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New money and WHOA restructuring proceedings

Sebastiaan W. van den Berg[1]

Abstract

This article explores the critical role of 'new money' in Dutch WHOA restructuring proceedings. Based on recent case law and international comparisons the analysis distinguishes between interim financing, which is needed to keep operations running during the restructuring process, and new financing, which is essential for implementing the restructuring plan itself and enabling the company to continue operating *going concern*. The Dutch WHOA, inspired by U.S. Chapter 11 and UK practices, applies a priority rule that requires any value created through restructuring must be distributed fairly among creditors in accordance with their legal rank. New investors can inject capital and receive returns, but only up to the value they contribute, *unless* parties agree otherwise or there is a reasonable ground for deviating from this priority rule. Valuation methodologies, such as the Discounted Cash Flow (DCF) model, are used to determine the 'reorganisation value' – the total distributable value after restructuring, *i.e.* 'post-restructuring value'. Case law illustrates how Dutch courts balance the interests of existing creditors and new financiers, sometimes permitting changes in creditor ranking or security rights to facilitate investments. Ultimately, the WHOA framework provides a transparent, equitable, and flexible environment for restructuring. After almost five years since its enactment, it is our observation that the WHOA contributes to the success of consensual out-of-court restructurings, as intended by the Dutch legislator when drafting the WHOA. This development not only enables successful recoveries but also strengthens the Dutch insolvency system, offering a robust solution for companies facing financial distress.

Key words: WHOA, Reorganisation Value, New Money, Investment Strategy

1 Sebastiaan van den Berg is a lawyer and partner at RESOR N.V., a law firm in Amsterdam specialized in cross-border restructuring and insolvency. He holds master's degrees in financial economics and law from the Erasmus University in Rotterdam, and an executive master of M&A and valuation of (now) the University of Groningen Business School. In 2019, Sebastiaan completed his PhD dissertation on *Valuation Issues in Dutch Corporate and Bankruptcy Law* at the University of Nijmegen, the Netherlands. This article is completed in October 2025.

1. Overview

1. In this article, we analyse the role of 'new money' in the context of WHOA[2] restructuring proceedings. After a brief introduction about new money in recent UK case law (section 2), we explore the definition of new money and distinguish between (a) new funding that is needed to meet the payment obligations during a WHOA restructuring process, and (b) funding required for the implementation of the WHOA restructuring plan (section 3). As the Dutch WHOA is inspired by, amongst others, U.S. Chapter 11 proceedings, a high-level overview of the new value doctrine is presented (section 4), which is followed by an overview of the relevant WHOA sanctioning requirements (section 5). This background facilitates going into the concept of post-restructuring going concern value (section 6), and the (mathematical) relation with new money (section 7). Also, but only to the extent relevant for the purpose of this article, we explain the ruling in the IHC case[3] (section 8). This analysis will be followed by possible investor strategies (section 9). A brief summary then concludes (section 10).

2. Introduction

2. A central feature of the Petrofac restructuring plans under Part 26A of the UK Companies Act 2006 was the provision of new financing for the restructured group. This comprised an investment of 'New Money' of US$350 million, divided into two parts: US$131.25 million would be provided by way of loan in exchange for 'New Money Notes' issued by a wholly-owned indirect subsidiary of the plan company, with the benefit of a guarantee and security package, and paying interest at a rate of 9.75% per annum; and US$218.75 million would be provided in exchange for 'New Money Equity', which comprised new ordinary shares in the plan company. There were numerous ways in which the return on the New Money could be presented. In its closing argument the plan companies provided a table that showed the overall return upon the investment of all the New Money would be US$939,343.036 (~211.7% return on the sums invested). So far as the participating Senior Secured Funded Creditors were concerned, for an investment of US$187.5 million of New Money, they

2 Act on Court Confirmation of Extrajudicial Restructuring Plans (*Wet Homologatie Onderhands Akkoord*), generally referred to as WHOA, and part of the Dutch Bankruptcy Act (DBA) (*Faillissementswet*).

3 Dutch Supreme Court 25 October 2024, ECLI:NL:HR:2024:1533; also see: F.M.J. Verstijlen, 'Financing a restructuring in the Netherlands after Rabobank v. IHC', *European Insolvency and Restructuring Journal,* 5 October 2025.

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would receive equity and debt with a value of approximately US$500.2 million (~266.8% return).[4]

3. Although the High Court of Justice sanctioned the Petrofac plans,[5] the Court of Appeal concluded, amongst others, that the plan companies failed to justify the returns granted in respect of the New Money. Due to absent evidence of the market rates, it could only be speculated as to what part of the return on the New Money would be fair.[6] The Court of Appeal considered that one way of demonstrating the fairness, could be by providing (expert) evidence (of market testing) to demonstrate why the returns generated by the restructuring fairly reflect the cost at which funding could have been obtained in the market.[7] Consequently, the Court of Appeal set aside the judge's order sanctioning the restructuring plans, which is in addition to the Adler-case, the second time that an appeal has been successful.[8] Although Petrofac has applied to the UK Supreme Court for leave to appeal the reversal of its plan, parties reached a consensual deal (11 September 2025).[9] In the meantime, in another case, Waldorf Production has received permission to appeal directly to the UK Supreme Court (and thus bypassing the Court of Appeal), following the High Court's refusal to approve Waldorf's restructuring plan earlier this year.[10]

4. Thus, several plans that were initially approved have since been overturned on appeal.[11] In short, one reason for the experienced uncertainty in the English system is the question of how to distribute the value post-restructuring. In this context, it is memorised that the conclusion that the High Court has jurisdiction to sanction a plan which requires a cross-class cram down does not signify that

4 Saipem SPA & Ors v Petrofac Ltd & Anor [2025] EWCA Civ 821 (01 July 2025).
5 Petrofac Ltd, In the Matter Of [2025] EWHC 1250 (Ch) (20 May 2025).
6 Expert reporting could substantiate whether the terms are (considerably) more favourable terms (as regards interest rates and arrangement fees, and as regards the capitalisation of accruing liabilities) than would be available in the market. See, *e.g.*, River Island Holdings Ltd, In the Matter Of [2025] EWHC 2276 (Ch) (04 September 2025), par. 11; Thames Water Utilities Holdings Ltd, Re [2025] EWHC 338 (Ch) (18 February 2025), par. 251; Strategic Value Capital Solutions Master Fund LP & Ors v AGPS BondCo PLC (Re AGPS BondCo PLC) [2024] EWCA Civ 24 (23 January 2024), par. 169.
7 Petrofac Ltd, In the Matter Of [2025] EWHC 1250 (Ch) (20 May 2025), par. 167, 168 and 186.
8 Re AGPS Bondco Plc, [2024] EWCA Civ 24. Re Thames Water Utilities Holdings Limited EWCA Civ 475 is a Court of Appeal case that upheld the High Court's sanctioning of Thames Water's restructuring plan.
9 https://tools.eurolandir.com/tools/Pressreleases/GetPressRelease/?ID=7797921&lang=enGB&companycode=uk-pfc&v=
10 Waldorf Production UK PLC, Re [2025] EWHC 2181 (Ch) (19 August 2025); Waldorf Production UK PLC, In the Matter Of [2025] EWHC 2297 (Ch) (09 September 2025).
11 Re AGPS Bondco Plc, [2024] EWCA Civ 24 (Adler); Saipem and others -v- Petrofac, [2025] EWCA Civ 821.

it should exercise that jurisdiction. The satisfaction of those threshold conditions A and B (as explained in the footnote) opens up the exercise of the discretion to approve the restructuring plan notwithstanding its failure to secure the approval of all classes.[12] The High Court then needs to consider whether to exercise its discretion to sanction a plan.[13] I also understand it is generally concluded that this 'discretionary test'[14] under the UK Companies Act 2006 contains that it should be demonstrated that the benefits preserved or generated by the plan,[15] *i.e.* the 'post-restructuring value', are shared fairly between the plan creditors.[16]

12 See *e.g.*, Waldorf Production UK PLC, Re [2025] EWHC 2181 (Ch) (19 August 2025), par. 86; Poundland Ltd, In the Matter Of [2025] EWHC 2755 (Ch) (24 October 2025), par. 53; River Island Holdings Ltd, In the Matter Of [2025] EWHC 2276 (Ch) (04 September 2025), par. 42; Section 901G of UK Companies Act 2006 materially provides as follows:
"(1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.
(2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.
(3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).
(4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.
(5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summons under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative."

