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Internally Organised Master's Thesis

Credit Bidding during insolvency proceedings: application in Belgium

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SUMMARY MASTER'S THESIS

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1 Problem formulation and research question

Due to a severe economic and financial crisis in 2008 and the years after, the number of bankruptcies have been high in all member states of the European Union. This economic downturn has put many companies into financial distress and some companies even into insolvency. In Belgium, insolvent companies can choose to agree a plan of reorganization with some of their creditors, involving some debt relief or a longer period to pay back. Sometimes they can choose to sell off part of the companies' assets to a third party. If a company cannot reach an agreement with their creditor 'out-of-court', they will have to start the insolvency procedure with involvement by the Bankruptcy Court (*Rechtbank van Koophandel* in Belgium) to reach an agreement for a plan of reorganization providing 3 alternatives (CAP-netwerk, 2014). If this does not lead to an optimal result, the company will file for bankruptcy and sell off its assets to pay back creditors as much as possible. Creditors fear to not recover a substantial part of their outstanding loan and will be hesitant to provide credit during the current, volatile economic situation.

Credit bidding is a legal tool providing secured creditors the right to bid their outstanding claim during a bankruptcy auction or the sale of the assets it has a secured claim for in order to protect their interests if a debtor gets into financial distress. This tool has been frequently used in the United States leading to diverging views towards its added value. But a recent ruling by a Judge and a positive recommendation by the American Bankruptcy Institute in 2014 has elevated credit bidding to the forefront of defensive strategies of lenders (Mankovetsky, 2011). However in the European Union and more specifically Belgium, credit bidding does not exist under the same form. In this report, we will look further into the possible application of credit bidding in Belgium and the positive effect it could have for distressed companies and secured lenders and what the advantages and disadvantages are to provide recommendations on the application of credit bidding during insolvency proceedings in Belgium.

Research question

Can credit bidding be used as a tool to protect secured creditors during bankruptcy assets sales or the sale to a third party as part of a reorganization plan under Belgian law as we currently know it in the United States and Canada and could it be advantageous to apply in Belgium?

2 Research method

To provide a conclusive answer to the research question of this report, qualitative research will be conducted. The research starts with a literature review to define credit bidding as it is frequently used in the US and looking at the positive and negative consequences. Case studies of recent, high-profile cases are used after every sub-chapter to illustrate what was explained in the literature. To provide an answer to the research question a non-probability sampling technique was used as some specifically selected experts were asked for their opinions, this is due to the exploratory stage of this research in Belgium (Saunders et al., 2009).

2.1 Justification of the research method

This specific research method of using non-probability sampling to collect data on the topic has been chosen due to the exploratory stage of this research in Belgium. Some experts in the field have been chosen carefully and were interviewed by the use of semi-structured interviews in order to obtain more data input as there is a limited amount of available data on this topic in Belgium (Saunders et al., 2009).

2.2 Collection and processing of the data

For the literature review to define credit bidding and its possible applications, research was conducted in legal literature, especially in legal and financial journals and reviews on the topic of Chapter 11 and credit bidding. The sources to define credit bidding were mostly found in the United States and some Canadian sources as the process of credit bidding is a more common practice in US and Canadian insolvency proceedings than in the European Union. To illustrate the theory and legal context of credit bidding, recent cases from the United States and Canada where credit bidding was used were used to elaborate on the different possibilities and outcomes possible after the introduction of a credit bid. This is to make the concept more clear.

The semi-structured interviews were conducted with experts in Belgian financial institutions with specific knowledge on the restructuring of insolvent companies. Most interviews were with professionals from the banking world as this research is more focused on the application in the banking sector. The data was collected by recording the interviews and taking notes, which were later transcribed and added in the Appendix.

3 Findings and conclusions

Credit bidding, as it currently exists under United States law, is a tool to protect secured lenders against a drop in value of their secured claim when a debtor becomes distressed. Evidence from US bankruptcy cases showed that credit bidding was an adequate tool to protect secured lenders by using their right to credit bid during a sale of the collateral of their secured claim. Also, after the introduction of the credit bid during the bankruptcy auction sale of the distressed debtor's assets the auction ended with higher bids than those submitted by third parties before the credit bid. This shows that credit bidding not only protects secured creditors against the insolvency of a debtor but also the other creditors of the distressed company can benefit as they will recover more from the debtor if the credit bid leads to higher competition during the sale of the debtors' assets.

