

EPP Seminar

Designing a balanced restructuring system

Nicolaes Tollenaar, RESOR
18 May 2018

RESOR



What is a restructuring system?

A restructuring system is an insolvency system that enables creditors to maximise their recoveries by realizing the reorganisation value as opposed to only the liquidation value of the business.

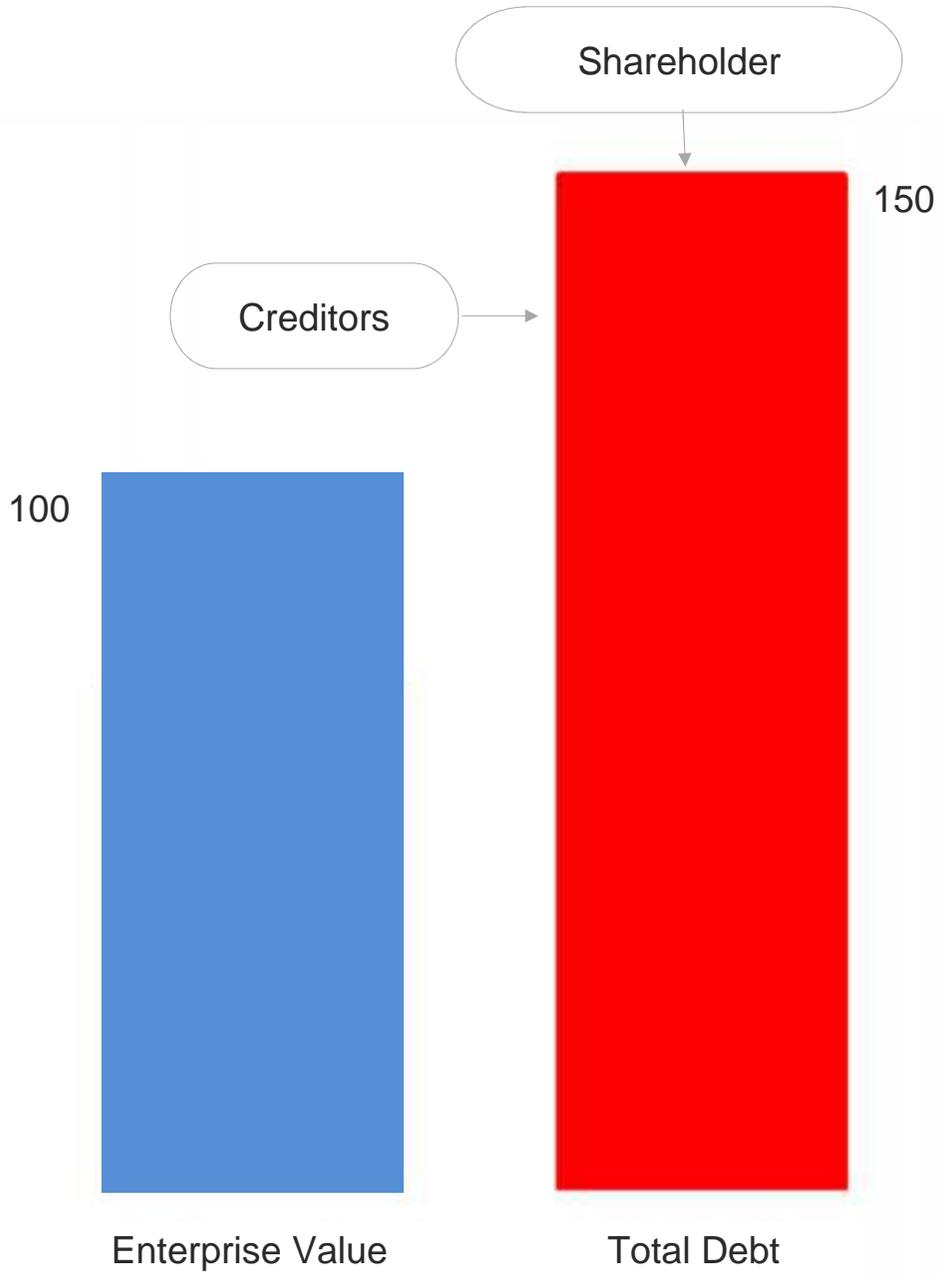
Two forms of insolvency procedures:

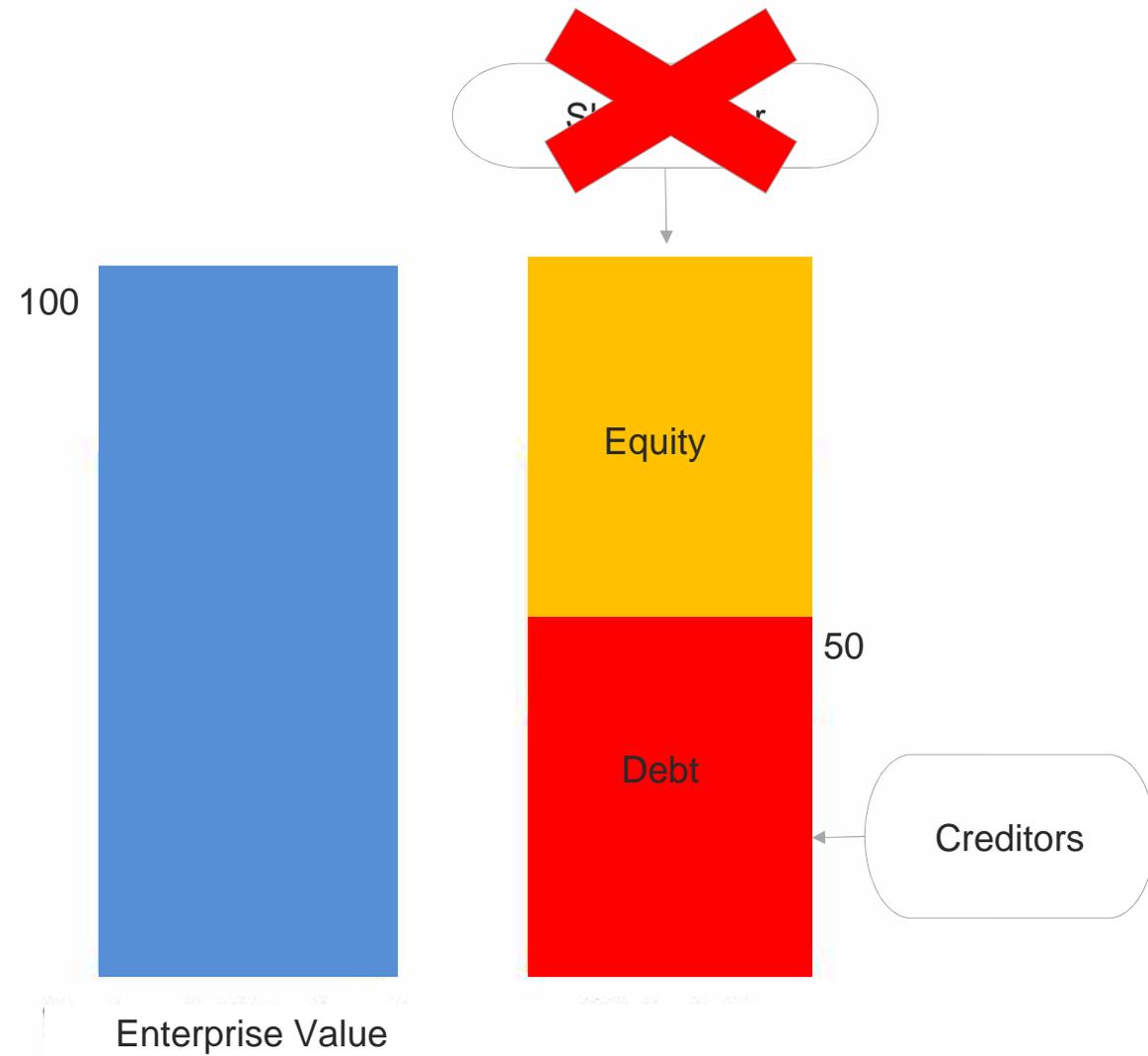
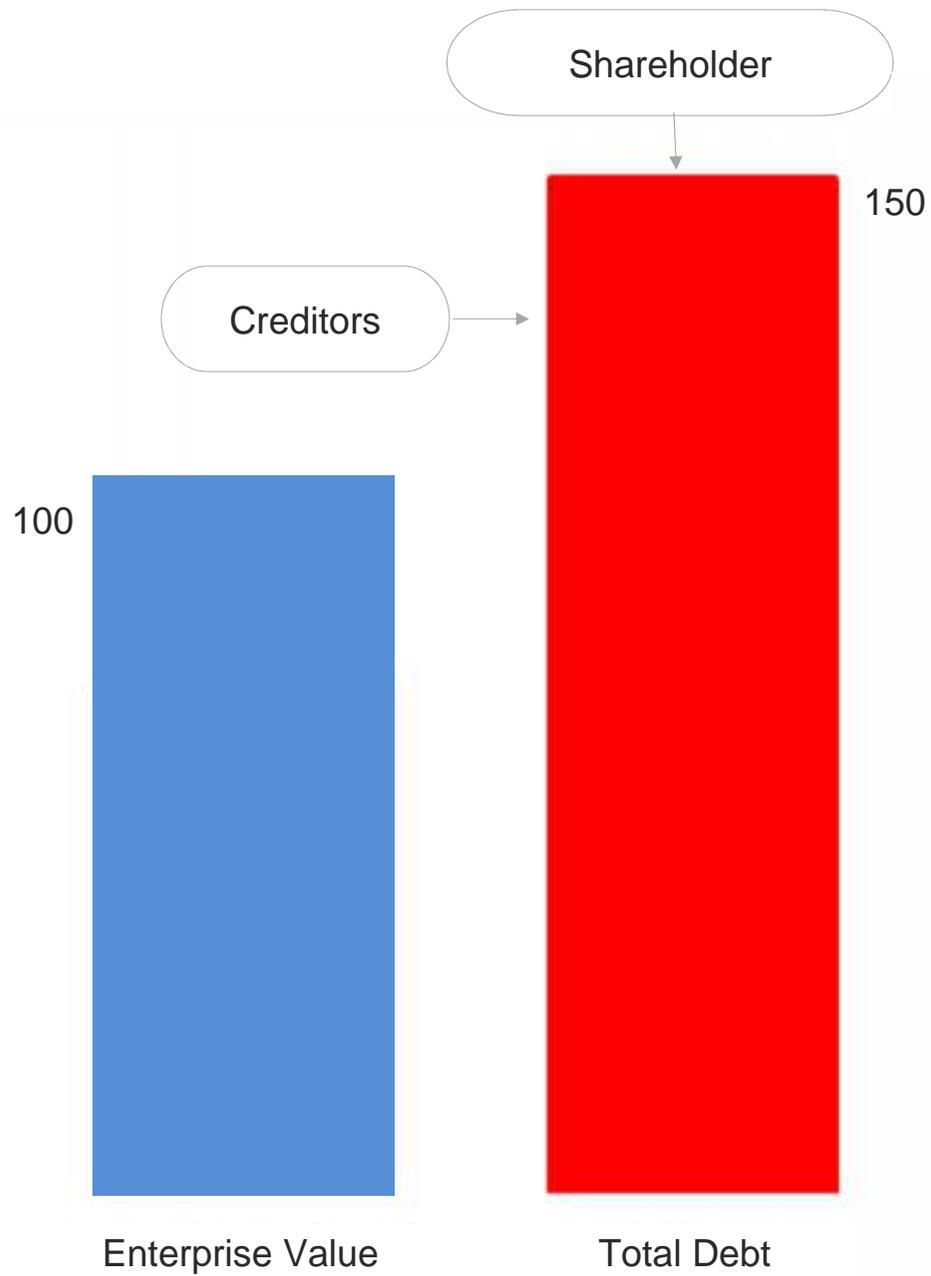
- (i) liquidation procedure - the business is sold to a third party for cash;
- (ii) restructuring procedure – the creditors take the business over themselves.