13 See *e.g.*, Waldorf Production UK PLC, Re [2025] EWHC 2181 (Ch) (19 August 2025), par. 135.

14 See *e.g.*, S. Paterson, 'Judicial Discretion in Part 26A Restructuring Plan Procedures', January 24, 2022, available at SSRN: https://ssrn.com/abstract=4016519; R. Mokal, 'The court's discretion in relation to the Pt 26A cram down', *Butterworths Journal of International Banking and Financial Law*, January 2021; Explanatory Notes to the Corporate Insolvency and Governance Act 2020, par. 25 and 190.

15 Re AGPS Bondco Plc, [2024] EWCA Civ 24 (Adler), par. 160 and 161; Waldorf Production UK PLC, Re [2025] EWHC 2181 (Ch) (19 August 2025), par. 149.

16 R. Mokal, 'The court's discretion in relation to the Pt 26A cram down', *Butterworths Journal of International Banking and Financial Law*, January 2021; Re Virgin Active Holdings Ltd [2021] EWHC 1246 (Ch), par. 226, 242 and par. 255 (*"[the court] would also have to look closely at whether the dissenting class received a share of the value of the enterprise that was preserved by the plan that was in some way proportionate or comparable to the compromise that they were being asked to make. That is not, however, the instant case."*).

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5. Under the English system,[17] there is no priority rule based on the American Absolute Priority Rule, but one of the factors (condition A) considered is whether a creditor is better off compared to the 'relevant alternative': the proceeds in the hypothetical scenario if the plan is not approved.[18] However, this insight does not yet answer the question of how the reorganisation surplus is distributed (as is tested in the WHOA). Initially, it seems that this element did not play a major role,[19] or that English judges only recently received sanctioning requests where this element played a more decisive role.[20]

6. The English assessment framework is gradually being shaped based on case law, but for the time being it seems that it is less clearly defined than the judicial assessment of the Dutch priority rule. Under Dutch WHOA restructuring proceedings, imposing a plan on dissenting classes of creditors or shareholders requires that the dissenting class has the ability to receive its share of the post-restructuring value in accordance with its legal rank (the Dutch priority rule).[21] It is thus insufficient to conclude that the dissenting class is no worse off under the WHOA plan. In the Dutch doctrine, this post-restructuring value, *i.e.* the value that is available for allocation to the pre-WHOA existing claimants is called the 'reorganisation value'.[22] In practice, the Dutch priority rule works well as a mathematical distribution rule with the necessary flexibility. The Dutch priority rule has led to less discussion and legal uncertainty than we currently see with the equivalent in the UK, which is potentially also

17 See *e.g.*, S. Paterson, 'Chapter 14: UK restructuring in the last decade: key developments and emerging themes', in: S.W. van den Berg, L. Janssen & I.J. Romo (ed.*), Cross border restructuring & insolvency 2012-2022: cases and developments. For the 10th anniversary of the International Insolvency Institute's Next Gen Leadership Program* (Law of Business and Finance volume 24), Deventer: Wolters Kluwer 2023.

18 Section 901G(4) of the Companies Act 2006. See also: S.A.J. van Rossum, Court of Amsterdam 21 March 2024, ECLI:NL:RBAMS:2024:1608, *JOR* 2024/177.

19 See *e.g.*, Re Virgin Active Holdings Ltd [2021] EWHC 1246 (Ch), par. 226, 242 and par. 255 (*"[the court] would also have to look closely at whether the dissenting class received a share of the value of the enterprise that was preserved by the plan that was in some way proportionate or comparable to the compromise that they were being asked to make. That is not, however, the instant case."*).

20 R. Mokal, 'The court's discretion in relation to the Pt 26A cram down', *Butterworths Journal of International Banking and Financial Law*, January 2021; Re Virgin Active Holdings Ltd [2021] EWHC 1246 (Ch), par. 226 and 242; S.W. van den Berg, 'The Meaning of Valuation in Dutch Share Pledge Enforcement Proceedings, the Dutch Scheme and Part 26(A) Plan Proceedings', *International Corporate Rescue*, Volume 19, Issue 5, p. 256; G.Á.C. Orban, 'The Adler Appeal: de verdeling van reorganisatiesurplus in Engelse restructuring plan', *TvI* 2024/24, par. 2.

21 Art. 384(4)(b) DBA.

22 See *e.g.*, S.W. van den Berg, a.o., 'Reorganisation Value and the Dutch Bill on the Confirmation of Private Plans', *International Corporate Rescue*, Volume 16 (2019), Issue 6.

because no appeal is allowed for in respect of both sanctioned WHOA plans, but also WHOA plans that are declined.[23]

7. Because of the increasing UK focus on fair distribution of post-restructuring value as well, the restructuring plan under Part 26A of the UK Companies Act 2006 essentially seems to converge to the Dutch WHOA restructuring proceedings in respect of this specific element of the sanctioning conditions.

3. Conceptual introduction to various forms of new money

8. New money can be required for either the preparation of a restructuring plan, mostly defined as debtor-in-possession (DIP) financing, bridge financing or interim financing. The term 'interim financing' is used in the EU Restructuring Directive,[24] and defined as any new financial assistance, provided by an existing or a new creditor, that includes, as a minimum, financial assistance during the stay of individual enforcement actions, and that is reasonable and immediately necessary for the debtor's business to continue operating, or to preserve or enhance the value of that business.

9. New money can also be required for the purpose of implementing the restructuring plan, either because a certain cash pay-out is part of the plan, or because the business has liquidity requirements that need to be met in order to be able to continue trading after the sanctioning and implementation of the plan. The EU Restructuring Directive defines this form of new money as 'new financing', which means any new funds, any new financial assistance provided by an existing or a new creditor to implement a restructuring plan and that is included in that restructuring plan.

10. Under Dutch law, it is a mandatory requirement that the plan contains, where applicable, a description about the new financing that the debtor wishes to obtain in the context of the implementation of the plan and the reasons why

23 Art. 369(10) DBA; Amsterdam Court of Appeal, 13 February 2024, ECLI:NL:GHAMS:2024:346; The Hague Court of Appeal ECLI:NL:GHDHA:2023:721.