Interviews with industry experts have showed that there is no similar framework available for secured creditors in Belgium. The most similar concept in Belgium to credit bidding is the transfer of assets going-concern with judicial authority. This way the Judge could decide to transfer the company or a significant part of the assets to the creditor at a Court approved price. But financial institutions were reluctant to this idea as this would lead to additional questions in asset management which is outside the core business of the banks in Belgium. However, for other types of investors this could prove to be an interesting option which is quite similar to the credit bidding concept to apply in Belgium.

The financial institutions have also expressed their reluctance towards the use of a concept such as credit bidding. The main reason was that it creates legal uncertainty as there is currently no legal base for credit bidding and therefore not advisable in a civil law legal system like in Belgium.

This can be caused by differences in culture between the two countries but will most likely be caused by the differences between the two legal systems, originating from the differences between common and civil law systems.

Therefore it can be concluded that credit bidding cannot be applied under Belgian law and secured creditors in Belgium have showed little or no interest in using a similar concept in their operations. In order for a system like credit bidding to be applied in Belgium, further research has to be conducted to determine the legal obstacles preventing credit bidding in Belgium and which changes in the legal framework should be made in order for credit bidding to be successfully used in Belgium.

Research objectives

Objective 1

Define credit bidding as it is frequently used in the United States and use case studies to clarify the framework.

Objective 2

Discuss the positive and negative consequences of credit bidding by using literature of proponents as well as opponents. Use recent cases to show both sides

Objective 3

Analyze recent, high-profile bankruptcy cases to clarify credit bidding. Analyze the outcomes of these cases after the introduction of a credit bid for the secured creditors as well as the debtor and other creditors of the distressed debtor.

Objective 4

Determine if credit bidding is possible under Belgian law or whether a similar protection mechanism exists for secured creditors during insolvency of a debtor.

Objective 5

Determine whether credit bidding could be a useful tool to protect secured creditors in Belgium against the insolvency of a debtor.

Objective 6

Determine the differences in legal systems or culture between the United States and Belgium to assess the difference in applying credit bidding.

Objective 7

Provide recommendations for Belgian and European policy makers on whether or not credit bidding could be an interesting addition to current insolvency proceedings. Evaluate whether credit bidding as a protection tool for secured creditors could lead to higher credit provision by reducing the credit risk due to the insolvency of a debtor.

Acknowledgements

I would like to thank my supervisor, Professor Bart De Moor, for introducing me to this interesting topic and providing me with all his knowledge in order to write this report. I had never heard of the concept of credit bidding but he immediately made me very interested in the topic. It was a positive experience for me to research such topic as it gave me another insight into the financial sector and the other side of financing the economy which was a great addition to my current knowledge on the financial sector.

I would also like to thank the several experts who provided me with their expert knowledge which was crucial for me to provide recommendations as part of the research.

Last but not least, I would like to thank family and friends who read my work and provided me with additional remarks.

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1 Introduction

There has been a significant rise in bankruptcies in the EU since the financial crisis in 2007. In 2007, there were approximately 130.910 bankruptcies in the Eurozone¹. This number increased to an all-time high in 2013 with approximately 189.855 bankruptcies, which eventually declined to 179.662 in 2014 (a 5,4% decrease). Especially in the Mediterranean countries, a significant reduction in the number of firms still in operation has been caused by the long phase of recession. One of the main causes of this high number of bankruptcies is the absence of well-functioning insolvency proceedings in these troubled countries (Creditreform, 2015).

Currently many bankruptcies in the EU are caused by the current, volatile economic situation and the subsequent lower credit provision by financial institutions. Also, the absence of proper functioning insolvency proceedings for troubled businesses impact the high number of bankruptcies. Many countries have implemented laws to facilitate the insolvency process or to protect companies facing difficulties against their creditors. These frameworks aimed to prevent distressed companies from going bankrupt by giving them the opportunity to reorganize their business first and save economic value in terms of revenues and employment².

