether. The experience in the United States and United Kingdom shows that valuation disputes are manageable through judicial scrutiny, burden allocation, and disciplined evidentiary requirements. Accordingly, any power of the Court to sanction a plan despite the dissent of a class should require, among other things, evidence that such class is not worse off than they would be in an alternative liquidation scenario.

Pitch Three: Liquidator Powers in the Cayman Islands

This section argues that the Cayman Islands' regime governing official liquidators' powers is unduly restrictive because many core powers require case-specific court sanction, driving up cost and causing delay without commensurate supervisory benefit. Targeted legislative reform should permit liquidators to exercise most powers without prior sanction while preserving court control and stakeholder challenge. The Cayman Islands should move from prospective micro-sanctioning to *ex post* oversight.

The Law in the Cayman Islands

The powers of liquidators in the Cayman Islands are governed by section 110(2) of the Companies Act (2026 Revision) (the "**Companies Act**"), which divides an official liquidator's statutory powers into two categories: powers requiring the Grand Court's sanction, as listed in Part 1 of Schedule 3 to the Act ("**Part 1 Powers**") and powers exercisable without sanction, listed in Part 2 of Schedule 3 ("**Part 2 Powers**").

Part 1 Powers include powers fundamental to the effective administration of a liquidation, such as bringing or defending proceedings, engaging attorneys, carrying on the business so far as necessary for a beneficial winding up, paying any class of creditors in full, and compromising liabilities, debts and claims between the company and contributories or other debtors.

Part 2 Powers include the power to do all acts and execute documents in the name of and on behalf of the company, to take possession of company property, and convene creditor or contributory meetings.

The procedural position is that a liquidator must seek and obtain sanction each time a Part 1 Power is to be exercised unless the appointment order already confers the authority sought. Applications must be supported by evidence tailored to the specific transaction or step proposed, and the Grand Court will not issue "*blanket authority*" to exercise all or a suite of Part 1 Powers prospectively. In *Re UCF Fund* [2011 (1) CIRL 305] ("**Re UCF Fund**"), Jones J explained that section 110(2)(a) exists to maintain judicial supervision over Part 1 Powers and refused non-transaction-specific approvals because the application was premature and insufficiently particularised. Although the Court acknowledged that engaging attorneys and utilising liquidators' staff are expected features of official liquidations, it declined to sanction those powers in blanket fashion absent concrete context.

Recent judgments have applied *Re UCF Fund* rigorously. In *Re UNUMX* [2025] CIGC (FSD) 15 ("**Re UNUMX**"), Doyle J required removal of draft order paragraphs that would have conferred Part 1 Powers without evidential justification, describing the attempt to include the paragraphs as inconsistent with Re UCF Fund; he added that, if Schedule 3 is thought to cause liquidators difficulties in practice, the remedy lies with the legislature, not by ignoring authority.

Practical Issues with the Current Regime

The requirement to obtain prior sanction before exercising Part 1 Powers gives rise to significant practical difficulties. Each application must be prepared with contemporaneous evidence and may be subject to oral argument in each case. Because the Court will not grant prospective approvals, liquidators must return to court as discrete decisions arise, multiplying applications and increasing administrative overhead.

The costs of such applications are borne by the estate and, ultimately, by creditors. In smaller liquidations, the costs of seeking sanction may be disproportionate to the value of the assets under administration. In larger and more complex cases, the cumulative effect of multiple applications over the life of the liquidation can be substantial. Delay caused by sanction applications can prejudice creditors' interests, particularly where the liquidator must act swiftly to preserve value or to take advantage of a time-sensitive opportunity. Although 'retrospective' sanction can be sought, this may put liquidators in a difficult position and (in any event) does not address the cost burden of the current regime.

Re UNUMX underscores that judicial accommodation through broad appointment orders is not available, since the Court views legislative amendment, not judicial discretion, as the appropriate remedy. That position closes the path to pragmatic drafting solutions, thereby entrenching iterative sanctioning even for expected and uncontroversial functions of an official liquidation. The present framework therefore imposes a procedural burden not justified by the supervisory interests it purports to protect. Whilst the Court's supervisory role is important, the mechanism by which that supervision is exercised (namely, prior sanction) operates as an impediment to efficient administration rather than as a proportionate safeguard.

This is particularly so in circumstances where section 110(3) of the Companies Act provides that the liquidator shall exercise Schedule 3 powers subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of those powers. The Grand Court therefore retains supervisory jurisdiction irrespective of whether a particular power falls within Part 1 or Part 2 of Schedule 3.