24 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on Restructuring and Insolvency).

this is necessary.[25] In addition, the court shall eventually deny a request to confirm the plan if it is included in the plan that the debtor wants to obtain new financing, while it is reasonably likely that this is not necessary for the implementation of the plan or that the interests of the joint creditors will be materially harmed as a result of the new financing.[26]

11. In this respect, it is noteworthy that the EU Restructuring Directive prescribes that Member States shall ensure that interim financing and new financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor: (a) interim financing and new financing shall not be declared void, voidable or unenforceable; and (b) the grantors of such financing shall not incur civil, administrative or criminal liability, on the ground that such financing is detrimental to the general body of creditors, unless other additional grounds laid down by national law are present.[27]

12. In the WHOA, this led to a new article 42a (*protection of security*) DBA that provides that a bankruptcy trustee in subsequent bankruptcy proceedings may not annul a legal act (granting of security rights or otherwise) performed after the debtor has submitted a WHOA opening declaration (*startverklaring*) as meant in article 370(3) DBA or after the court has appointed a restructuring expert under article 371 DBA, if the court, upon the debtor's request, has granted prior approval of that legal act. This 42a protection is thus limited to interim financing only. The court shall grant the requested approval if, at that time, it can reasonably be assumed that entering into the interim financing agreement is necessary to either (1) continue the debtor's business during the preparation of a WHOA plan, or (2) to prepare, put to vote or have approved a WHOA plan; and this interim financing would be in the interests of the joint creditors and would not materially prejudice the interests of any individual creditors.

13. Although the EU Restructuring Directive provides for the possibility that EU Member States may provide that grantors of interim financing or new financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have

25 Art. 375(1)(i)1° DBA.
26 Art. 384(2)(f)1° DBA.
27 Article 17 EU Restructuring Directive.

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superior or equal claims, under Dutch law and especially article 42a DBA, there is no possibility to grant such 'priming liens' in respect of interim financing.

14. In 2024, the Dutch Supreme Court did, however, rule that the WHOA plan itself does allow for the offering of a plan that changes the order of priority applicable to the creditors bound by such plan.[28] This does not only apply to a change in the contractual ranking – such as the amendment of an Intercreditor Agreement – but also to an adjustment of the property law ranking between the creditors,[29] for example by granting a new financier a security interest in combination with a reduction in the ranking of the security interests of existing creditors. This too constitutes a change in the rights of the creditors as allowed for under a Dutch WHOA plan.

4. U.S. Chapter 11 proceedings, APR and the new value exception

15. The WHOA is inspired by Chapter 11 of the U.S. Bankruptcy Code and my understanding thereof is as follows. Under the U.S. Chapter 11 proceedings, the *Absolute Priority Rule* requires that senior classes of claims must be paid in full prior to junior classes receiving any distributions under the plan. This means that equity holders cannot retain or receive new equity in the reorganised debtor unless all creditors are paid in full under the plan. This general rule predates the Bankruptcy Code and finds its origins in the equity receiverships of the early 1900s. As the U.S. Supreme Court explained, *"creditors [are] entitled to be paid before the stockholders could retain [equity] for any purpose whatever."*[30]

16. A question that arises in the context of equity holders and the absolute priority rule is whether equity holders can retain equity in the reorganised debtor. This potential exception to the absolute priority rule is commonly called the 'new value exception or corollary'.[31] The principle is that, although being out of the money, an existing shareholder may retain a financial position if it contributes

28 Dutch Supreme Court, 25 October 2024, ECLI:NL:HR:2024:1533; also see: F.M.J. Verstijlen, 'Financing a restructuring in the Netherlands after Rabobank v. IHC', *European Insolvency and Restructuring Journal,* 5 October 2025.

29 Under Dutch law, there is only one reason why a creditor can take precedence over unsecured creditors in the distribution of proceeds from foreclosure, and that is priority. Priority, in turn, has three sources: pledge and mortgage rights, privileges, and other grounds specified under Dutch law.

30 *ABI Commission to study the reform of Chapter 11* (2012-2024), p. 225.

31 N. Pac. Ry. Co. v. Boyd, 228 U.S. 482 (1913).

new money or new value for that interest on market terms. In *203 North LaSalle*, the U.S. Supreme Court held: *"A debtor's pre-Bankruptcy equity security holders may not, over the objection of a senior class of impaired creditors, contribute new capital and receive ownership interests in the reorganised entity, when that opportunity is given exclusively to the old equity security holders under a plan adopted without consideration of alternatives."*[32]

17. My understanding is that lower courts have adopted different approaches to assessing this potential exception,[33] but that courts and commentators generally have interpreted 203 North LaSalle as requiring a 'market test' or 'equity auction' before a court confirms a Chapter 11 restructuring plan in which equity holders retain or receive equity in the reorganised entity in violation of the absolute priority rule.[34] Courts do not, however, necessarily agree with regards to the parameters of this market test or the minimum process required to satisfy the 203 North LaSalle standard. In fact, some courts appear to limit the potential market tests to the two examples identified by the U.S. Supreme Court in 203 North LaSalle – *i.e.*, a competing Chapter 11 plan or competitive bidding.[35]

18. In 2014, the American Bankruptcy Institute (ABI) Commission determined that Chapter 11 reorganisations would benefit from further clarity on the new value doctrine. It agreed that codifying the new value doctrine as an expressed exception to the absolute priority rule and identifying the key elements of the exception would enhance the confirmation process in many cases. Accordingly, the ABI Commission recommended a statutory new value doctrine that required (i) new money or money's worth; (ii) in an amount proportionate to the equity received or retained by prepetition equity security holders; and (iii) that would be subject to a 'reasonable' market test. The ABI Commission

32 See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 458 (1999).

33 N. Pac. Ry. Co. v. Boyd, 228 U.S. 482 (1913).

34 See, *e.g.*, In re Castleton Plaza, LP, 707 F.3d 821 (7th Cir. 2013) (rejecting new value plan because lack of market competition prevented court from being able to test purported new value in exchange for grant of 100 percent of reorganised equity to insider in violation of absolute priority rule). See also R.J. Keach, 'LaSalle, The "Market Test" and Competing Plans: Still in the Fog', *Am. Bankr. Inst. J.*, Dec. 2002, at 18 (2002).

35 See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 458 (1999) *("Whether a market test would require an opportunity to offer competing plans or would be satisfied by a right to bid for the same interest sought by old equity is a question we do not decide here."*). See also In re Situation Mgmt. Sys., 252 B.R. 859, 861, 865 (Bankr. D. Mass. 2000) (rejecting new value plan *"was not confirmable in the absence of competitive bidding for the equity interests to determine the adequacy of the new value contribution"*).