But most of these laws don't work like policy makers initially expected them to do. Fewer companies use these frameworks to have temporary protection from their creditors. This is due to the fear of being stigmatised of not being capable to survive their current precarious state. This causes extra difficulties for such companies as current or potential business partners are hesitant to engage in business transactions which could eventually lead to a negative spiral for these companies in difficulties. This creates the opposite effect as originally intended by policy makers when installing these insolvency frameworks aimed at protecting these distressed companies. Instead of protecting the companies in distress, they get into more difficulties and will go bankrupt at an even faster rate.

Entrepreneurs who failed once have difficulties to receive a second chance in the EU. This is a huge potential loss of economic value as these entrepreneurs have higher success rates during their second or even third time starting a company (European Commission, 2011).

In contrast, in the US it's a more common practice to receive second chances after going bankrupt before. This is partly due to the fact that there's another mindset in the US towards bankruptcy and failure by entrepreneurs. Failure is seen as a normal step towards future success. In chapter 5, we will see that cultural differences between Belgium and United States also play an important role in the different views towards failure in both countries.

However, this is not the only reason. There's also a better functioning insolvency framework in the US: Chapter 11 of the US Bankruptcy Code. The US courts have defined Chapter 11 as follows: *'This chapter of the Bankruptcy Code generally provides for reorganization, usually involving a corporation or partnership. A chapter 11 debtor usually proposes a plan of reorganization to keep its business alive and pay creditors over time.'*³

¹ Eurozone in 2014: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Uk.

² For example, in Belgium there's the WCO or 'Wet Continuïteit der Ondernemingen' which aims to protect companies against creditors during difficult times in order to preserve valuable economic value that most of these firms present for the economy. This framework is the Belgian equivalent of Chapter 11 in the US

³ See: <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics>

But rather than go through the traditional process of proposing a plan of reorganization to be voted by its various claimants, Trustees⁴ of the bankruptcy estate increasingly seek to sell all or substantially all of their assets under the authority of 11 U.S.C. § 363(b), which permits the bankruptcy court alone to approve a sale, in the form of a bankruptcy auction or the sale to a third party, after notice and a hearing (Kling, 2012). As a reorganization plan can be a time-consuming process, it is sometimes preferred to sell off the companies' assets in order to save time and preserve the value of these assets.

A bankruptcy sale is intended to create a competitive bidding environment aimed at selling the collateral at the highest value possible. These sales are typically advertised and marketed to parties-in-interest, among which creditors as well, in order to attract the most interest. Buyers also find these bankruptcy auctions attractive as the ultimate sale will be the subject of an order of the Court to authorize the transfer of the collateral to the winning bidder, free and clear of all claims, liens and encumbrances (Solomon, 2008, p.32). This Court approved process creates additional certainty to these buyers.

With the reduction of capital sources during the recent economic downturn, 363 sales have become an important alternative to traditional Chapter 11 reorganizations. As a result, credit bidding has been elevated to the forefront of defensive strategies for traditional lenders. This is to protect their interests during insolvency proceedings, i.e. protecting them from a decreased value of their collateral due to the asset sales under Section 363(b) (Mankovetskiy, 2011). Credit bidding could be seen as a potential protection tool for secured lenders (i.e. financial institutions in the EU) to reduce credit risk.

In the US, credit bidding has been a frequently used tool by secured creditors to protect the value of the collateral securing the debt owed to the secured creditor (Mankovetskiy, 2011). This is used when a debtor is facing difficulties and seeks to sell off his assets by using the 363 Sales framework, as part of the United States Bankruptcy Code.

The secured creditor benefits in at least 2 ways from a bankruptcy sale: First, the bankruptcy sale creates a competitive marketplace to achieve the highest sale price. In cases where the secured creditor hopes to acquire title, a bankruptcy sale can be quicker and cleaner than a regular judicial foreclosure. Second, after a successful credit bid the secured creditor also receives title free and clear of all claims and liens without having to litigate a foreclosure upon subordinate interest holders. (Solomon, 2008, p.32).

However, during recent years there has been a lot of criticism towards the use of credit bidding. Many critics argue there are numerous negative effects caused by the credit bidding process during bankruptcy auctions.

