Valuation of distressed businesses – a comparative analysis of valuation methods applied in restructuring proceedings in the United States of America and The Netherlands

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1. Introduction

1.1. There is a fresh wind blowing in the land of corporate restructuring proceedings. While the United States of America (US) already recognised the added value of legislated corporate restructurings decades ago and introduced US Chapter 11, a more widespread awareness that court-accommodated restructurings can prove a valuable addition to the traditional insolvency toolkit has gained traction relatively recently. Riding this wave, the European Union (EU), amongst others, introduced the Directive on Preventive Restructuring Frameworks ('the Directive') in 2019.[1] The Directive stipulates that all EU Member States must accommodate for pre-insolvency restructuring mechanisms, albeit on the basis of minimum harmonisation. This has nevertheless resulted in a true competitive landscape for restructuring proceedings, both within the EU and globally.

1.2. Without a doubt, US Chapter 11 has headed the ranks for years, being such a powerful instrument for debt restructuring.[2] Amongst other things, jurisdiction is easily established, US Chapter 11 is flexible, and the implications can be far reaching (in terms of impact as well as geographic coverage). New restructuring tools often mirror key elements of US Chapter 11, such as cross-class cram-down. Examples are the UK Restructuring Plan and the Dutch

[1] European Union, Directive (EU) 2019/1023, at << https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32019L1023>>, last accessed on 1 March 2024.

[2] See Marshall, Jennifer; Cho, Jonathan; Orbán, Geza, "The Big Three: the UK Restructuring Plan, the Dutch Scheme and US Chapter 11 Proceedings", at <<https://www.scribd.com/document/541081955/The-Big-Three-article-IW-Q2-2020>>, last accessed on 9 March 2024.

WHOA (*Wet Homologatie Onderhands Akkoord*), both echoing various key features of US Chapter 11. In this context, some have even argued that these restructuring proceedings together now form 'The Big Three'.[3]

1.3. As any restructuring professional will attest to, value preservation is the *raison d'etre* of all restructuring tools.[4] The ultimate goal of these proceedings is to reorganise a company's balance sheet to ensure the company's future as a going concern for the benefit of all involved.[5] Valuation is a vital pillar of that process.[6] After all, the value of a distressed company ultimately defines which creditors can get a piece of the pie in the restructuring and which creditors cannot. And more importantly, a restructuring often does not entail a market-led transaction demonstrating the (market)value of the company.[7] But even if the restructuring does involve a transaction:

> "*Value is what you get, price is what you pay.*"[8]

1.4. So, valuation is key. For this reason, (judicial) valuation has been a rewarding topic for publications for years already.[9] This paper seeks to contribute to that by making a comparative analysis of the valuation methods used to determine the value of a distressed business when considering restructuring solutions in the context of US Chapter 11 and Dutch WHOA proceedings. Admittingly, the blueprint of US Chapter 11 has been quite an inspiration for the Dutch legislator.[10] This could fuel the assumption that there are predominantly resemblances and therefore little cause for comparison. But it should not be forgotten that these reorganisation procedures have been developed in very different timeframes and are applied in different legal systems (common law and civil law respectively). This prompts the comparative analysis of two restructuring procedures described in this paper. It focusses on which methods are used in these procedures to determine the value of the distressed company and how these methods compare.

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3 Ibid.

4 Ayotte, Kenneth; Morrison, Edward R., "Valuation disputes in corporate bankruptcy", 166 University of Pennsylvania Law Review 2018, p 1820. See also Broekema, Marc.; Adriaanse, Jan, "Valuation Ambiguities under the European Directive on Preventive Restructuring Frameworks: Insights from the Netherlands", 1 The European Business Valuation Magazine 2022, p 5.

5 Van den Berg, Sebastiaan W., *Waarderingsvragen In Het Ondernemings- En Insolventierecht*, Kluwer, Deventer (2017), p 5.

6 Ibid.

7 Ibid. See also Sontchi, Christopher S., "Valuation methodologies: a judge's view", 20 Am. Bankr. Inst. L. Rev. 1 2012, p 1.

8 Van den Berg, Sebastiaan W., *Waarderingsvragen In Het Ondernemings- En Insolventierecht*, Kluwer, Deventer (2017), p 5, and citations included therein.

9 Ayotte, Kenneth; Morrison, Edward R., "Valuation disputes in corporate bankruptcy", 166 University of Pennsylvania Law Review 2018, p 1821.