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declined to define an appropriate market test; rather, it believed that courts should make this determination based on the facts, the evidence presented, and what would be reasonable in the particular case before the court.[36]

5. WHOA sanctioning requirements and the Dutch priority rule

19. The financial requirements of a WHOA plan essentially boil down to the following two tests: (i) the best interest of creditors or no worse off test, which is based on the liquidation value, and (ii) the Dutch priority rule in respect of a cross-class cram down scenario.[37]

5.1. WHOA – best interest test

20. The Dutch court may refuse to confirm the plan, at the request of one or more creditors or shareholders who did not approve the plan or who were wrongly excluded from the vote,[38] if there is *prima facie* evidence that these creditors or shareholders will be worse off under the plan than they would have been in a liquidation of the debtor's assets in bankruptcy.[39]

21. Liquidation value is therefore defined as the expected proceeds that can be realised from a liquidation of the assets of the debtor in bankruptcy.[40] It depends on the hypothetical liquidation scenario to which valuation standard should be applied. For example, it could be a (partial) sale of the company, *i.e.* a (partial) distressed going concern perspective, or the liquidation of the company and sale of all assets by means of an auction or otherwise, i.e. a (partial) piece meal sale perspective.[41]

36 ABI Commission to Study the Reform of Chapter 11, p. 226.

37 Only creditors or shareholders of which the rights are amended under the plan, are entitled to vote. Art. 381(2) DBA.

38 Art. 384(3) DBA.

39 Art. 384(3) DBA.

40 Art. 375(1) under f DBA.

41 See also Recital 52 of the EU Restructuring Directive: *"Satisfying the 'best-interest-of-creditors' test should be considered to mean that no dissenting creditor is worse off under a restructuring plan than it would be either in the case of liquidation, whether piecemeal liquidation or sale of the business as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not to be confirmed."*

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22. In respect of the best interest test, the WHOA court seems to follow the U.S. system, where the focus is on the estate of solely the debtor.[42] For determining the liquidation value for the purpose of the best interest test, it has been considered in Dutch case law that only the value of the WHOA-debtor/ the company has to be taken into account, which in the event of bankruptcy consists of the liquidated assets of (only) the debtor.[43]

23. There are at least two reasons for this approach: first, focusing on interests and sources of value outside the assets of the debtor is impractical. A plan of reorganisation cannot account for all interests of those who have claims against the debtor. To do so would require an endless inquiry into the various interests of every party and the indirect effects of every decision.[44]

24. Second, focusing on outside sources of value when conducting the best interest test undermines the fundamental purpose of the WHOA plan. For example, consider a single creditor who also holds financial instruments that only pay out if the debtor's business liquidates. If the WHOA includes those payouts in the liquidation value, a plan of reorganisation might be rejected even in situations where that plan would maximise the value of the debtor's assets and benefit the creditors as a whole. That would not be in accordance with the underlying purpose of the WHOA. The same applies for a third-party guarantee. No additional economic value is created nor is any going concern value in respect of the WHOA debtor preserved when the guarantee is paid out. It is only a redistribution of wealth, from the guarantor to the guaranteed party. Using that distribution as a floor on plan recovery does nothing to preserve value of the debtor's estate for the benefit of the creditors as a whole, and it may even encourage value-destroying liquidations and undermine the collective nature of the WHOA plan.

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42 See D.G. Baird, A.J. Casey, & R.C. Picker, *The Bankruptcy Partition,* 166 U. Penn. L. Rev.1675, 1680 ("*The bankruptcy trustee (or, as is most often the case in Chapter 11, the debtor in possession) is charged with ensuring the most value is obtained from the assets of the estate without regard to how doing this affects the outside interests of the creditors.*").

43 District Court of Limburg, 8 October 2021, ECLI:NL:RBLIM:2021:8851, par. 3.3.21: "*When assessing the grounds for rejection discussed here, the only question is whether Aspen's claim against the guarantor in the event of bankruptcy should be taken into account when answering the question of whether Aspen would be better off in bankruptcy than under the agreement (...) When making that assessment, only the value of the company should be taken into account, which in the event of bankruptcy consists of the liquidated assets of (only) the debtor.*" [informal translation]

44 See D.G. Baird, A.J. Casey, & R.C. Picker, *The Bankruptcy Partition,* 166 U. Penn. L. Rev.1675, 1681.

25. For example, imagine a debtor with EUR 100 million of unsecured debt. A plan of reorganisation creates reorganisation value of EUR 30 million (30% recovery). A liquidation scenario realises EUR 10 million (10% recovery). It is without doubt that from an economic and bankruptcy perspective one should opt for the reorganisation plan. But what if one of the creditors, with a small claim (for example EUR 100.000) has a guarantee claim against a third party, which guarantee will pay out in full in the liquidation scenario? In case this entitlement is included for the purposes of the best interest test, that creditor has the power to veto the plan – which liquidation scenario will destroy EUR 20 million of value – unless it is paid an additional EUR 90.000. Actually, not only this creditor but all creditors have an incentive to secure similar guarantees to create their own veto rights. The collective nature of the WHOA procedure, like the U.S. Chapter 11 procedure, is intended to *protect* the collective creditors from such self-interested demands.[45]

5.2. WHOA – Dutch priority rule

26. In addition to the best interest test, the WHOA plan can also be imposed upon any dissenting class. This confirmation is subject to conditions that may be invoked at the request of one or more dissenting capital providers from a dissenting class.[46] The key principle is that the value realised under the plan must be distributed across the different classes under the plan in accordance with their statutory or contractual order of priority (Dutch priority rule).[47] An important nuance to the Dutch priority rule is that deviation of said rule is allowed for, *if* there are reasonable grounds for such deviation and the interests of the dissenting creditors or shareholders are not prejudiced by it.

27. In addition, creditors of a dissenting class should be given the right to opt for a cash payment in the amount they would have expected to receive in cash in a liquidation of the debtor's assets in bankruptcy.[48] This no worse off test therefore does not only apply in case of consenting classes. Note that this 'cash-out' right does not apply to creditors that have priority arising from a right of pledge or mortgage.[49] Although those secured parties do not have a cash-out right, they cannot be forced to accept a plan that gives them shares or depositary receipts of shares without the right to opt for a distribution in a

45 See: Legislative History (*Kamerstukken II*) 2018/19, 35 249, nr. 3, p. 6, 31, and 71.
46 The voting threshold is 2/3 in value (art. 381(6) DBA); no headcount applies.
47 Art. 384(4) under b DBA.
48 Art. 384(4) under c DBA.
49 Art. 384(4) under c and d DBA.

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different form.[50] In practice and with a view on analysing whether a 'cross-class cram down' would be a realistic scenario, the most important test is whether the dissenting class is out of the money on the basis of the reorganisation value. If this is the case, the out of the money dissenting class can vote against the plan, but the WHOA court will then be in a position to apply the cross-class cram down measure.

28. To conclude, imposing a plan on dissenting classes of creditors or shareholders requires that the dissenting class has the ability to receive its share of the post-restructuring value in accordance with its legal rank. This makes the post-restructuring or plan value of the essence. Ignoring controlled wind-down schemes the plan value is the enterprise value, based on a going concern business case, of the reorganised debtor with a restructured capital structure: the 'reorganisation value'.[51] Especially in the larger WHOA (private) restructuring proceedings, the operational creditors are categorially left out of the WHOA plan. This impacts the relevant valuation, which will be explained in the next chapter.

6. From enterprise value to reorganisation value[52]

29. The enterprise value, as known in the field of *Mergers & Acquisitions*, based on the Discounted Cash Flow (DCF) model, is equal to the present value of the free cash flows available to all capital providers computed at the weighted average cost of capital (WACC) of the firm. When determining the total enterprise value, the free cash flows available to – solely – interest-bearing debt and equity providers, is calculated.[53]

30. The free cash flows (FCF) are, amongst others, affected by the change in operating working capital. Operating working capital is equal to the current operating assets minus the current operating liabilities. If the operating working capital increases, this will reduce the free cash flow and lower the enterprise

50 Art. 384(4) under d DBA.

51 See for a more in-depth overview of the calculation of the reorganisation value and the difference with the enterprise value: S.W. van den Berg, a.o., 'Reorganisation Value and the Dutch Bill on the Confirmation of Private Plans', *International Corporate Rescue*, Volume 16, Issue 6.