The Law in England and Wales

In England and Wales, the Insolvency Act 1986 (the "**Insolvency Act**") (as amended in 2015) provides that a liquidator in either a compulsory or voluntary winding up may exercise any of the powers in Schedule 4 of the Insolvency Act without prior court sanction, reflecting a conscious policy to streamline liquidations. Core Schedule 4 powers include paying any class of creditors in full, compromising claims and debts, bringing antecedent transaction claims, commencing or defending proceedings, selling property, carrying on the business so far as necessary for a beneficial winding up, executing documents, raising money on security, and doing all things necessary to wind up the company's affairs.

The English model preserves robust checks through two anchor provisions. First, section 167(3) provides that the liquidator's exercise of powers is subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of those powers. Second, section 168(5) provides that any person aggrieved by any act or decision of the liquidator may apply to the court, which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

The effect is a high-trust, high-accountability regime in which officeholders act without prior permission but remain answerable to stakeholders and the court. The model treats the liquidator as a responsible officer of the court entrusted to act decisively in the company's interests, while preserving stakeholders' ability to challenge the exercise of powers.

The Case for Reform

The foregoing provides merely a high-level summary of the relevant legal positions under Cayman Islands and English law. Nevertheless, a clear divergence in approach is apparent. The Cayman framework requires prior judicial approval for important but routine liquidator powers; the English framework trusts the liquidator, as a qualified insolvency practitioner and officer of the court, to exercise professional judgement, subject to stakeholder challenge after the event. The English approach is the more appropriate model for a modern insolvency regime, and the Cayman Islands should legislate to rebalance its framework in favour of an office-holder model with robust supervision rather than *ex ante* permissioning.

A proportionate legislative amendment would restructure section 110 and Schedule 3 of the Companies Act, so that Part 1 Powers become exercisable without prior sanction, subject to section 110(3) of the Companies Act, giving any creditor or contributory standing to apply concerning any exercise or proposed exercise of those powers. To widen the scope for review and Court supervision, the Cayman Islands legislature should consider including a provision similar to section 168 of the Insolvency Act, which provides *inter alia* for challenges by "*persons aggrieved*" (section 168(5)), allowing the court to confirm, reverse or modify any impugned act or decision. The liquidator's ability to seek directions should, in addition, be preserved to facilitate proactive engagement with the court without converting each operational decision into a sanction application.

Such reform would yield substantial benefits: reducing liquidation costs by eliminating the need for routine sanction applications, enabling liquidators to act more swiftly and decisively in the interests of creditors, and reducing the burden on the Grand Court's listing capacity. It would also bring the Cayman Islands into closer alignment with international best practice. Importantly, stakeholders would not be left without protection: the shift in focus from *ex ante* to *ex post* oversight would simply place the burden on those who object to a liquidator's conduct to bring the matter before the Court, rather than requiring the liquidator (who is, after all, an officer of the Court) to seek permission before acting.

Conclusion

Cayman's statutory insistence on case-specific sanction for the exercise of many core liquidation powers, as enforced in Re UCF Fund and Re UNUMX, imposes avoidable cost and delay on estates. The Grand Court has repeatedly signalled that reform must be legislative. England and Wales offer a proven alternative in which liquidators exercise Schedule 4 powers without prior sanction yet remain firmly under court control and subject to stakeholder challenge. The path for Cayman is clear: allow liquidators to exercise Part 1 Powers without prior sanction, while broadening the scope for challenge pursuant to 110(3) of the Companies Act and provisions similar to those included in section 168 of the Insolvency Act. Adopting this model would preserve the Court's supervisory role and stakeholders' remedies while enabling liquidators to act with the speed and efficiency that modern, cross-border liquidations require.

Pitch Four: A case for the valuation of the recovery in liquidation or other relevant alternative being prepared by a court-appointed valuer

In Hong Kong, the cost of preparing an analysis of the alternative to implementation of a proposed restructuring through a scheme of arrangement can be significant in the context of the extremely tight liquidity position of many debtors.[30] It is arguable that the benefit obtained by the stakeholders from the preparation of this analysis is not commensurate with the cost.

In addition, the opaque process of appointing the valuer and agreeing scope and methodology does not facilitate creditor confidence in the work product and gives rise to an increased risk of challenge – an expensive process ultimately likely to be detrimental to creditors recoveries.

These issues could be addressed, at least in part, through court involvement in the appointment of the valuer and determination of the scope and methodology of the valuation.

Drawbacks of the current process

The current process for appointment typically involves a number of providers pitching with price being the major determinant of who gets appointed. This creates challenging incentives for those firms pitching. In order to be competitive on pricing but without compromising standards or professionalism, the main lever available is to minimise the scope through methodology adjustments (e.g. segmenting groups rather than preparing entity by entity, limiting testing of management data).