10 Dutch Parliamentary Documents II, 2018/2019, 35 249, no. 3, p 65. See also Van den Berg, Sebastiaan W., "WHOA: de cram down beschouwd vanuit waarderingsperspectief", 41 Tijdschrift voor Insolventierecht 2017, paragraph 4.

2. Enterprise valuation in going concern scenario

2.1. Since reorganisation proceedings do not often encompass an actual transaction under market terms, but rather a balance sheet rearrangement, valuation is generally a paper exercise. As such, any valuation is full of assumptions. This explains the vast notion that enterprise valuation is not "an exact science"[11] (but rather an art), "educated guesswork"[12] or even "crystal ball gazing"[13].

2.2. To a large extent, valuations used for the purposes of (pre-)insolvency proceedings are the same as for going concern enterprise valuations.[14] The latter are usually entertained on (a mix of) three key valuation methods, which have been well-established in practice over time:[15]

- The discounted cash flow method (DCF)

  The DCF method basically aims to estimate future free cash flows of the enterprise and subsequently discount these cash flows to present value on the basis of a discount rate (the weighted average cost of capital, 'WACC').[16] This calculation yields the Enterprise Value, i.e. the company's total value. This method is most commonly used for Enterprise Value calculations and is considered to be accurate.[17] At the same time, it can be complicated to implement this valuation method in practice as it builds on a substantial amount of assumptions – for instance when forecasting the free cash flows, the WACC and the applicable growth rate of the company involved.[18] The accuracy of the assumptions made are difficult to evaluate.[19]

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[11] In re AMR Corp., 447 B.R. 384, 436-37 (S.D.N.Y. 2012).
[12] In re Mirant Corp., 334 B.R. 800 (Bankr. N.D. Tex 2005).
[13] Ibid.
[14] Van den Berg, Sebastiaan W.; Holterman, Wim G.M.; Haanappel, Hans, T., "De reorganisatiewaarde onder de WHOA", 10 Tijdschrift voor Insolventierecht 2019, paragraph 3. See also Den Hollander-Arntz, Joost R.R., "'Opening the black box: Company Valuation and Value Allocation in distress' - Verslag van de najaarsvergadering 2022 van de NVRII", 24 Tijdschrift voor Insolventierecht 2023, p 195-196. Ayotte, Kenneth; Morrison, Edward R., "Valuation disputes in corporate bankruptcy", 166 University of Pennsylvania Law Review 2018, p 1825-1831
[15] Ayotte, Kenneth; Morrison, Edward R., "Valuation disputes in corporate bankruptcy", 166 University of Pennsylvania Law Review 2018, p 1825-1831. Van den Berg, Sebastiaan W., "(Rechtsvergelijkende) Beschouwing over waardeallocatie bij herstructureringen", 42 Tijdschrift voor Insolventierecht 2015.
[16] Ayotte, Kenneth; Morrison, Edward R., "Valuation disputes in corporate bankruptcy", 166 University of Pennsylvania Law Review 2018, p 1826-1829. See also De Weijs, Rolef; De Vries, Joost; Jonkers, Aart, *Corporate finance for lawyers*, Edward Elgar Publishing Limited, Chaltenham (2023), paragraph 3.5.
[17] Van den Berg, Sebastiaan W., "(Rechtsvergelijkende) Beschouwing over waardeallocatie bij herstructureringen", 42 Tijdschrift voor Insolventierecht 2015.
[18] Ayotte, Kenneth; Morrison, Edward R., "Valuation disputes in corporate bankruptcy", 166 University of Pennsylvania Law Review 2018, p 1826. Van den Berg, Sebastiaan W., "(Rechtsvergelijkende) Beschouwing over waardeallocatie bij herstructureringen", 42 Tijdschrift voor Insolventierecht 2015.
[19] Ibid.

- The comparable company multiple (CCM)

  In the CCM, the present value of an enterprise is estimated on the basis of market values of publicly traded companies that are comparable in terms of assets, operating risks, and growth opportunities.[20] The market values of these 'peer group' companies are divided by a key operational performance parameter, such as EBITDA (*Earnings Before Interest, Tax, Depreciation and Amortization*), to compute a so-called 'multiple'.[21] A company's Enterprise Value can then be calculated by multiplying the company's own performance parameter (again, such as EBITDA) with the relevant multiple.