52 This section is a summarised version of the respective section in: H.T. Haanappel & S.W. van den Berg, 'Reorganisation Value Under the Dutch WHOA', in: J.A.A. Adriaanse a.o., *Valuation for Insolvency Practitioners*, INSOL International (2025).

53 T. Koller a.o., *Valuation, measuring and managing the value of companies*, John Wiley & Sons, Inc., 2025, 8th edition, p. 184.

value. For example, if operating creditors are paid (leading to a cash out), this will lead to an increase in working capital which lowers the free cash flow, thereby negatively affecting the enterprise value. In M&A, working capital is frequently normalised or adjusted by buyers in order to protect themselves against any decreases in the value of the target company (or a depletion in its working capital) during the period between the date the target company was initially valued (for signing purposes) and closing.

31. Despite the beforementioned purchase price adjustment, a purchase price based on a 'debt and cash free' principle does not take into account operational creditors as debt, hence the DCF-model assumes that, going forward, the non-interest-bearing trade creditors (existing at the time of sanctioning the plan) will be paid on the basis of the normal working capital cycle. They are not refinanced at closing, therefore their claim is already captured in the enterprise value.

32. Again, and to emphasise because of its importance, the total enterprise value indicates what value (*i.e.* the sum of the discounted free cash flows) can be distributed to – solely – interest-bearing debt and equity providers. This means that an adjustment is required for restructuring purposes, as for example for the Dutch priority rule it is in principle required to have insight in the total value that is distributable to all creditors and shareholders. For this purpose, the M&A parameter of enterprise value does not give sufficient insight. The required adjustment is illustrated by two approaches.

6.1. EV adjustment – approach 1

33. The first approach is to correct the enterprise value by means of adding the value that would otherwise be contributed to the trade creditors. This amendment then results in the reorganisation value available to all creditors, including the trade creditors.

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Approach 1	2024	2025	2026	2027	2028	2029	2030	2031	CV
NOPLAT	50	50	50	50	50	50	50	50	500
Capex = depr	0	0	0	0	0	0	0	0	
Change in trade creditors	0	0	0	0	0	0	0	0	
Free Cash Flow	**50**	**50**	**50**	**50**	**50**	**50**	**50**	**50**	**500**
Discount rate	0,95	0,87	0,79	0,72	0,65	0,59	0,54	0,49	0,49
Present Value	**48**	**43**	**39**	**36**	**33**	**30**	**27**	**24**	**245**
Trade creditors BoP	320	320	320	320	320	320	320	320	
Trade creditors EoP	320	320	320	320	320	320	320	320	
Enterprise value	524								
Trade creditors BoP	320								
Reorganisation value	**844**								

34. Starting with the Net Operating Profit Less Adjusted Taxes (NOPLAT) figure of EUR 50 million, capital expenditures (in this example set at zero) are deducted and corrected for the change in working capital. For illustration purposes, other components of working capital are ignored. The change in trade creditors is zero (see trade creditors at the End of the Period (EoP) minus the trade creditors at the Beginning of the Period (BoP)). This means that during the year the trade creditors (amounting to EUR 320 million) existing before the restructuring plan are actually paid (leading to a cash out of EUR 320 million) and that new trade creditors will deliver goods or services, leading to a new balance of trade creditors at the end of the period, in this example set at EUR 320 million, as well. Note that the amount of expected future trade creditors can deviate from the amount of existing trade creditors/existing claimants at the day of sanctioning the plan. This of course has an impact on the reorganisation value.

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35. As illustrated above, the sum of ~EUR 280 million of FCF discounted at the WACC (assumed to be 10% applying mid-period discounting convention), plus ~EUR 245 million of present terminal value, leads to the present value (PV FCF) or enterprise value of ~EUR 524 million. This is the enterprise value of the company, available only for shareholders and holders of interest-bearing debt. In order to assess the amount of value that can be distributed to all the claimants existing before sanctioning the scheme, an adjustment is required. Namely, for distribution or valuation purposes the amount of EUR 320 million should first be added to the enterprise value of EUR 524 million, totalling a reorganisation value of EUR 844 million, before trade creditors are granted a certain debt instrument with an entitlement of the reorganisation value in accordance with their rank.

6.2. EV adjustment – approach 2

36. There is an alternative mathematical approach that leads to approximately the same outcome (*i.e.* a reorganisation value of approximately EUR 844 million as per the previous example). This is illustrated by assuming that the scheme or restructuring plan provides the debtor with a 'fresh start', resulting in a starting position of zero trade creditors. Thus, the trade creditors that existed at the date of the sanctioning of the plan are set to zero in the forecast. The increase in new trade creditors from EUR 0 to EUR 320 in year one, increases the free cash flow in year one thereby increasing the enterprise value. By considering a fresh start in respect of the position of operating creditors at the date of sanctioning the plan, the DCF model provides an immediate reorganisation value of EUR 829 million (sum of EUR 584 million of FCF discounted at the WACC, plus EUR 245 million of present terminal value). This is illustrated as follows:

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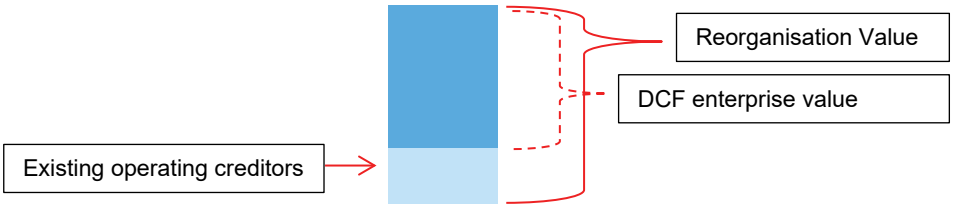
Approach 2	2024	2025	2026	2027	2028	2029	2030	2031	CV
NOPLAT	50	50	50	50	50	50	50	50	500
Capex = depr	0	0	0	0	0	0	0	0	
Change in trade creditors	320	0	0	0	0	0	0	0	
Free Cash Flow	**370**	**50**	**50**	**50**	**50**	**50**	**50**	**50**	**500**
Discount rate	0,95	0,87	0,79	0,72	0,65	0,59	0,54	0,49	0,49
Present Value	**353**	**43**	**39**	**36**	**33**	**30**	**27**	**24**	**245**
Trade creditors BoP	0	320	320	320	320	320	320	320	
Trade creditors EoP	320	320	320	320	320	320	320	320	
Reorganisation value	**829**								
Difference	-15								

37. There is a difference of EUR 15 million in reorganisation value between the EUR 844 million under approach 1 and the EUR 829 million under approach 2. This is explained by a discounting effect of EUR 15 million, as under approach 2, the inflow of EUR 320 million from the new trade creditors is implicitly assumed to happen after six months as a consequence of the application of the mid-period discounting convention (*i.e.* EUR 320 million divided by (1 + WACC)^0,5)). As in reality the inflow of these new trade creditors occurs much faster than six months (probably in month one and two), approach 1 appears to be a more accurate way to determine the reorganisation value.

