



AMERICAN
BANKRUPTCY
INSTITUTE

2025 International North American Insolvency Symposium

Transatlantic Restructuring Plans in the U.S., Canada, U.K. and Netherlands

Ian Benjamin

Stephenson Harwood LLP | London

Dr. Marc Broekema

Kroll, LLC | Amsterdam, The Netherlands

Dr. Sebastiaan Van Den Berg

RESOR | Amsterdam, The Netherlands

Christopher A. Ward

Polsinelli | Wilmington, Del.

Sara-Ann Wilson

Dentons Canada LLP | Canada, Toronto

Comparing Transatlantic Restructuring Plans in the U.S., U.K., Canada, and the Netherlands

American Bankruptcy Institute, 2025 International North American Insolvency Symposium

November 5, 2025

PANEL



Dr. Sebastiaan van den Berg
RESOR N.V. | The Netherlands



Sara-Ann Wilson
Dentons Canada LLP | Canada



Prof. Marc Broekema
Kroll B.V. | The Netherlands



Christopher A. Ward
Polsinelli | United States of America



Ian Benjamin
Stephenson Harwood LLP | United Kingdom



Editors

Dr. Sebastiaan van den Berg, RESOR 

Prof. Jan Adriaanse, Kroll & Leiden University 

Prof. Marc Broekema, Kroll & University of Groningen 

Contributors

Prof. Wim Holterman, University of Groningen & Value Insights

Alexis Anaman & Jonathan Dyer, FTI Consulting

Prof. Kevin Kaiser & Ashley Marie Schammel, MBA, The Wharton School of the University of Pennsylvania

Dr. Felix Nockher, Rothschild & Co

Philip Hertz, Alice Odolant, Emma Buchanan, Gabrielle Ruiz, Lewis Cymbal, Clifford Chance LLP

Nick Talbot, International Valuation Standards Council (IVSC)

Hans Haanappel, Vantage Valuation

Prof. Anthony J. Casey & Caroline D. Boone, The University of Chicago Law School

Carla S. Nunes, CFA, Anas Aboulamer, PhD, Molly Jennerman, Kroll

Dr. Johan Van den Cruyce, Atlas Services Belgium (Orange Group), Vlerick Business School

Prof. Wouter De Maeseneire, Vlerick Business School



INSOL HONG KONG 17-19 MARCH 2025



BACKGROUND OF THE PROJECT AND THE SURVEY

- Project started in 2022 to better **understand** the role of valuations in R&I cases in general and why valuation disputes often arise in R&I.
- To provide INSOL members (R&I specialists) with no background in valuation with **new insights**.
- Survey study as **starting point**:
 - Questionnaire was sent out in 2023 to all INSOL members
 - Respondents from 48 countries
 - 71% male, 27% female
 - 45% more than 20 years of experience

SUMMARY OF RESULTS (1)

What are the most common **discussion points** with respect to valuation in an R&I setting?

Answer Choices	Responses
Forecasting of future cash flows (DCF)	59,41%
Discount rate (e.g. WACC)	43,56%
Terminal/continuing value approach	23,76%
Business/turnaround plan as input for the valuation	55,45%
Distribution of value (i.e. the proposal towards creditors; in or out of the money)	48,51%
Biases among valuers	17,82%
Interest rate on debt	7,92%
Other (please specify)	7,92%

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SUMMARY OF RESULTS (2)

What are the most challenging aspects associated with **reading, understanding, and using** a valuation report in an R&I case?

Answer Choices	Responses
A lack of good narrative to underpin the financial outcome	52,48%
Use of jargon that is difficult to understand	29,70%
Randomness of figures and numbers being used	40,59%
A lack of consistency in valuation reporting	38,61%
A lack of general readability	18,81%
Valuers never give a price, always only a value range	19,80%
The costs involved with valuations versus the benefits	25,74%

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SUMMARY OF RESULTS (3)

General advice from respondents to enhance valuation practice in R&I cases, showing certain **bottlenecks** in practice:

Advice from respondents

'Be completely independent'

'Be objective, be able to justify your methodology, reasoning and conclusions by reference to objective standards and evidence.'

'Provide more background in respect of the key bases and rationale underpinning the valuations.'

'Brief explanation of the methodology with the use of plain language and use of visuals'

'Adequately support assumptions and criteria with factual information. Avoid letting client bias affect credibility and reasonability of valuation.'