- The comparable transaction multiple (TM)

  TM structurally works the same as CCM. Instead of market values, the TM takes multiples used in recent acquisitions of peer group companies as a reference point for multiplying the company's performance parameter to calculate Enterprise Value.[22]

2.3. Strongly linked to the question what valuation <u>method</u> should be used for business valuation, is the question what <u>standard</u> to use. The applicable standard is primarily dependent on the designated beneficiary of the valuation. 'Fair market value' (determined under the premise of 'value in exchange'), 'investment value' (determined under the premise of 'value to the holder') and 'intrinsic value' (if assets are structurally undervalued) are three valuation standards most commonly used.[23] In the context of corporate restructurings – that revolve around determining the value of creditor entitlements – fair market value is generally applied.[24]

2.4. As may be expected on the basis of the citations in paragraph 2.1 above, valuations can easily give rise to corporate disputes, both in and out of a restructuring context.[25] The root cause for this is the fact that all of these methods implicitly or more explicitly rely on assump-

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[20] Ayotte, Kenneth; Morrison, Edward R., "Valuation disputes in corporate bankruptcy", 166 University of Pennsylvania Law Review 2018, p 1830-1831. See also De Weijs, Rolef; De Vries, Joost; Jonkers, Aart, *Corporate finance for lawyers*, Edward Elgar Publishing Limited, Chaltenham (2023), paragraph 3.4.
[21] Ibid.
[22] Ibid.
[23] Tollenaar, Nicolaes W.A., *Het pre-insolventieakkoord*, Wolters Kluwer, Deventer 2016, p 129.
[24] Ibid.
[25] Ayotte, Kenneth; Morrison, Edward R., "Valuation disputes in corporate bankruptcy", 166 University of Pennsylvania Law Review 2018, p 1830-1831. Pantaleo, Peter V.; Ridings, Barry W., "Reorganization Value", 51 The Business Lawyer 1996, p 436-441.

tions. In the case of TM and CCM, this often relates to the peer group constituting the benchmark for comparison purposes.[26] Another frequently debated cause of concern is the parameter (e.g. EBITDA) used for the valuation, and if it was calculated correctly.[27]

3. Valuation methods used in US Chapter 11 proceedings

3.1. Since 1978, Chapter 11 of the US Bankruptcy Code has entertained numerous business reorganisations around the world. Amongst many others, this includes illustrious companies such as Delta Air Lines, Inc. and General Motors Corporation.[28] US Chapter 11 is usually seen as an insolvency procedure to reorganise the debtor's balance sheet through the offering of a restructuring plan (but it can also be used for liquidation purposes).[29] At the heart of US Chapter 11 lies the conviction that enterprises will yield more value to all stakeholders as a going concern than through an insolvent wind-down.[30]

3.2. There are many features of US Chapter 11 proceedings worth highlighting. This paper specifically focusses on valuation aspects of this restructuring tool. On a more general level, however, it should be noted that one of the distinct features of US Chapter 11 proceedings is that a debtor remains in possession, i.e. the filing company retains the authority to manage its affairs and assets (albeit subject to certain limitations).[31] Furthermore, as soon as a request under US Chapter 11 is filed, an automatic stay is triggered, protecting the debtor against any third parties that seek to enforce any rights against it.[32] These measures are all designed to facilitate that the debtor can maintain its business as a going concern, including its customer base, supplier relationships, employee morale, and market reputation, and to generate cash flow to navigate the (generally rather expensive) reorganisation process.[33]

3.3. A restructuring plan under US Chapter 11 can take many forms. The US Bankruptcy Code provides a rather detailed outline of potential restructuring options that are available to the

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[26] Ayotte, Kenneth; Morrison, Edward R., "Valuation disputes in corporate bankruptcy", 166 University of Pennsylvania Law Review 2018, p 1830.
[27] Ayotte, Kenneth; Morrison, Edward R., "Valuation disputes in corporate bankruptcy", 166 University of Pennsylvania Law Review 2018, p 1826.
[28] See <<https://en.wikipedia.org/wiki/Chapter_11,_Title_11,_United_States_Code#Largest_cases>>, last accessed on 9 March 2024.
[29] Van den Berg, Sebastiaan W., "(Rechtsvergelijkende) Beschouwing over waardeallocatie bij herstructureringen", 42 Tijdschrift voor Insolventierecht 2015.
[30] Ibid.
[31] Chapter 11 U.S. Bankruptcy Code §§ 1107-1108.
[32] Chapter 11 U.S. Bankruptcy Code § 362.
[33] See Chapter 11 U.S. Bankruptcy Code §§ 1107.