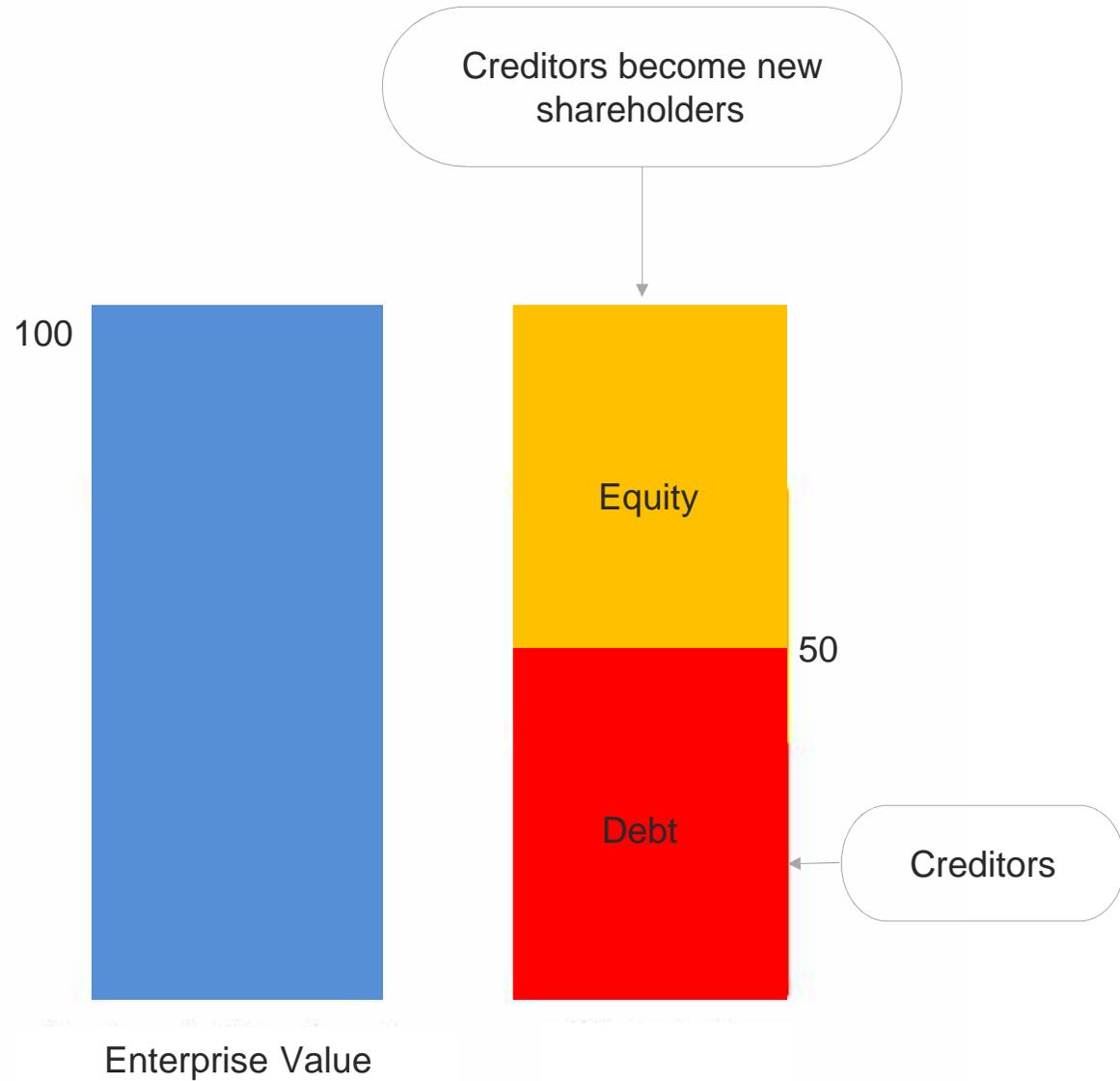
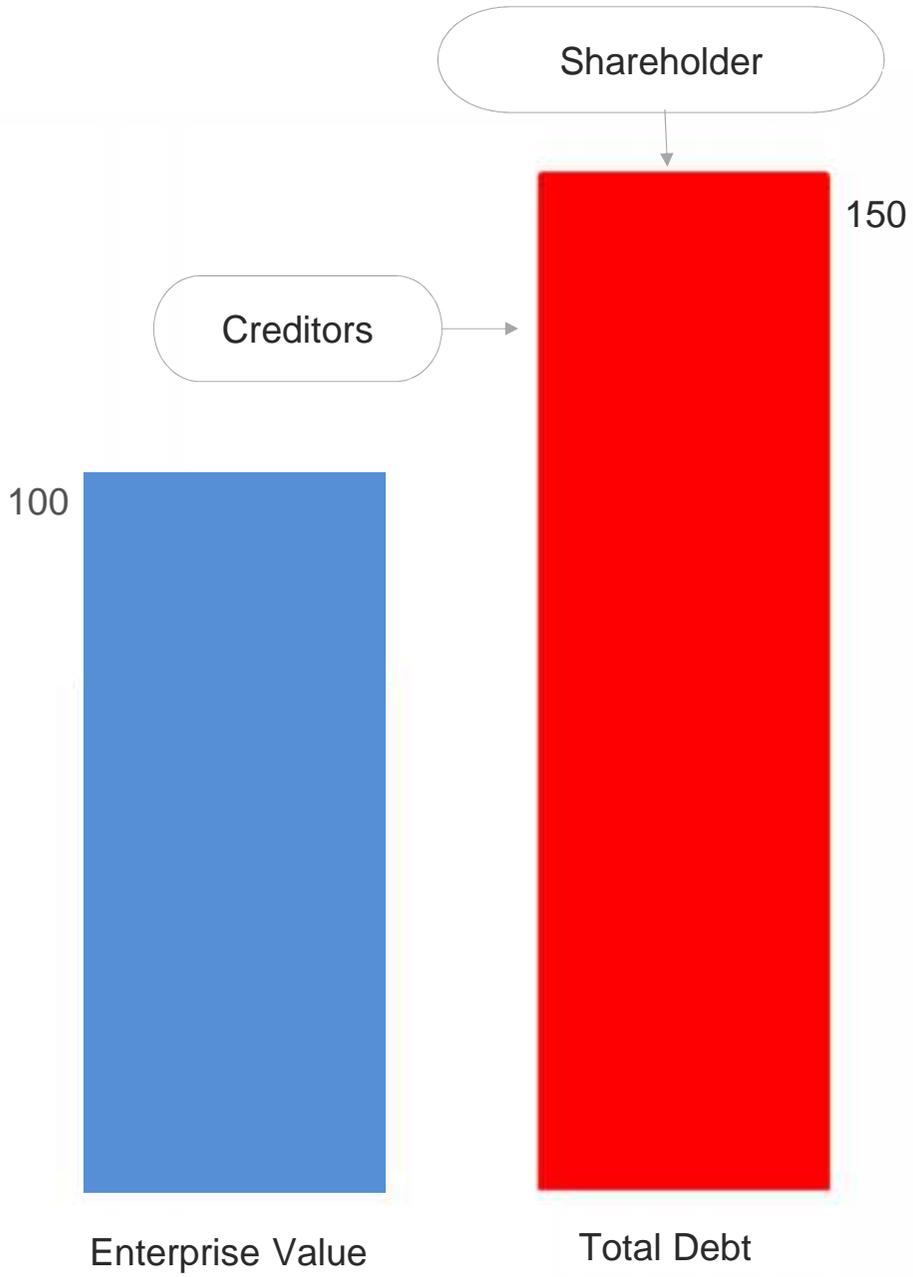
A restructuring procedure allows the creditors as a group to prevent liquidation (i.e. a sale to a third party) and to preserve and realize the value of the business by taking it over themselves.