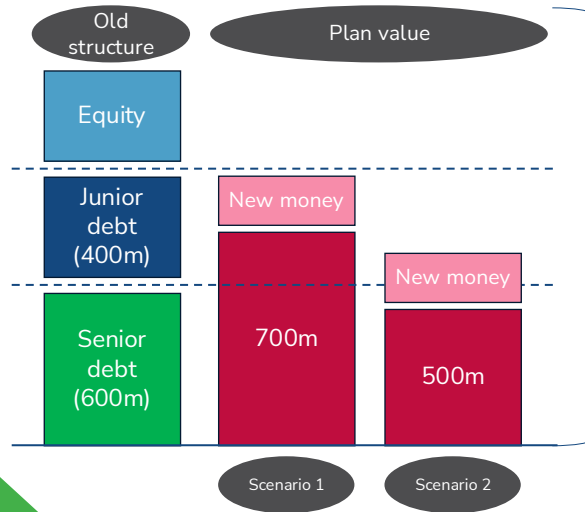
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PANEL DISCUSSION: VALUATION ISSUES IN TRANSATLANTIC RESTRUCTURINGS

- **Moderator:** Prof. Marc Broekema, Kroll & University of Groningen
- **Speaker:** Dr. Sebastiaan van den Berg, RESOR
- **Speaker:** Ian Benjamin, Stephenson Harwood LLP
- **Speaker:** Sara-Ann Wilson, Dentons Canada LLP
- **Speaker:** Christopher A. Ward, Polsinelli

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R&I CASE PERCEIVED FROM DIFFERENT JURISDICTIONS



Topics on Plan Proceedings

1. Cram down test?
2. How to solve the valuation dispute?
3. Possible funding or investment strategy?

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COMPARISONS

Ad. 1 – Cram Down Test Explained



- Cram down dissenting class (<2/3 in value); distribution of "reorganization value" in accordance with legal rank
- Reorg value = post-restructuring value
- Legal rank ≠ legal form, i.e. cram down interest rate discussion (debt valuation)
- Cram down testing = valuation debate



- Fair and Equitable
- Best interests of creditors
- Absolute Priority Rule



- A company can push through a plan, even if there is a dissenting class (or classes), provided that the following conditions satisfied:
 - Condition A - the no creditor worse off test: and
 - Condition B – the genuine economic interest test.
- No absolute priority rule in UK plan.
- Out of money creditors can no longer be completely disregarded (*Petrofac*).



- Cram down is not permitted.
- Plan must be approved by double majority (majority in number and at least two-thirds in value) of each class of affected creditors.
- Class structuring important – commonality of interest.
- Plan is subject to court sanction, fair and reasonable test.

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COMPARISONS

Ad. 2 – Solving Restructuring Plan Valuation Disputes



- Filing of “aspect request” → interim court judgment about features of the plan, e.g. “reorg value”
- Appointment of court-appointed Restructuring Expert (who can also file an aspect request)
- Valuation debate between parties, court to solve
- Court inclined to follow RE and its advisors



- Discounted Cash Flow (DCF)
- Comparable company value
- Comparable transaction value
- Market Test Value
- Expert Testimony
- Date of the valuation (petition date v. confirmation date v. future value)
- Example Cases: Genco, Exide, Mirant, Horsehead Holdings (deeper dive on contested valuations and risks to the Court)



Court guidance for stakeholders wishing to challenge a plan on valuation grounds:

- obtain any financial information from the company that may be required, either on a voluntary basis or by making a timely disclosure application
- file expert evidence of its own, instruct the expert to engage in the production of a joint report in the normal manner and tender the expert for cross-examination
- attend the hearing and address argument for the assistance of the court at the appropriate stage in the process at which the point is to be determined:
 - if an order is sought to disenfranchise out-of-the-money stakeholders from voting, that will be at the convening stage, and
 - if the court is being asked to approve a plan that not every class has approved, that will be at the sanction hearing.



- Deference to the Monitor/Trustee valuation and recommendations.
- CCAA is debtor-friendly statute.
- Ex. Pride Group CCAA – going concern sale to management vs. liquidation.

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COMPARISONS

Ad. 3 – Funding or Investment Strategy?



- No “priming lien” for DIP funding, unless agreed upon
- IHC v. Rabobank [2024] (appeal to the NL Supreme Court in the interest of the law): approval of higher-ranking security for new-money providers (under the plan)
- Acquiring debt (at a discount) and receiving a higher return on its position, or converting into another instrument (other ranking)



- Super-priority interim (DIP) funding may be approved by court to fund working capital, restructuring costs, etc.
- In approving DIP, court evaluates necessity, fairness, terms and commercial reasonableness.
- Cashflows reviewed by Monitor/Trustee and report filed regarding DIP terms.
- No roll-up DIPs.



Fairness is now front and centre in UK plans following recent decisions in *Thames Water*, *Petrofac* and *Waldorf* cases:

- Are creditors of the same ranking treated in broadly the same way (or if not, is there a good justification for any differential treatment)?
- Does the plan include any special benefits or incentives in the form of fees, new money entitlements and the like? If so, are they properly justified and explained?
- Has the company taken reasonable steps to consult with its creditors and given genuine consideration to any alternative proposals put forward?
- In all the circumstances, has the benefit of the restructuring been fairly allocated as between different groups of creditors?



- New Value Plan

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Faculty

Ian Benjamin is a partner with Stephenson Harwood LLP in London and advises domestic and international clients on all aspects of restructuring and insolvency matters. He is known for his cross-sector experience advising a variety of stakeholders. Mr. Benjamin has multi-sector experience that includes real estate, hospitality, leisure and retail, financial services, automotive and health care. He has worked extensively on business turnarounds and both creditor- and debtor-led restructurings, and he regularly acts for lenders, distressed investment funds, insolvency practitioners, trade creditors, landlords, directors, sponsors and foreign lawyers. Mr. Benjamin is listed as a ‘Next Generation Partner’ in *The Legal 500 UK* for 2023, is ranked in *Chambers & Partners UK* for 2024 and is a “Recommended Practitioner” in Lexology’s *Who’s Who Legal: Restructuring & Insolvency* for 2024. He received his B.A. in Latin and Ancient Greek from the University of Nottingham.