Clearly, it is appropriate for a cost-benefit analysis to be performed when developing scope, but the current process usually results in a focus only on the cost side of that equation. Creditors may also have concerns about the independence and motivations of the valuer in circumstances where it is within the control of the debtor to replace an appointed valuer and/or to provide market feedback detrimental to a firm’s opportunity to win future work.

[30] This section is focused on the position in Hong Kong. However, the discussion may be food for thought for other jurisdictions with a similar process to the Hong Kong scheme.

A common outcome is that the liquidation analysis plays little to no part in the decision-making process for creditors. Sophisticated and focused creditors have access to their own advice or perform their own analysis. Other creditors commonly do not read the terms of the liquidation analysis and trust the court to perform the function of protecting their interests. The availability of consent fees for creditors who support the deal early (potentially prior to a final liquidation report being available) can exacerbate this problem.

Consequently, the approach on preparation of the liquidation analysis is often driven by the lawyers considering what the court is likely to find acceptable in the circumstances.

The proposal

There may be merit in the following approach –

a) As an initial step in the scheme process, an application must be made to court for the appointment of a valuer to prepare the relevant alternative analysis.
b) The court (rather than the debtor) then determines the appointee from an approved list.[31]
c) The appointee first prepares a proposed scope, methodology and anticipated pricing ("**Proposed Approach**") which could then be shared with creditors and the debtor for consultation. In the event of objection, the court could be asked to determine whether the Proposed Approach is appropriate.
d) Costs to be taxed during the period between the convening hearing to commence the formal scheme process and sanction hearing and payment of the taxed costs will be a pre-condition to the scheme's effectiveness.

This would have a number of immediate benefits:

i) In many cases it would result in any uncertainty/disputes around this issue being resolved at a much earlier stage of the restructuring process (preserving value for creditors).
ii) The removal of unhelpful pressures on the valuer and optics of a court appointment should further reduce the number of disputes around this valuation.
iii) In performing their work, the valuer could be required to keep clear records of information requests and provision. Provided that this dovetails appropriately with the releases of directors common in schemes, this will enhance creditors' comfort with relying upon the report because in the event of subsequently discovered inaccuracies, there will be a clear audit trail to determine responsibility (and potentially liability).

Longer term implications

[31] It is noted that the Hong Kong court is already very familiar with considering the professional qualifications of the firms who would typically act as valuers in the context of appointing liquidators.

This proposal is intended to be a relatively modest refinement of the existing scheme process rather than a radical change.

However, it could drive a number of broader positive process changes. For example, if all parties are comfortable that there will be a thorough trusted source of information available, then a practice may develop of the report being prepared in time to be basis for commercial negotiations based on common information.

Similarly, the inability of the debtor to control the process of this valuation should result in debtors commencing the restructuring process when they have a larger war-chest to complete the process. In Hong Kong, where directors' duties are weak creating an additional incentive to commence a restructuring process early is a positive.

Challenges and mitigants

This paper is prepared as part of an "ideas battle". Accordingly, it is appropriate to consider potential challenges to the structure and mitigants.

An argument could be made that the court is not the right person to appoint the valuer and or approve the Proposed Approach. However, the reality is that valuation is an art rather than a science and it is already the case that in the context of a valuation dispute the court is ultimately determining which approach is best.

It extends the formal scheme process and therefore could, in theory, expose the debtor to additional risk of creditor action. However, the reality in Hong Kong is that most cases have already triggered events of default well before the scheme process is launched and either creditors refrain from enforcement action or the court is pragmatic in allowing winding-up petitions to be deferred provided that genuine progress is being made to implement a restructuring.

This mechanism could complicate parallel schemes because typically only one valuation is prepared for all of the relevant jurisdictions. There may, therefore, need to be an element of practical co-ordination between jurisdictions in implementing legislation and executing it as it would not be in the interest any stakeholder to have multiple valuations potentially producing differing results.

The positive impact of the debtor not being in control of the costs of the preparation of the valuation report is considered above. However, it is a valid concern that a valuer reporting to the court may have an incentive to pursue a "belts and braces" approach when something less complete may be appropriate in the circumstances. This is a risk. However, it is one that is mitigated by the preparation of a methodology report including anticipated pricing and providing the debtor and the creditors with the opportunity to comment and challenge.

Conclusion

Although the four proposals explored in this article arise from different jurisdictions and address different restructuring challenges, they are united by a common objective: improving the efficiency and effectiveness of insolvency systems while preserving fairness, transparency, and judicial legitimacy. We thank you for exploring our “brilliant ideas” and welcome any opportunity to further debate these concepts.