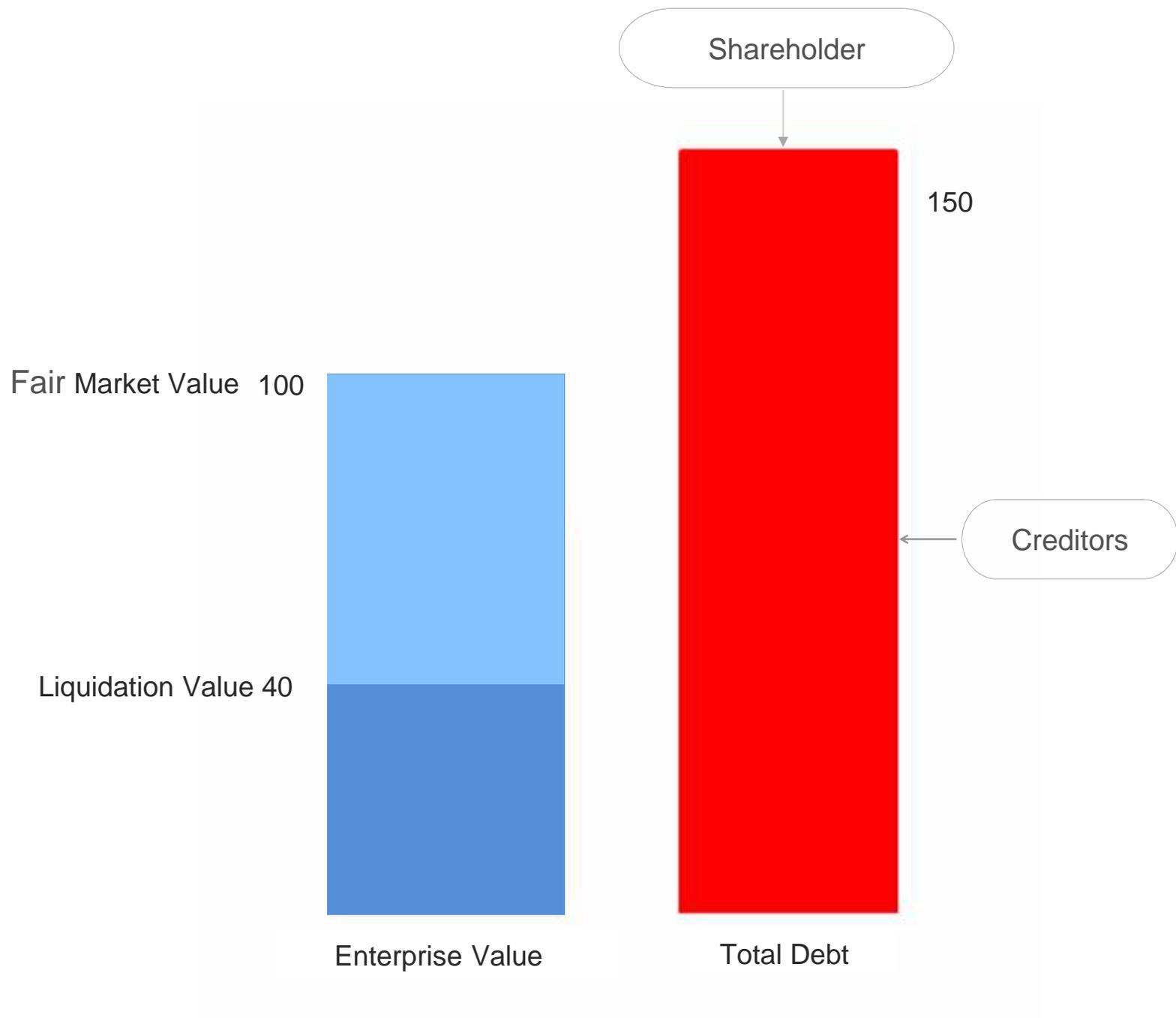
The purpose is not to enable the debtor to prevent or restrict creditors from enforcing their rights for the purpose of rescuing the business as a goal in itself.