Dr. Marc Broekema is a managing director with Kroll, LLC in Amsterdam and heads its Netherlands Expert Services practice. He has more than 20 years of experience in advising clients on valuation and damages issues within commercial and corporate disputes, as well as in cross-border restructuring and insolvency cases. Dr. Broekema works closely with law firms, courts, arbitration and expert committees, corporates and professional investors. Notably, he acted as valuation adviser to Steinhoff International Holdings (SIHNV) and secured court sanctioning of its WHOA Restructuring Plan in the Netherlands. He also served as a valuation advisor to the shareholders of a Turkish bank in proceedings for the European Court of Human Rights following its expropriation, and he recently advised a private-equity firm and its attorneys concerning the share price following a tender offer. In addition, he has testified in many cases in Dutch courts as a court-appointed expert. Dr. Broekema co-chairs the Europe Committee of the IVSC, which leads engagement with valuation stakeholders across Europe, ensuring regional input to the evolution of International Valuation Standards (IVS) and supporting its implementation. He also is a lay judge at the Enterprise Chamber of the Amsterdam Court of Appeal, and he is a member of the Disciplinary Council of Appeal of the Dutch Association of Chartered Business Valuators (NiRV) and a Certified Expert Witness at the Dutch national register of judicial experts (LRGD). In addition to his work for Kroll, Dr. Broekema is an assistant professor in corporate valuation at the Department of Business Studies of Leiden Law School. He received his Ph.D. in valuation from Leiden University, the Netherlands.

Dr. Sebastiaan Van Den Berg is a partner at RESOR in Amsterdam, The Netherlands, which specializes in cross-border restructuring and insolvency. His practice includes advising and litigating for companies/management, shareholders, creditors/noteholder committees and trustees on all insolvency or restructuring-related issues, such as out-of-court restructurings, WHOA and litigation with respect to valuation disputes. Dr. Van Den Berg holds master’s degrees in financial economics and law from the Erasmus University of Rotterdam. In 2013, he completed the executive master of M&A and valuation of the University of Groningen Business School. In 2019, he completed his Ph.D. dissertation on valuation in Dutch corporate and bankruptcy law at the University of Nijmegen.

Christopher A. Ward co-chairs Polsinelli PC’s Bankruptcy & Financial Restructuring Practice and is the managing shareholder of the firm’s Wilmington, Del., office. He also is ABI’s Immediate Past

President. Mr. Ward focuses his practice on corporate bankruptcy, financial restructuring, bankruptcy and distressed litigation, and distressed asset sales, as well as nonbankruptcy alternatives. He has been lead chapter 11 debtor's counsel in Esco Ltd., Lucky's Markets, Elements Behavioral Health, Orchids Paper Products and Bayou Steel Group, among many others. Mr. Ward has been recognized for excellence in Delaware Bankruptcy/Restructuring by *Chambers USA* since 2010, in *Delaware Super Lawyers* for Bankruptcy & Creditor Rights since 2014, in *Lawdragon 500 Leading U.S. Bankruptcy & Restructuring Lawyers*, and in *The Best Lawyers in America* for Bankruptcy/Restructuring in Delaware since 2015. He serves as an editor and contributor to the interactive web version of Pol-sinelli's *The Devil's Dictionary of Bankruptcy Terms*. In addition, he is the editor of ABI's *The Professional's Guide to Non-Bankruptcy Alternatives*, a co-author of *The Zone of (In)solvency: Fiduciary Duties and Standards of Review for Corporations and Limited Liability Companies* and *A Business Creditors' Guide to Distressed Vendors, Debt Collection and Bankruptcy*, and the editor and a co-author of *The Chief Restructuring Officer's Guide to Bankruptcy*. Mr. Ward received his B.A. from Moravian College in 1995 and his J.D. *cum laude* from Widener University School of Law in 1999.

Sara-Ann Wilson is a member of the Restructuring, Insolvency and Bankruptcy group of Dentons Canada LLP in Toronto. Her practice focuses on corporate insolvency proceedings and financial services, including proceedings commenced pursuant to the Bankruptcy and Insolvency Act (Canada) (BIA) and the Companies' Creditors Arrangement Act (Canada) (CCAA). Ms. Wilson advises creditors, debtors and other stakeholders on their respective rights in connection with informal workouts, security enforcement, receiverships, bankruptcy proceedings, BIA proposals and CCAA proceedings. Her experience extends to complex cross-border insolvency and restructuring proceedings, including chapter 11 proceedings. She also advises indenture trustees and bondholder groups involved in restructuring proceedings and regularly represents receivers, trustees and court-appointed monitors in their respective capacities. Ms. Wilson is global regional director of the International Women's Insolvency & Restructuring Confederation (IWIRC). She received her J.D. from the University of Toronto in 2007.