38. The analysis above leads to the following result:



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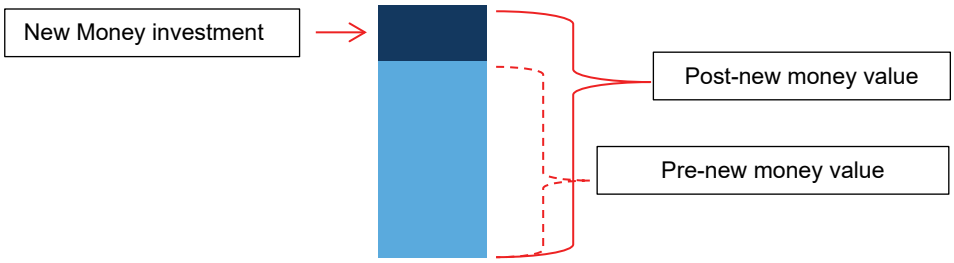
7. Effect of new money on enterprise and reorganisation value

39. The outcome of both the enterprise value and reorganisation value analysis is what is called a 'pre-money' valuation. Thus, the outcome of the DCF-model results in a valuation *before* new money is invested in the company. In its application, the DCF-model thus assumes that any future liquidity requirements will be funded by some kind of financing in the future. Without additional financing, however, the company will once again find itself in financial difficulties. On the basis of the cash flow forecast, it will therefore be necessary to determine how much new money is required to implement the recovery plan. The financing deemed necessary for the implementation of the (recovery) plan increases the post-money value. The same effect occurs (of course) in a company that is not experiencing financial difficulties: new money will also lead to a higher post-money enterprise value in that case. The fact that there may be any future liquidity requirement does not affect the current present value of the free cash flows, *i.e.* the outcome of the enterprise DCF-model.

40. To summarise, post-money value = pre-money valuation + new money.[54]

41. Conceptually, this can be shown as follows:



54 A. Damodaran, *Valuing Young, Start-up and Growth Companies: Estimation Issues and Valuation Challenges* (12 June 2009), p. 16.

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42. From time to time this leads to confusion because it is sometimes said that the value can only be created because of the investment of new money, consequently the new money should, in that line of reasoning, be deducted from the calculated enterprise value. The reason why this line of reasoning is flawed is that this does not take into account that the enterprise value is only the present value sum of all the cash flows. This can be best illustrated by a simplified DCF-model.

43. Below, it is illustrated that the sum of the future cash flows amounts to a *pre-money* present value/enterprise value at the beginning of 2025 of EUR 100 million. This is based on a cash outflow, a deficit, of EUR 10 million in the first year (2025).

	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	Continuing Value
Free Cash Flow	-10,0	12,0	12,0	12,0	12,0	12,0	12,0	12,0	12,0	12,0	120,0
WACC 10%	0,9	0,8	0,8	0,7	0,6	0,6	0,5	0,5	0,4	0,4	0,4
Present Value (FCF)	-9,1	9,9	9,0	8,2	7,5	6,8	6,2	5,6	5,1	4,6	46,3
Total value beginning 2025	100,0										

44. Because of this forecasted cash outflow and in order to prevent bankruptcy proceedings in year 1, new money needs to be invested. Investing this amount of EUR 10 million will basically directly, but for a short moment in time, create a sort of excess cash position of EUR 10 million. At that moment in time, *i.e.* before the cash outflow, there is a *post-money* valuation of EUR 110 million (pre-money valuation of EUR 100 million + new money investment of EUR 10 million). Subsequently, during 2025, the cash will be used, hence the expected cash outflow of EUR 10 million.

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45. After this year, so at the beginning of 2026, the cash outflow of EUR 10 million is no longer relevant: this amount of money has been used for cash flow purposes and the operation of the company, preventing the bankruptcy scenario. This will result in the following valuation at the beginning of 2026:

	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	Continuing Value
Free Cash Flow		12,0	12,0	12,0	12,0	12,0	12,0	12,0	12,0	12,0	120,0
WACC 10%		0,9	0,8	0,8	0,7	0,6	0,6	0,5	0,5	0,4	0,4
Present Value (FCF)		10,9	9,9	9,0	8,2	7,5	6,8	6,2	5,6	5,1	50,9
Total value beginning 2026	120,0										

46. Consequently, because there is no longer a cash-outflow expected, the total value at the beginning of 2026 is higher than the total value at the beginning of 2025. Not only with EUR 10 million, but actually with EUR 20 million. This is because the discounting effect is less significant compared to the valuation at the beginning of 2025. Due to these two reasons, the total value at the beginning of 2026 increases from EUR 100 million to EUR 120 million.

8. New money and the Dutch priority rule under the WHOA

47. If the outcome of the pre-money DCF valuation, as explained above, is higher than the liquidation value, the WHOA plan has added value for the joint creditors of the WHOA-debtor. If, in the context of a restructuring plan, new money is inserted to secure the financing of future liquidity requirements and accordingly, financial instruments (*i.e.* debt or equity instruments) are allocated to these new providers of capital, the contribution to these new financial instruments is in principle not available for distribution to the pre-WHOA existing claimants. Although this new capital may be needed to implement the restructuring plan, this new capital does and may not become available to the existing claimants; it becomes available to the providers of the new capital. They will – without further negotiations – in principle be entitled to 100% of the value provided to the debtor. By making the WHOA plan possible, and basically

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creating the reorganisation surplus, the fact that new money is invested does (indirectly) add value to the existing claimants. Without this, the debtor would not have been able to execute the restructuring plan and realise the reorganisation value.

48. The result of the above is that, because all existing claimants are entitled to their fair share (*i.e.* in accordance with their legal rank) of the reorganisation value, new money providers can – without a consensually agreed deviation therefrom – not receive more than the value of their financing amount. Provided that dissenting classes would have objected against the respective plan, and for a comparative analysis, the Petrofac Restructuring Plans in a WHOA restructuring proceedings could then not be sanctioned.

49. As an example, imagine a company with 60 senior debt and 40 junior debt, a reorganisation value of 70 (which is pre-money, as explained above), a funding requirement of 20 and an investor willing to become 100% shareholder for investing the required 20. In principle, 70 is available for the claimants, this value should be distributed in accordance with the rank of all these claimants (provided they do not accept a deviation of said ranking, or in case there is no reasonable ground for such a deviation). *If* the investor will receive more than 20 in value *against* the will of said dissenting debt holder, who collectively need to write down their claim by 30 (in order to total 70), this will be a deviation from the Dutch priority rule – and a 'reasonable ground' should be provided for such a deviation.

50. If the pre-money value exceeds the amount of the existing debt (and therefore a value of shares is still considered to exist after confirmation of the plan),[55] it is not possible to compulsorily withdraw the shareholder's existing shares. The 'expropriation' of shares that have value is a violation of article 384(4)(b) DBA. Pursuant to the Dutch priority rule of article 384(4)(b) DBA and depending on the valuation and the new capital structure, the compulsory settlement will at most lead to a dilution of the existing shareholders (if and when providers of new money are granted new shares).

55 See, *e.g.*, District Court of Amsterdam 5 August 2021, ECLI:NL:RBAMS:2021:6519, par. 10.5.

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51. If, on the other hand, there is based on the reorganisation value no shareholding or equity value, and other classes do not 'gift' any value to the existing shareholder,[56] it is also not in accordance with article 384(4)(b) DBA if a shareholder nevertheless retains shares while a dissenting class is not satisfied in accordance with its rank. As an exception, the law provides that deviations from the statutory ranking to the detriment of a dissenting class of creditors are permitted if there is 'a reasonable ground' for such deviation. Such a deviation involves a redistribution of the reorganisation value available to the capital providers.