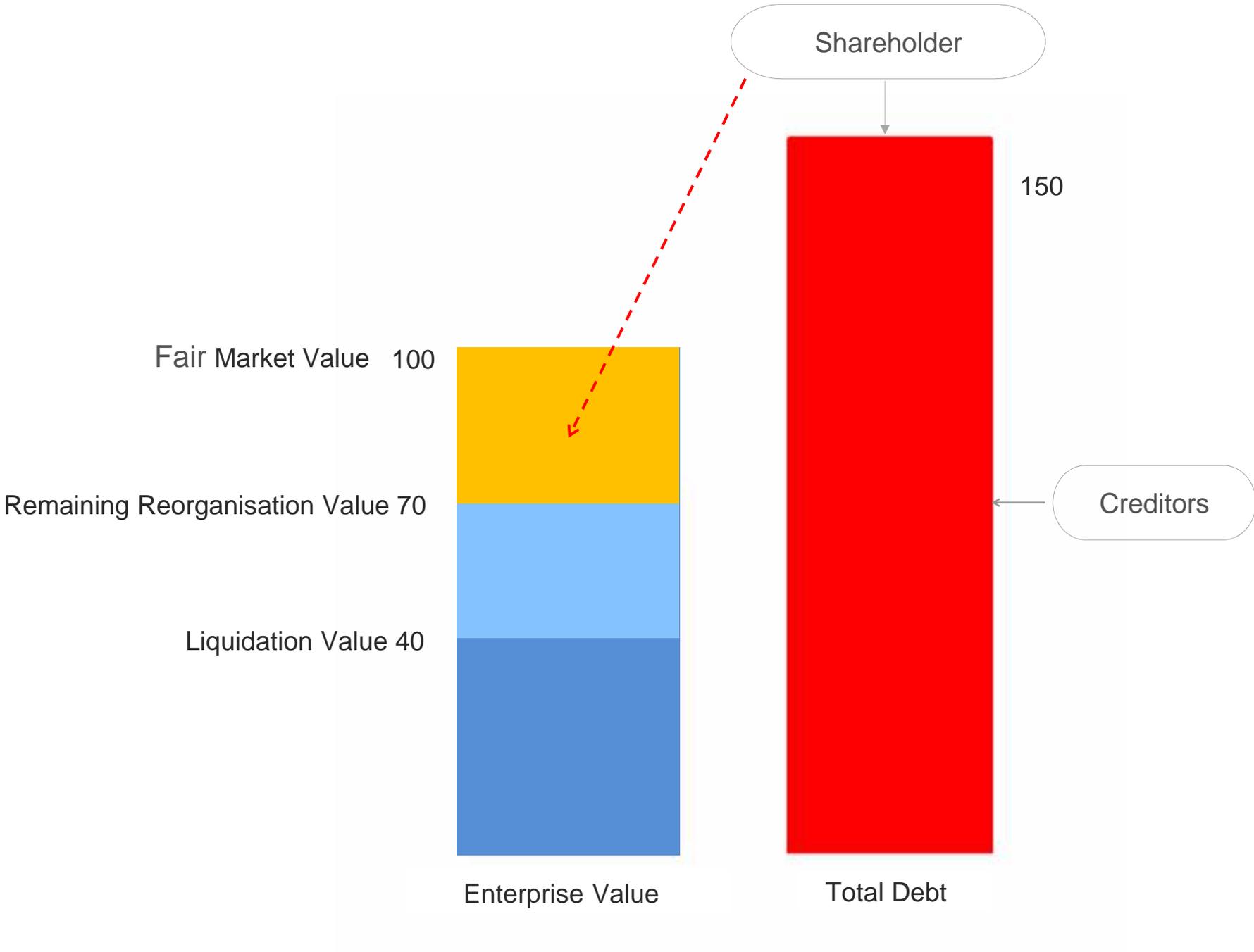
RESOR

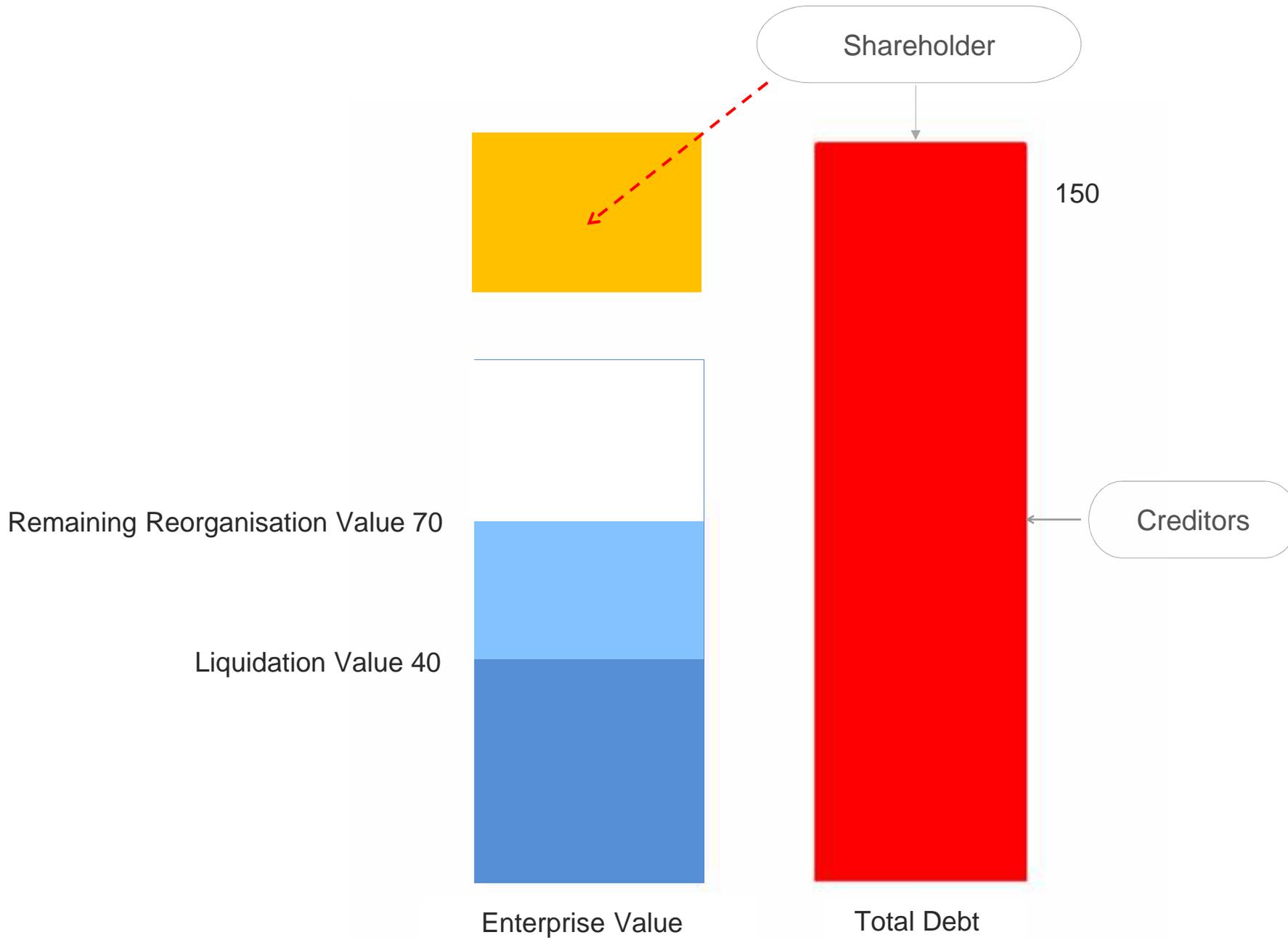






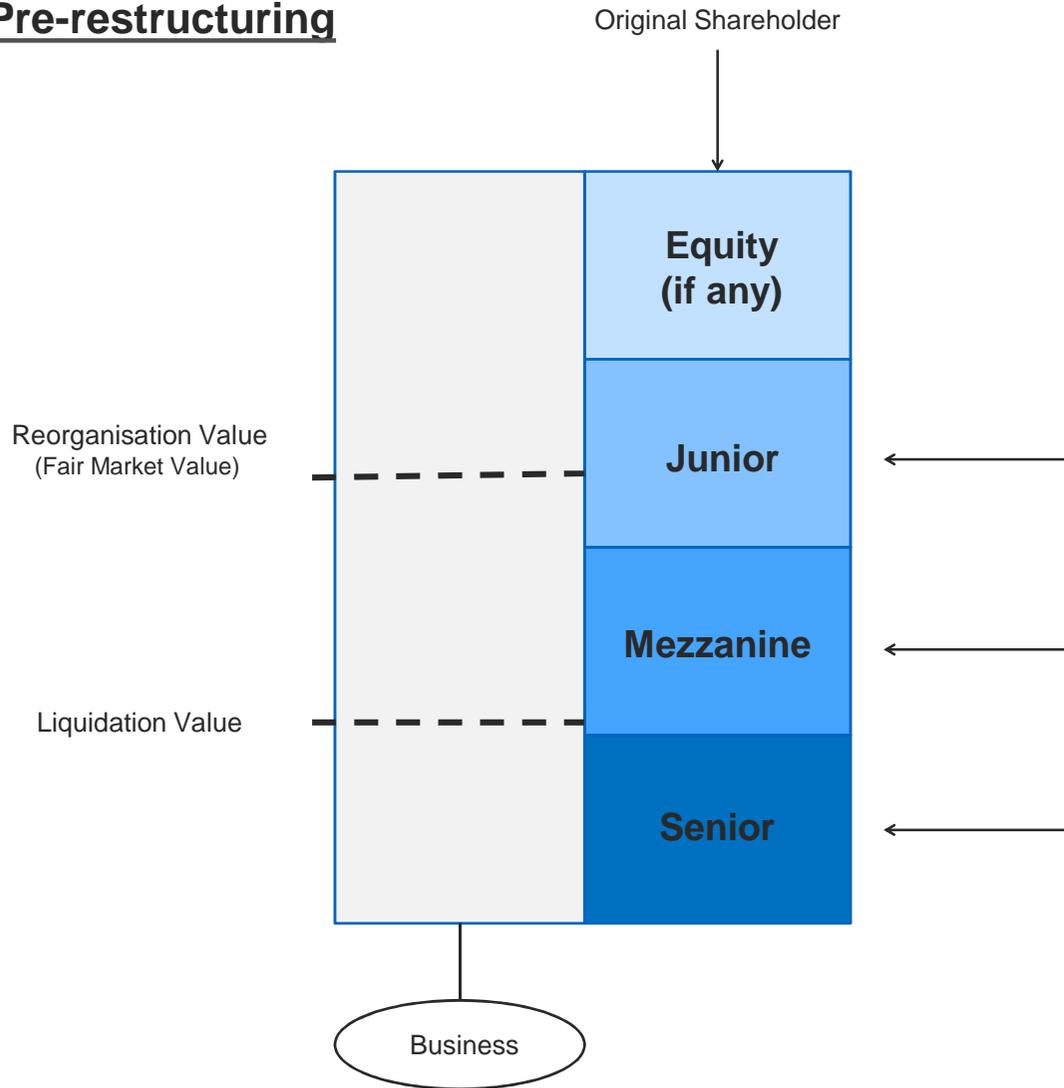




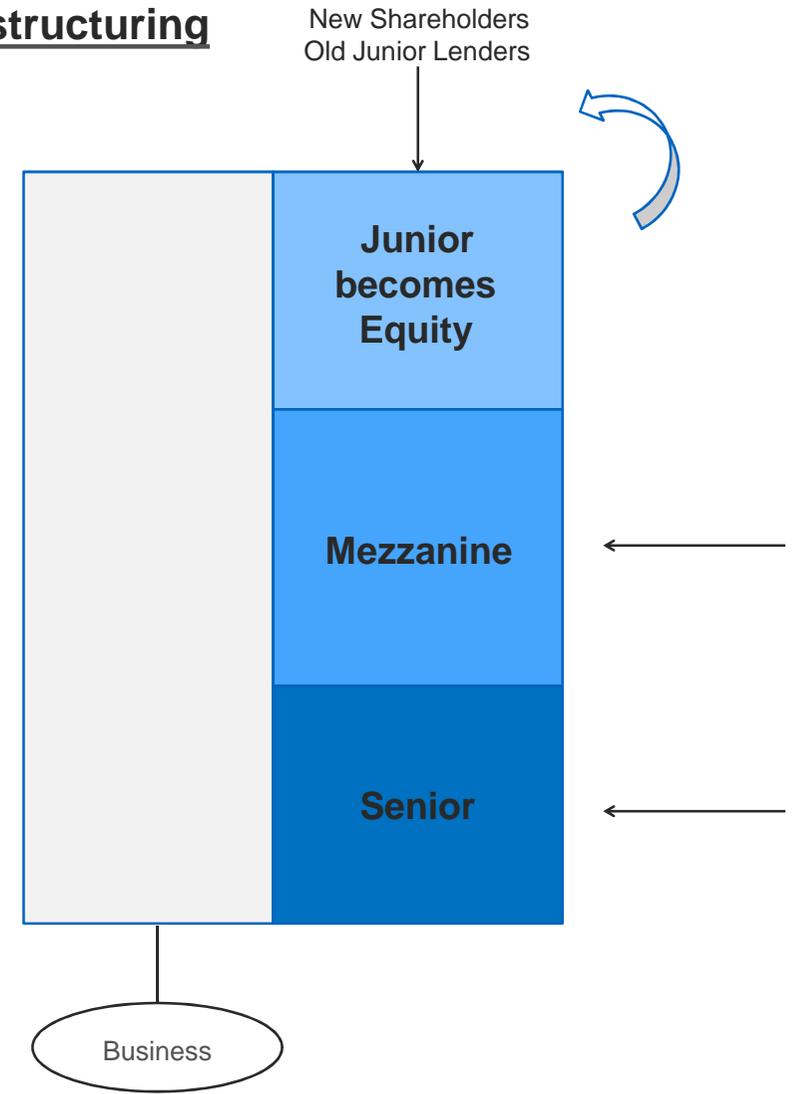


Distributing value in a restructuring

Pre-restructuring



Post-restructuring





Restructuring systems and NPL's

- “Tug of war” between existing equity and creditors over the enterprise value. This “tug of war” harms the business and destroys value
- There is no such thing as a “debtor” friendly system. Debtor friendly is equity friendly: it gives out of the money equity a “hold out” position
- The greater the ability for creditors to realize the available value without disruption or leakage to equity, the greater the market value of the NPL's
- Market value and secondary market for NPL's can be increased by:
 - Strengthening the rights and the control of creditors in the restructuring process
 - An efficient mechanism to eliminate and avoid value leakage to hold-out equity
- This minimizes disruption to the business, facilitates business rescue and increases returns to creditors (NPL's)

Purpose of interference: enhancing not restricting recovery

Justification and purpose of insolvency law in general (coordination of enforcement):

- Solving the common pool and anticommons problem
- Upon inability to pay: a cascade of uncoordinated individual actions might ensue