plan-offering party.[34] In practice, a plan often involves a debt-for-equity swap, whereby creditors that are 'in the money' receive equity in the company in exchange for a debt write-down.[35] 'Out of the money' creditors can also receive value under a proposed plan (notwithstanding the so-called *Absolute Priority Rule*, see paragraph 3.5 below) but only if *gifted* by higher ranked classes that support the plan.[36]

3.4. While it is not required that a company shows it is in a state of insolvency to enter US Chapter 11 proceedings,[37] the (tested) assumption is a company will only enter these proceedings when facing severe financial headwinds (which is also what the US legislator had envisaged)[38].[39] Such financial difficulties will also resonate in the value of the company. After all, expected cash flows will be lower than 'normal' and the WACC will be higher due to increased costs of funding (the so-called *distress premium*).[40] If the financial restructuring is successful, costs of funding usually drop as trust in the business is restored and uncertainty around business performance declines.[41]

3.5. This ('distressed') value of a company plays a key role for certain crucial aspects of US Chapter 11 proceedings, especially in the context of plan confirmation. A plan eligible for confirmation can be *consensual* – if all classes have voted in favour of the plan – or *non-consensual* – if the plan was rejected by at least one class.[42] A class qualifies as supporting class if two thirds of the aggregated claim amount has voted in favour of the plan, representing more than half of the number of creditor claims against the debtor in said class.[43] Following plan acceptance, the plan may be confirmed by the bankruptcy court. Valuation of the distressed business can very well determine the faith of the accepted plan.[44] This valuation most notably comes into play in the following respects:

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[34] Chapter 11 U.S. Bankruptcy Code § 1123.
[35] Tollenaar, Nicolaes W.A., *Het pre-insolventieakkoord*, Wolters Kluwer, Deventer 2016, p 143. Van den Berg, Sebastiaan W., "(Rechtsvergelijkende) Beschouwing over waardeallocatie bij herstructureringen", 42 Tijdschrift voor Insolventierecht 2015.
[36] Tollenaar, Nicolaes W.A., *Het pre-insolventieakkoord*, Wolters Kluwer, Deventer 2016, para. 6.14.4.
[37] Chapter 11 U.S. Bankruptcy Code § 301.
[38] Warren, Elisabeth, *Chapter 11: Reorganizing American Businesses*, Wolters Kluwer, Deventer 2008, p 24.
[39] If a creditor files for US Chapter 11, it is required to demonstrate that "*the debtor is generally not paying such debtor's debts as such debts become due unless such debts are subject of a bona fide dispute as to the liability or amount".* Chapter 11 U.S. Bankruptcy Code § 303(h)(1).
[40] Van den Berg, Sebastiaan W., *Waarderingsvragen In Het Ondernemings- En Insolventierecht*, Kluwer, Deventer (2017), p 92.
[41] Ibid.
[42] Chapter 11 U.S. Bankruptcy Code § 1129(a)-(b).
[43] Chapter 11 U.S. Bankruptcy Code § 1126(c). For equity holders, substantially the same threshold applies. See Chapter 11 U.S. Bankruptcy Code § 1126(d).
[44] Chapter 11 U.S. Bankruptcy Code § 1129(a).

a) Firstly, in the *best interest of creditors* test, that applies to all (consensual and non-consensual) plan confirmations. This test essentially requires evidence that every creditor rejecting the plan, will receive at least the same pay-out as in a US Chapter 7 liquidation.[45] Hence, this calls for a thorough analysis of the value to be realised in a hypothetical Chapter 7 liquidation scenario compared to the value that will be yielded through completion of US Chapter 11 proceedings (which can prove challenging in reality). Note that the Chapter 7 scenario does not necessarily equal a piecemeal liquidation, but can also involve a liquidation as a going concern, whatever is most likely.[46]
b) Secondly, in the *feasibility* test, also applicable to all (consensual and non-consensual) plan confirmations. This test prescribes that the debtor should be able to return to doing business as a going concern following a plan confirmation, without the need for any further restructuring or liquidation proceedings (save for any anticipated post-bankruptcy actions already included in the plan).[47] To assess this overall financial viability outlook of the debtor, the bankruptcy court will look at the feasibility of many business performance indicators, which include – but are not limited to – feasibility of revenue- and cash flow forecasts, the debtor's capital structure, headroom for capital expenditures, management competencies and working capital forecasts.[48]
c) Thirdly, in assessing whether any non-consensual plans are *fair and equitable* and *not unfairly discriminatory* amongst classes of creditors and equity holders.[49] These criteria are designed to safeguard that the value of the distressed company is fairly distributed to a creditor class that has rejected the plan in accordance with its rank (under the bankruptcy waterfall). A plan is not discriminatory if it treats equally ranked creditors in an equal manner, or if unequal treatment is justified for good business rationale.[50] A plan is fair and equitable if:

    i. secured creditors do not receive less than the liquidation value of the secured assets;[51] and