This has been confirmed by some recent cases where the US Courts limited the use of credit bidding during bankruptcy auctions of a distressed debtors' assets under the 363 asset sale framework (cfr infra). Credit bidding leads to a lot of controversy during the auction process as junior creditors recover less from a 363 assets sale auction process if a secured creditor uses his

⁴ Trustee= person appointed by the United States Trustee, which is an officer of the Department of Justice, to represent the debtor's estate in a bankruptcy proceeding. Although a bankruptcy judge has the ultimate authority on the distribution of assets, the trustee is charged with evaluating and making recommendations about various debtor demands in accordance with the U.S. Bankruptcy Code (Investopedia.com, 2017).

right to credit bid, this is referred to as the 'bid chilling' effect which we will discuss in chapter 2.4. We will look into their arguments in Chapter 2.4 of this research. We will make a distinction between the diverging views of its proponents and opponents towards the use of credit bidding in order to assess whether credit bidding could be a useful tool for secured creditors in Belgium.

The aim of this research is to look further into the characteristics of credit bidding. We will also look into its advantages and disadvantages during insolvency proceedings. Furthermore, this research aims to provide a concise answer to the question whether credit bidding can be used in the EU (and more specifically under Belgian law).

This could save economic value otherwise lost due to a time-consuming process we are currently witnessing during lengthy, inefficient insolvency proceedings in Belgium.

Answering this question aims to fill the gap in the literature on credit bidding in the EU, and more specifically Belgium. This could be useful during the difficult economic situation as we are currently facing in the EU. This could also change the negative climate European entrepreneurs and SMEs are currently facing in terms of finding adequate financing as creditors will be more protected against credit risk when providing credit to these projects.

As there is currently no comparable framework available in Belgium during insolvency proceedings, it could be interesting to see whether there is a legal base for secured creditors to use their right to credit bid their outstanding amount of debt during a bankruptcy auction or sale to a third party in Belgium.

2 What is Credit Bidding?

2.1 Introduction

Rather than go through the traditional process of proposing a plan of reorganization, which has to be voted by its various claimants and is a time-consuming process, bankrupt companies increasingly seek to sell all or substantially all of their assets under the authority of 11 U.S.C. § 363(b)⁵, which permits the bankruptcy court alone to approve a sale after notice and a hearing by a judge. These sales can be accomplished quickly and without complying with Chapter 11's disclosure and voting requirements. This reduces the costs of legal proceedings and minimizes the period during which a debtor must operate under the cloud of bankruptcy which is beneficial for the possible survival of the company. By selling an entire division or even all of a firm's assets, the 363 Sales can preserve the firm's going concern value and thereby displacing the need for a full-blown reorganization process which has proven to be time-consuming and increasingly complex process (Kling, 2012).

Instead of starting the insolvency proceedings and negotiating a reorganization plan with all creditors, the debtor can seek court approval to sell assets or even sell the whole company in order to save time. As operating under the cloud of bankruptcy can be detrimental for a firm (e.g. some suppliers and clients can choose to not engage in business transactions anymore), asset sales are a very efficient tool for a company to survive or to preserve the value of firm specific assets by selling them to an interested third party.

In chapter 2.2.2, we will see how the sale of all of a firm's assets (i.e. Aéropostale in the US) saved a significant part of the company going concern and made it possible to operate on a smaller scale and save numerous jobs in the process.

With the reduction of capital sources during the recent economic downturn, 363 sales have become an important alternative to traditional Chapter 11 reorganizations. As a result, credit bidding has been elevated to the forefront of defensive strategies for traditional lenders (Mankovetskiy, 2011).

It's an interesting tool as a defensive strategy in the sense that the collateral will not be sold under its value during a bankruptcy auction or a private sale to a third party. Secured lenders are able to protect their secured loan if the asset sale or auction sale does not lead to a bid they consider as reasonable and can choose to bid on the assets on which they possess a lien by issuing their secured claim.

But it's also increasingly used as an offensive strategy by the private fund community focused on distressed debt investment⁶. These distressed debt investors buy a loan from a secured lender at a lower value, i.e. 30% of face value, and then use the value of the outstanding claim to credit bid during a bankruptcy auction. This is done in order to acquire the asset or even the whole company in distress which leads to high profits for these investors as they only paid a fraction of the face value (Mankovetskiy, 2011).