- Uncoordinated individual enforcement actions can result in value destruction
- Creditors lose their individual enforcement rights (interference)
- Replaced by collective enforcement system – coordinated enforcement
- Collective system enables creditors to better realise their rights (higher recoveries)

NB! The interference is *not intended to limit* the ability of creditors to realise their rights for the benefit of some other policy objective (e.g. business rescue as such), but the interference is intended only to organise and coordinate enforcement in order to *improve* the ability of creditors to realise their rights

- A restructuring system is a collective enforcement system of the creditors aimed at enabling the creditors to realise the market value rather than only the liquidation value of the enterprise



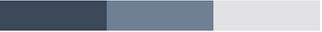
Key features of a balanced system

- System characterized and understood as insolvency system that enables creditors to maximise their recoveries by preserving and realizing the value of the business (with minimal disruption and value leakage to out-of-the money parties)
- Right for creditors to initiate a plan upon insolvency or inevitable insolvency
- Cross-class cram down based on determination of reorganisation value
- Respecting priority (pre-existing entitlements to value), i.e. no wealth transfer
- Adequate protection of secured creditors (the right to liquidate)
- Light, fast and efficient process required that causes no or minimal disruption to underlying business (debtor-in-possession, limited court involvement, no appeals)

The Draft Restructuring Directive – excellent, only minor tweaks required. Please don't mess it up!

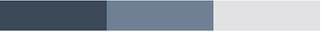
Draft Restructuring Directive is beautiful, only a few minor but important changes required:

- Re-characterization as insolvency instrument (aimed at assisting creditors not “preventing” creditors from realizing their rights)
- Include right for creditors to initiate a plan upon insolvency or inevitable insolvency
- Include protection for secured creditors (right to receive expected liquidation proceeds upon class dissent)
- Don't use American terminology when formulating priority principle
- Exclude appeals
- Keep it “light-touch” with minimal court involvement!



Concerns about Draft Report European Parliament

- No clear distinction between insolvency and pre-insolvency; may negatively impact efficient insolvency systems
- Permanent exclusivity of debtor maintained
- Head count re-introduced
- Cross-class cram down only if majority of affected classes consents
- (Still) insufficient protection of dissenting classes of secured creditors
- Ability of appeal maintained (non-suspensive effect subject to certain requirement)



Thank you!