[45] Chapter 11 U.S. Bankruptcy Code § 1129(a)(7).
[46] In Re Lason, Inc., 300 B.R. 227 (Bankr. D. Del. 2003)*: "(…) a chapter 7 liquidation may be done either under "forced sale" conditions or as a going concern*."
[47] Chapter 11 U.S. Bankruptcy Code § 1129(a)(11).
[48] Tollenaar, Nicolaes W.A., *Het pre-insolventieakkoord*, Wolters Kluwer, Deventer 2016, p 156-157.
[49] Chapter 11 U.S. Bankruptcy Code § 1129(b).
[50] Tollenaar, Nicolaes W.A., *Het pre-insolventieakkoord*, Wolters Kluwer, Deventer 2016, paragraph 6.14.4.
[51] Chapter 11 U.S. Bankruptcy Code § 506(a)(1). Tollenaar, Nicolaes W.A., *Het pre-insolventieakkoord*, Wolters Kluwer, Deventer 2016, paragraph 6.14.2.

ii. the *Absolute Priority Rule* is met, which holds that no lower-ranking creditor class can receive any value if any higher-ranking class rejecting the plan has not received its full share in the going concern value of the reorganising debtor (as anticipated under the plan).[52,53]

3.6. The US Bankruptcy Code does not prescribe how the relevant values for assessing these criteria should be computed. In practice, however, the valuation methods recognised by US bankruptcy courts in US Chapter 11 are DCF, TC and CCM.[54] Ideally, these methods should be used in an integrated manner.[55] As indicated above, in a going concern scenario, these methods will yield the Enterprise Value, comprising the present value of the future cash flows or the market value on the basis of the multiplied EBITDA (or any similar performance parameter). In a reorganisation scenario, in a US context the output of these methods is generally referred to as Reorganisation Value – i.e. the value available for allocation of claims.[56] These methods should approximate the financial situation post-bankruptcy as good as possible. For instance, by including specific assumptions in the calculation tailored to the emergence from bankruptcy (e.g. by neutralising the effects of the bankruptcy and considering any (envisaged) benefits (to be) realised under the plan, such as operational efficiencies and divestment proceeds).[57] Such adjustments should be justified, as they are generally scrutinised by the courts.[58]

3.7. In conclusion, US Chapter 11 proceedings hinge on business valuation in some important respects. The valuation methods to be used for these purposes have not been legislated, but in practice generally entail (a mix of) DCF, TM and/or CCM. US Chapter 11 requires that the Reorganisation Value of a business computed on the basis of these methods is compared against the Liquidation Value (assuming a piecemeal or going concern sale of the

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[52] Tollenaar, Nicolaes W.A., *Het pre-insolventieakkoord*, Wolters Kluwer, Deventer 2016, paragraph 6.14.3.

[53] Ayotte, Kenneth; Morrison, Edward R., "Valuation disputes in corporate bankruptcy", 166 University of Pennsylvania Law Review 2018, p 1824.

[54] Van den Berg, Sebastiaan W., "(Rechtsvergelijkende) Beschouwing over waardeallocatie bij herstructureringen", 42 Tijdschrift voor Insolventierecht 2015. Pantaleo, Peter V.; Ridings, Barry W., "Reorganization Value", 51 The Business Lawyer 1996, p 421, 436-441. Ayotte, Kenneth; Morrison, Edward R., "Valuation disputes in corporate bankruptcy", 166 University of Pennsylvania Law Review 2018, p 1836-1838. Other valuation methods that are also available are asset-based valuation and option pricing using contingent claim valuation. See Sontchi, Christopher S., "Valuation methodologies: a judge's view", 20 Am. Bankr. Inst. L. Rev. 1 2012, p 1.

[55] Pantaleo, Peter V.; Ridings, Barry W., "Reorganization Value", 51 The Business Lawyer 1996, p 441-442.

[56] Van den Berg, Sebastiaan W., "(Rechtsvergelijkende) Beschouwing over waardeallocatie bij herstructureringen", 42 Tijdschrift voor Insolventierecht 2015. Dutch Parliamentary Documents II, 2018/2019, 35 249, no. 3, p 50.

[57] Van den Berg, Sebastiaan W., *Waarderingsvragen In Het Ondernemings- En Insolventierecht*, Kluwer, Deventer (2017), p 53-56.