52. What constitutes a 'reasonable ground' is not defined by the Dutch legislator. Case law needs to provide further guidance in this respect. In a specific case, the District Court of The Hague considered it reasonable to distinguish between the unsecured part of a bank's claim and other unsecured creditors, because without the bank's involvement, the agreement would not have gone ahead; bankruptcy would have been inevitable and the creditors in bankruptcy would not have been better off.[57] In another case, the District Court of Limburg considered it unfair if the shareholders were to keep their shares and benefit from the value accumulation resulting from the future activities of the debtors, while the creditors had to take a haircut on their claims and would not benefit from that value creation (apart from any distribution from the profits of the year in question).[58] However, the District Court of Rotterdam ruled that a shareholder could hold its position because it was reasonable to assume that the support of this shareholder, as the sole and therefore crucial shareholder, would continue to be necessary in order to achieve the projected result.[59] The District Court of Midden-Nederland ruled in yet another case that there were reasonable grounds for deviating from the waterfall principle because full satisfaction of the claims of a certain group of creditors (i) prevented considerable turbulence that would jeopardise the continuity of the debtor's business; (ii) prevented these creditors from terminating agreements and reclaiming their goods, thereby enabling the debtor to avoid a reduction in the reorganisation

56 As the Dutch priority rule stipulates that the reorganisation value should be distributed in accordance with everyone's rank, this provides for the possibility that first ranked creditors gift value to third ranked creditors, while second ranked creditors receive their portion of the reorganisation as well. Consequently, under the WHOA there is no explicit rule that prescribes that junior creditors are not entitled to receive any value in case higher ranked creditors are not paid in full.

57 District Court of The Hague, 23 July 2021, ECLI:NL:RBDHA:2021:8121.

58 District Court of Limburg, 22 November 2021, ECLI:NL:RBLIM:2021:8857.

59 District Court of Rotterdam, 9 June 2022, ECLI:NL:RBROT:2022:12156.

value; (iii) prevented additional costs in connection with the conclusion of the agreement (voting procedure) and the distribution to creditors could be avoided; and (iv) moreover, the amount owed by the debtor to this group was limited in relation to the total distribution to the creditors in its agreement.[60] See also the District Court of Gelderland, where the court allowed a group of creditors that could be regarded as compulsory creditors (*dwangcrediteur*) to be excluded from the agreement.[61]

53. In this context, it is questioned whether the Dutch priority rule provides for the possibility of granting the providers of new money security rights that have an effect on the position of the existing claimants. To conclude: yes, the WHOA-plan in principle permits for the granting of security for the providers of new money.[62]

54. In the IHC case, the Dutch Supreme Court considered the following:

> *"Section 370(1) DBA allows for a plan that changes the ranking (in the event of an enforcement procedure) applicable to the creditors bound by the plan. A plan to that effect can, if a creditor invokes the absolute priority rule of Section 384(4)(b) DBA, only be sanctioned if, in short, that creditor belongs to a class that voted in favour of the plan by the required majority, or if there are reasonable grounds for that deviation and the creditor's interests are not harmed as a result."[63] [informal translation]*

55. In the IHC case there was, however, no dissenting class of capital providers,[64] hence – absent a dissenting class – article 384(4)(b) DBA could thus not be invoked by any dissenting creditor. Because this article did effectively not need to be tested in full, it seems likely that the Dutch Supreme Court only shared some high-level considerations in this respect. When taking a deeper dive, and as practitioner Fliek already demonstrated correctly,[65] this consideration is not completely correct, which will be explained below.

60 District Court Midden-Nederland, 31 March 2022, ECLI:NL:RBMNE:2022:1329.
61 District Court of Gelderland, 4 December 2023, ECLI:NL:RBGEL:2023:7127.
62 See also: F.M.J. Verstijlen, 'Financing a restructuring in the Netherlands after Rabobank v. IHC', *European Insolvency and Restructuring Journal*, 5 October 2025, section 11, last paragraph.
63 Dutch Supreme Court, 25 October 2024, ECLI:NL:HR:2024:1533, par. 3.11.
64 District Court of Rotterdam, 9 March 2023, ECLI:NL:RBROT:2023:2800, par. 3.5.
65 See: J.F. Fliek, '124. Het (ontbrekende) toetsingskader voor een wijziging van de rangorde door middel van een WHOA-akkoord', *FIP* 2025/4 (in Dutch only).

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56. The Dutch priority rule sets out requirements relating to the distribution of (reorganisation) value and not to the *form* in which this (reorganisation) value is allocated. Subsequently, it will in our view be possible to distribute a lower ranked debt instrument (*e.g.* compared to the position before the sanctioning of the plan: with a second ranked debt security instead of a thirst ranked position), *provided* that the market value of said (lower ranked) debt instrument has the same value as the legal entitlement of the respective financier. Otherwise, you are not receiving the value to which you are entitled.

57. Once the ranking has been determined, it must be decided whether each class will receive what it is entitled to on the basis of the ranking. In case of a cash payment, this is straightforward. The relevant capital provider should receive a cash amount equal to its claim on the reorganisation value. If creditors are paid in a form other than cash, this essentially means that they are continuing to finance the company, *i.e.* making available money that has already been provided in a form other than that was originally agreed.[66] In case of a distribution in the form of an instrument (a debt instrument or shares), and *provided* there is a dissenting class, it must be determined whether the market value of this equity security is indeed equal to the relevant capital provider's entitlement on the reorganisation value.[67] This means, among other things, that a market-based compensation will have to be offered for, for example, the fact that payments (interest and repayment) are deferred, or that the creditor is given a different security position.

58. Following this line of reasoning, the District Court of Amsterdam in another WHOA case correctly considered the following:

> *"A plan can be used to restructure the claims of both creditors, for example by granting them a debt instrument, but there are also other ways in which the agreement can provide for full satisfaction of the claim. The condition for this is that the present value of what is offered to the creditors is equal to the amount of those creditors' claims. In this case, this means, among other things, that a market-based compensation will have to be offered for, for example, the fact that the interest payments have been and will be rolled up. If and insofar as*

66 Legislative History *(Kamerstukken) II* 2019/20, 35 249, nr. 24.

67 See also: A.M. Mennens, *Het dwangakkoord buiten surseance en faillissement* (diss. Nijmegen), Deventer: Wolters Kluwer 2020, par. 9.6.5.2; N.W.A. Tollenaar, *Het pre-insolventieakkoord* (diss. Groningen), Deventer: Wolters Kluwer 2016, p. 81.

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the present value of what is offered to the creditors concerned under the plan is equal to the amount of their claim, there is no violation of the priority rule."[68] *[informal translation]*

59. Although not explicitly included in the DBA, the fact that the providers of new money can be granted security rights with priority over existing claimants is effectively the indirect adoption of article 17(4) of the EU Restructuring Directive.