⁵ See <https://www.law.cornell.edu/uscode/text/11/363> for the full text of 11 U.S.C § 363(b)

⁶ www.distressed-debt-investing.com defines this as: 'Distressed debt investing is the purchase (or sale) of equity or debt securities, bank debt, CDS, trade claims, options etc of companies under financial distress' in order to sell this at high profit but taking on a higher risk

In Chapter 2.4.1, we will see an example of this process in the Fisker Automotive case where Hybrid (the distressed debt investor in this case) bought a secured loan at a public auction organised by the original lender (i.e. the Department of Energy of the United States) for only 15% of the face value of this secured loan.

The framework of credit bidding during insolvency proceedings, more specifically U.S.C § 363(k) of Chapter 11 of the Bankruptcy Code, has been frequently used in the US but also increasingly in Canada during recent years (Latham et al., 2011). This framework provides some important advantages such as reducing the length of insolvency proceedings which is crucial to preserve economic value and protecting lenders against a decreasing value of their collateral.

However, during recent years there has been a lot of criticism towards the credit bidding process. Many critics argue there are numerous negative effects caused by secured creditors using their right to credit bid during bankruptcy auctions.

Among these critics is the fact that distressed debt investors, sometimes even referred to as 'vulture investors', use credit bidding to gain high short-term profits. They do this by buying loans at a discount (e.g. 30% of their initial value when it was issued) and use the right to credit bid the full amount of the loan during an auction in order to acquire the underlying collateral or even the whole company in some cases (this will be supplemented by an additional cash amount in most cases).

Critics argue that these funds do not create sustainable economic value but only aim at gaining short-term profits. Proponents however argue that these investors create liquidity by buying assets otherwise not bought on the market. They also claim that these investors provide specific knowledge to companies in difficulties (e.g. financial expertise, experience in a specific sector, experience with a certain technology). Therefore, they could be a valuable addition to the restructuring process instead of only aiming at short-term profits (Van den Berg, 2016).

It has become clear that credit bidding leads to a lot of controversy and diverging views on its application. This chapter aims to look further into the characteristics of credit bidding and its advantages as well as its disadvantages during a bankruptcy auction as part of a 11 U.S.C § 363(b) asset sale to sell off all or parts of the assets of a distressed company.

2.1.1 Credit bidding outside of Chapter 11

Credit bidding can also be used outside the scope of Chapter 11. As part of an out-of-court plan of reorganization between a debtor and some of the creditors, secured creditors can also use their right to credit bid if an asset sale is part of the reorganization plan. Even outside the scope of Chapter 11, secured creditors can protect their interests during an asset sale of the collateral of their loan (Van den berg, 2016).

This is being increasingly used during the restructuring of companies which can be due to operational or financial reasons. During a financial restructuring, there will be changes in the capital structure of the company because the structure no longer corresponds to the earnings capacity of the company. These restructurings can take place within or outside insolvency

proceedings. Distressed debt investors are increasingly using asset sales to sell off assets of a distressed company, which they acquired at a discount, and use their right to credit bid the value of the secured claim in order to make profits by acquiring the collateral or raising the bids on the collateral (Van den berg, 2016).

However, in this report we will focus on the mechanism of credit bidding during insolvency proceedings of distressed companies and how secured creditors use their right to credit bid as a protection tool during a bankruptcy auction or sale to a third party within the framework of the US Bankruptcy Code and subsequently the Belgian insolvency proceedings.

This research will also focus more on secured creditors in the form of financial institutions or third parties interested in the companies' assets due to similarities in the activities. This is due to the fact that in the European Union financing relies more on financial institutions (i.e. banks) than in the United States where capital markets play a more important role in financing the economy compared to the traditional banking system (Slovik, Cornède, 2011). Therefore, distressed debt investors and vulture investors are a less common practice in Belgium. This research aims to provide recommendations on the application of credit bidding as a protection mechanism for secured creditors during insolvency proceedings under the Belgian legal framework.

2.2 Defining credit bidding

Franks et al. (1996) have defined companies being insolvent as "*the inability to pay debts as they mature or as obligations become due and payable*". This definition is also used in Belgium on which this research is focused⁷.