[58] Sontchi, Christopher S., "Valuation methodologies: a judge's view", 20 Am. Bankr. Inst. L. Rev. 1 2012, p 16. See also Pantaleo, Peter V.; Ridings, Barry W., "Reorganization Value", 51 The Business Lawyer 1996, p 436-441. Ayotte, Kenneth; Morrison, Edward R., "Valuation disputes in corporate bankruptcy", 166 University of Pennsylvania Law Review 2018, p 1837.

business, whatever the case may be). The underlying rationale is that confirmation of a plan through US Chapter 11 can only be deemed in the interest of creditors if it can unlock value that would otherwise not be the case.[59]

4. Valuation methods used in Dutch WHOA proceedings

4.1. In pursuit of other jurisdictions that have successfully legislated restructuring tools, the Netherlands have implemented their own framework to facilitate in-court confirmation of pre-insolvency schemes in 2021. This tool is distinctively referred to as WHOA (*Wet Homologatie Onderhands Akkoord*). Under the umbrella of the Directive – adopted by the EU in 2019 as one of the pillars in the EU's program to advance a Capital Market Union – the introduction of WHOA was accelerated by the COVID-19 pandemic to avoid any unnecessary bankruptcies and subsequent wind-downs of essentially viable businesses. Largely inspired by the fundamental principles of US Chapter 11, the WHOA aims to preserve value by accommodating financial restructuring of a debtor outside insolvency proceedings to restore financial health, whilst allowing the debtor's business to proceed as a going concern.[60]

4.2. WHOA proceedings are designed as a hybrid instrument, accommodating out-of-court workouts with the option for court-involvement if deemed necessary.[61] This provides for significant flexibility and also provides a certain relief to the judicial system. The option to have courts involved increases deal certainty on the other hand, as (potential) disagreements between stakeholders can be dealt with at an early stage. In certain matters, the WHOA mandatorily requires a decision by the court. For instance, if the debtor seeks a stay against third party enforcements[62] – which, unlike US Chapter 11, is not granted automatically under the WHOA – or if the debtor seeks confirmation of a scheme (that has not received unanimous support amongst the voting classes) as to make it binding upon all creditors that are party to it.[63]

4.3. A scheme can be offered to both debtors and shareholders, but only those whose rights are impacted under the scheme are eligible to vote.[64] A scheme can be confirmed by the court if

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[59] Van den Berg, Sebastiaan W., *Waarderingsvragen In Het Ondernemings- En Insolventierecht*, Kluwer, Deventer (2017), p 152-153.
[60] Dutch Parliamentary Documents II, 2018/2019, 35 249, no. 3, p 1, 65.
[61] § 378 Dutch Bankruptcy Act ("DBA").
[62] § 376 DBA.
[63] § 384 DBA. There is case law that a WHOA scheme adopted by all voting classes, does not have to be confirmed by the WHOA court and is not even eligible for submission for confirmation. See e.g. District Court of Rotterdam 15 July 2022, JOR 2023/18.
[64] § 381(4) DBA.

supported by at least one ('in the money') creditors'[65] class, requiring a two thirds majority (in terms of aggregated claim amount) of affirmative votes within the class.[66]

4.4. Similar to US Chapter 11, the outcome of Dutch WHOA proceedings could also turn on business valuation.[67] If a scheme is submitted for confirmation (*homologatie*) to a WHOA court, in terms of valuation it may have to consider:

a) in the first place, the *No Creditor Worse Off-test*.[68] The key ingredient for applying this test is the so-called 'Liquidation Value'.[69] The Liquidation Value determines where 'the value breaks', in other words, which creditors could expect a pay-out in a liquidation scenario and which creditors cannot. As such, it leads to earmarking which creditors are 'in the money' and which are not.[70] The *No Creditor Worse Off-test* constitutes a ground for dismissal of the scheme if a challenge to this end is successfully brought forward by an opposing creditor. It basically stipulates that no creditor should receive (significantly) less value compared to a liquidation scenario in bankruptcy. While this may seem a straightforward test, liquidations can take many forms. For instance, a liquidation could encompass a piecemeal liquidation of all the debtor's assets, but it could just as well involve a going concern sale of the business.[71] The explanatory note accompanying any proposed scheme shall have to reflect what scenario is most likely to materialise if the scheme would fail and, hence, on what basis the Liquidation Value has been calculated in that specific matter.[72]
b) secondly, the *WHOA Priority Rule*.[73] This rule builds on the value of the reorganised debtor, defined under WHOA as 'Reorganisation Value' just like US Chapter 11.[74] The Reorganisation Value determines, amongst other things, to what extent any creditors involved in the WHOA can expect a distribution under the scheme.[75] According to the Dutch legislator, the Reorganisation Value does not necessarily need to be based on a