9. WHOA Investment Strategies

60. American case examples show that a distressed debt investor may pursue different strategies. Altman, for example, differentiates between three strategies: 'passive' (only trading in debt instruments), 'active' (indirectly, *e.g.*, by means of a role in the creditors committee),[69] or 'active-control' (aimed at a direct stake in the capital structure or the management board of the restructured debtor).[70] One of the more active strategies is the loan-to-own strategy, of which several variants exist in the United States. One variant is the strategy of securing a claim of a secured party, after which: (i) the capital structure is adjusted so that the relevant loan capital is converted into share capital; or (ii) the secured party participates in the bid on the collateral with the aim of purchasing the collateral itself.[71]

61. In the American legal system, credit bidding may be used in variant (ii). Credit bidding means that the secured party offers the property to be sold for an amount not exceeding the outstanding debt owed by the borrower to the lender.[72] Credit bidding can be advantageous for an investor: after the

68 Dutch Supreme Court, 25 October 2024, ECLI:NL:HR:2024:1533, par. 3.11.

69 See for a brief comparative overview of the role and formalities in respect of creditor committees in Canada, United States, Singapore and The Netherlands: R. Nicholson, A. Swick, J. Tay Yu Xi, S.W. van den Berg, M.Z. Fink, 'Cross Border Jeopardy: A Comparative Analysis on Key Insolvency Topics Across Various Jurisdictions', *Norton Journal of Bankruptcy Law and Practice*, No. 5, Ch. 2.

70 E.L. Altman, 'The role of distressed debt markets, hedge funds and recent trends in bankruptcy on the outcomes of chapter 11 reorganizations', *ABI Law Review*, Vol. 22:75, 2013, p. 84.

71 S.C. Gilson, *Creating Value through Corporate Restructuring*, 2nd edition, 2010, p. 20-26.

72 D.S. Bernstein e.a., 'The logic and limits of credit bidding by secured creditors under the bankruptcy code', 22 July 2011, p. 1; S.C. Gilson, *Creating Value through Corporate Restructuring*, 2nd edition, 2010, p. 20-26; P.R. Hage a.o., *Credit Bidding in Bankruptcy Sales: A Guide for Lenders, Creditors, and Distressed-Debt Investors,* American Bankruptcy Institute; 1st edition (2015), p. 2; H.P. Nesvold e.a., *The art of distressed M&A*, 2011, p. 392 e.v. Also see: G.Á.C. Orbán & R.J. de Weijs, 'Loan-to-Own meets Credit Bid: Credit Bidding naar Amerikaans en Nederlands recht', Dutch Journal of Insolvency Law (*Tijdschrift voor*

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purchase price for the secured claim has been satisfied at an earlier stage, in the enforcement no additional liquidity is required. The greater the difference between the purchase price of the claim and the value of the recovered property, the more profitable the deal.

62. Since the Dutch Schoeller Arca case in September 2009, various Dutch financial restructurings have been implemented on the basis of a private sale, sanctioned by the Court.[73] In a number of these Dutch cases, a loan-to-own strategy was executed by means of credit bidding the purchase price in a private sale. When considering the sale process, the Dutch courts conduct a 'holistic' test as to whether the bid price will result in the highest proceeds for the enforced shares, meaning that the non-cash consideration (*e.g.* the release of debt post-closing) is considered to be part of the consideration.[74]

63. Although the enforcement of share pledge might thus be beneficial to lenders for the purpose of executing a loan to own strategy, the lender runs a risk that another stakeholder will request the Dutch Court to order a cooling-off period (*afkoelingsperiode*) for the purpose of a WHOA restructuring procedure.[75] Where the enforcement of a pledge on shares concerns a form of execution, the WHOA is precisely intended to prevent enforcement, for which the

Insolventierecht), 2016/15; S.W. van den Berg, 'Herstructureringsmiddel voor distressed debt investors: credit bidding', Dutch Journal of Corporate Law (*Tijdschrift voor Ondernemingsrecht*), 2016/61 (in Dutch only).

73 Court of Amsterdam 23 September 2009, ECLI:NL:RBAMS:2009:BJ8848 (Schoeller Arca); Court of Utrecht 30 March 2012, ECLI:NL:RBUTR:2012:BW0487 (Selexyz); Court of Amsterdam 26 July 2012, (unpublished) (Uni-Invest); Court of Amsterdam 23 August 2012, ECLI:NL:RBAMS:2012:BY1439 (Ramblas); Court of Rotterdam 17 November 2014, ECLI:NL:RBROT:2014:9408 (Ambucare); Court of Amsterdam 30 January 2015, ECLI:NL:RBAMS:2015:816 (Svyaznoy); Court of Amsterdam (Netherlands Commercial Court) 8 March 2019, ECLI:NL:RBAMS:2019:1637 (Elavon/Crossbow); Court of Amsterdam 30 July 2019, ECLI:NL:RBAMS:2019:6505 (Vieo); Court of Amsterdam, 13 May 2020, ECLI:NL:RBAMS:2020:2681 (IHC Merwede); Court of Amsterdam, 11 September 2020, ECLI:NL:RBAMS:2020:4523 (HEMA); Court of Amsterdam, 11 March 2021, ECLI:NL:RBAMS:2021:1019 (Bever Sport); Court of Amsterdam (Netherlands Commercial Court) 23 June 2022, ECLI:NL:RBAMS:2022:3563 (Credit Suisse vs Eagle Ultimate Global Holding); Court of Amsterdam (Netherlands Commercial Court) 12 April 2023, ECLI:NL:RBAMS:2023:2196 (Frigoinvest Holdings); Court of Amsterdam (Netherlands Commercial Court) 8 January 2025, ECLI:NL:RBAMS:2025:67 (Unbrick Group); Court of Amsterdam (Netherlands Commercial Court) 13 May 2025, ECLI:NL:RBAMS:2025:4217 (Selecta).

74 See, *e.g.*, S.W. van den Berg, 'The Meaning of Valuation in Dutch Share Pledge Enforcement Proceedings, the Dutch Scheme and Part 26(A) Plan Proceedings', *International Corporate Rescue,* Volume 19, Issue 5, par. 4.

75 District Court of Amsterdam 15 February 2021, ECLI:NL:RBAMS:2021:6516; District Court of Amsterdam 5 August 2021, ECLI:NL:RBAMS:2021:6519.

cooling-off period may be used. In this way, the reorganisation surplus can be realised for the joint capital providers, and not just for the enforcing lender.[76]

64. Assuming the WHOA process will be carried out, the main investment strategies are thus: (i) providing new money for the purpose of the interim period, wherein the WHOA plan will be prepared and negotiations take place (either with a view to convert its interim financing position into, for example, a portion of the share capital, or merely receiving a lucrative (interest) return on the new money provided); (ii) providing new (higher ranked) money for the execution of the plan; (iii) taking over part of existing debt (against a certain percentage of its value) and either receiving a higher return on its position, or converting into another instrument.

10. Conclusion

65. In conclusion, the role of new money in WHOA restructuring proceedings is both pivotal and nuanced. The Dutch framework, inspired by international best practices yet tailored to local needs, ensures that fresh capital can be injected into distressed companies. By clearly defining the reorganisation value and strictly applying the Dutch priority rule, the WHOA provides a transparent and equitable process for distributing value among stakeholders. In case of a dissenting class of capital providers, deviations from this rule are only permitted on reasonable grounds, with courts closely scrutinising the fairness of any proposed plan. The interplay between new money providers and existing claimants is carefully balanced: while new investors are incentivised to support the restructuring, their returns are initially limited to the value they contribute (unless all parties consent to a different arrangement) but like all providers of equity, they are entitled to the potential upside in full – and for which they also run the corresponding risk.

76 See: S.W. van den Berg, '219. Pandexecutie voor minder dan de WHOA-reorganisatiewaarde: een boemerang tot doorfinancieren?', *FIP* 2024/7, par. 7.

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