[65] § 383(1) DBA.
[66] § 381(7) DBA.
[67] Dutch Parliamentary Documents II, 2018/2019, 35 249, no. 3, p 65.
[68] § 384(3) DBA.
[69] Van den Berg, Sebastiaan W., *Waarderingsvragen In Het Ondernemings- En Insolventierecht*, Kluwer, Deventer (2017), p 35.
[70] Which creditors are in the money, and which are not, is also relevant for the question if a scheme is eligible for confirmation. See para 4.3.
[71] Van den Berg, Sebastiaan W., *Waarderingsvragen In Het Ondernemings- En Insolventierecht*, Kluwer, Deventer (2017), paragraph 3.3.1.
[72] Dutch Parliamentary Documents II, 2018/2019, 35 249, no. 3, p 51.
[73] § 384(4)(b) DBA.
[74] § 375(1)(e) DBA. Van den Berg, Sebastiaan W., "(Rechtsvergelijkende) Beschouwing over waardeallocatie bij herstructureringen", 42 Tijdschrift voor Insolventierecht 2015. Dutch Parliamentary Documents II, 2018/2019, 35 249, no. 3, p 50.
[75] Van den Berg, Sebastiaan W.; Holterman, Wim G.M.; Haanappel, Hans, T., "De reorganisatiewaarde onder de WHOA", 10 Tijdschrift voor Insolventierecht 2019, paragraph 2.

continuation of the entire business as a going concern.[76] The scheme could also encompass a wind-down outside bankruptcy or a combination of these two scenario's (i.e. part going concern and part discontinuation of the business). The *WHOA Priority Rule* essentially holds that any scheme should provide for a fair distribution of the Reorganisation Value amongst the creditors.[77] Opposing creditor classes may challenge a scheme confirmation if this is not the case, based on this rule.[78]

4.5. Computing the Reorganisation Value of the business for the purposes above shows great resemblance with the US. Just like US Chapter 11, Reorganisation Value should be seen as the Enterprise Value of the reorganised debtor.[79] To be more exact, it is the value available for distribution amongst the debtor's existing capital providers (i.e. shareholders and creditors) at the time of the confirmation of the scheme and in accordance with the bankruptcy waterfall.[80] The methods for calculating an Enterprise Value are not bound by country borders, and as such are the same in the US and in the Netherlands. Hence, in the absence of any comparable transactions, Reorganisation Value is most commonly calculated on the basis of DCF (see paragraph 3.6). The Reorganisation Value is in principle computed under the assumption that there is a going concern business case and that the debtor's operational performance as well as cost management will improve following the restructuring.[81] The Dutch legislator has, however, not taken the opportunity to specify the valuation methods that should be used for establishing the Reorganisation Value when the WHOA was introduced. The first case law on WHOA seems to demonstrate that WHOA courts indeed adhere to a DCF approach.[82]

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[76] Dutch Parliamentary Documents II, 2018/2019, 35 249, no. 3, p 50.

[77] Van den Berg, Sebastiaan W.; Holterman, Wim G.M.; Haanappel, Hans, T., "De reorganisatiewaarde onder de WHOA", 10 Tijdschrift voor Insolventierecht 2019, paragraph 2.

[78] § 384(4)(b) DBA.

[79] Van den Berg, Sebastiaan W.; Holterman, Wim G.M.; Haanappel, Hans, T., "De reorganisatiewaarde onder de WHOA", 10 Tijdschrift voor Insolventierecht 2019, paragraph 3. See also Broekema, Marc.; Adriaanse, Jan, "Valuation Ambiguities under the European Directive on Preventive Restructuring Frameworks: Insights from the Netherlands", 1 The European Business Valuation Magazine 2022, p 5-6.

[80] Van den Berg, Sebastiaan W.; Holterman, Wim G.M.; Haanappel, Hans, T., "De reorganisatiewaarde onder de WHOA", 10 Tijdschrift voor Insolventierecht 2019, paragraph 3.

[81] Van den Berg, Sebastiaan W.; Holterman, Wim G.M.; Haanappel, Hans, T., "De reorganisatiewaarde onder de WHOA", 10 Tijdschrift voor Insolventierecht 2019, paragraph 3. Van den Berg, Sebastiaan W., *Waarderingsvragen In Het Ondernemings- En Insolventierecht*, Kluwer, Deventer (2017), p 54.

[82] See e.g. District Court Limburg 22 November 2021, ECLI:NL:RBLIM:2021:8857, *JOR* 2022/130. The court did not explicitly mention DCF as an accepted valuation method, but clarified that the assets and liabilities alone per the date of confirmation of a scheme do not determine a company's value, but that the company's future activities (assuming that the scheme is confirmed) are also included in the valuation. See also Den Hollander-Arntz, Joost R.R., "'Opening the black box: Company Valuation and Value Allocation in distress' - Verslag van de najaarsvergadering 2022 van de NVRII", 24 Tijdschrift voor Insolventierecht 2023, p 194.

4.6. Similar to the US, it has been argued in Dutch literature that – strictly speaking – the Reorganisation Value is distinct from Enterprise Value in the sense that it requires various technical adjustments to accurately reflect the value of the business post-restructuring.[83] However, scholars have not yet reached a final landing on this point. Some have argued that the amount of trade credit and operational provisions for admitted creditors should be added to the calculated Enterprise Value to approximate the Reorganisation Value.[84] Others have argued that trade credit should only be included if there is a debt write-down of existing trade credit under the scheme and subsequently (i.e. post-restructuring) new trade credit is made available to the debtor, thereby yielding a concrete cash-in that is available for distribution amongst the capital providers (and, hence, part of the Reorganisation Value).[85]

4.7. Finally, coming back to citations in the introduction of this paper, it is worth noting that – like in the US – various landmark cases on WHOA have demonstrated that valuation is far from an exact science.[86] For instance, in the first large WHOA case in 2021, various parties produced evidence on the debtor's value.[87] The Reorganisation Value submitted by the company was twice as high as produced by the main (secured) creditor. A third valuation produced a value right in the middle, which was subsequently adopted by the court.[88] A similar dynamic was visible in subsequent cases[89] and it is safe to say this dynamic will likely also play a part in future WHOA cases, just as it has done for many years in the US context.

5. Conclusion

5.1. This paper set out to provide a comparative analysis in business valuation methods in restructuring proceedings in the US and The Netherlands. The findings show that the valuation methods between US Chapter 11 and WHOA are very much aligned. Despite the fact that these proceedings have been adopted in two very different legal systems, this is not surprising, as the newly introduced Dutch proceedings were significantly influenced and inspired by the set-up of US Chapter 11.

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[83] Den Hollander-Arntz, Joost R.R., "'Opening the black box: Company Valuation and Value Allocation in distress' - Verslag van de najaarsvergadering 2022 van de NVRII", 24 Tijdschrift voor Insolventierecht 2023, p 196-199.
[84] Van den Berg, Sebastiaan W.; Holterman, Wim G.M.; Haanappel, Hans, T., "De reorganisatiewaarde onder de WHOA", 10 Tijdschrift voor Insolventierecht 2019, paragraph 3.
[85] Den Hollander-Arntz, Joost R.R., "'Opening the black box: Company Valuation and Value Allocation in distress' - Verslag van de najaarsvergadering 2022 van de NVRII", 24 Tijdschrift voor Insolventierecht 2023, p 196-197.
[86] District Court Amsterdam 2 September 2021, ECLI:NL:RBAMS:2021:6521.
[87] Broekema, Marc.; Adriaanse, Jan, "Valuation Ambiguities under the European Directive on Preventive Restructuring Frameworks: Insights from the Netherlands", 1 The European Business Valuation Magazine 2022, p 4-10.
[88] Ibid, p. 7.
[89] See e.g. District Court Zeeland-West-Brabant 26 May 2023, JOR 2023/277.

5.2. As a key takeaway, both proceedings pivot on business valuation, particularly in the context of plan confirmation. Reorganisation Value and Liquidation Value are seen as key concepts to that end in both jurisdictions. For computing the Reorganisation Value of a business, practice shows that professionals largely rely on DCF. In doing so, both proceedings also encounter the same difficulties, in particular around assumptions required to execute these calculations (e.g. regarding the future free cash flows).

5.3. In addition, the concept of Reorganisation Value still seems to be developing. As the anticipated need for financial restructurings increases in light of global economical and geopolitical uncertainties, it is probable that discussions on this topic will equally intensify. Both proceedings already have strong foundations and a proven track record, but there is always room for improvement. Hopefully, this paper will contribute to that further evolution.

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