It may be the case that a certain company has adequate assets to cover liabilities. However, it's possible that the company is not able to convert the assets into liquid means (e.g. cash) to meet their outstanding financial obligations that become due and payable. In this case the company will be considered as illiquid or not being able to pay back its short term liabilities with short term assets (Ooghe et al., 2012, pp. 195-215). If this continues, the company can become insolvent and will be forced to file for bankruptcy or ask for temporary protection against creditors under the framework of WCO in Belgium if the company shows signs of possible recovery.

Broadly speaking, there are two available options in terms of insolvency proceedings⁸; liquidation and reorganisation. Liquidation was defined by Franks et al. (1996) as "*closing down of the business operations and the realisation of its assets to pay back their creditors*".

A reorganisation on the other hand provides firms with a chance to restructure their financial and operational base in order to allow them to remain operational and pay back creditors (Chatterjee et al., 2004).

⁷ A second way in which insolvency is defined is by strictly looking at insolvency and liquidity ratios by analysing the financial statements of a company, even if they are still able to pay back creditors. This is out of the scope of this report

⁸ Also see Regulation on Insolvency Proceedings(EC) No 1346/2000 of 29 May 2000

Instead of going through the traditional reorganization process of Chapter 11 of the Bankruptcy Code, insolvent companies increasingly seek to sell all or substantially all of their assets under the authority of 11 U.S.C. § 363(b), which permits the bankruptcy court alone to approve a sale after notice and a hearing to approve the winning bid. This is mainly due to efficiency reasons as this has proven to be a faster process and it can be started without complying to the traditional disclosure and voting requirements of concluding a reorganization plan under Chapter 11 (Kling, 2012).

Section 363(k) of the Bankruptcy Code states that “*sales under section 363(b) of property that’s subject to a lien that secures an allowed claim, unless the court for cause orders otherwise, the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property*” (Kling, 2012). This is the legal base for credit bidding during insolvency proceedings and is the focus of this research.

Generally, a sale of the debtor's assets cannot be in the debtor's ordinary course of business in order to be compliant with section 363 of the US Bankruptcy Code. However, when it is necessary to determine whether the sale is in fact outside of the ordinary course of business two tests are conducted to assess the validity of the sale, i.e. a horizontal test and vertical test:

- The horizontal test determines “*whether the transaction in question is one that businesses similar to the debtor would engage in as part of its day-to-day operations.*”
- The vertical test asks “*whether this type of transaction is one that this particular debtor regularly engaged in pre-petition.*”
- ⇒ If the answer to both tests is negative, the proposed asset sale can be classified as a sale outside of the ordinary course of business and will be permitted under section 363 of the Bankruptcy Code (Porcelli, 2016).

Mankovetskiy (2011) defined Credit Bidding as: “*Section 363(k) of the Bankruptcy Code gives a creditor the right to use up to the full amount of the debt owed to the secured creditor by the debtor as currency in a bankruptcy auction sale of the collateral securing the debt owed to the secured creditor*”. The right to credit bid thus holds for the amount of the claim on the collateral which secures the debt.

This Section has been adopted by the US Congress to protect the interests of secured creditors during a bankruptcy auction when the bid price of its collateral is considered inadequate compared to the lien they have on the collateral. Secured creditors can then credit bid the amount of their outstanding secured claim to either drive up other bids or win the auction and subsequently gain possession over the collateral in exchange for releasing the amount of its bid equal to the winning bid (Mankovetskiy, 2011).

This provision, likewise, permits a holder of an allowed secured claim against a debtor to credit bid the outstanding value of the loan in a Section 363 Sale, unless a court “for cause” orders otherwise. Prior to 2014, the bankruptcy courts had generally limited “cause” to situations in which a secured creditor had engaged in egregious or malicious misconduct (Chapman and Cutler LLP, 2016). We will discuss the Fisker case from 2014 where the court ordered for “cause” in detail in chapter 2.4.1.

If we look at the credit bidding process in Canada, in Canadian law literature credit bidding was defined from a Canadian insolvency law perspective as: “*A recent development in financing workouts of insolvent businesses is the use of credit bidding. A credit bid essentially allows a*

creditor to use its debt to bid for the equity of the company, often in a stalking horse process⁹. Although there is no express language in the CCAA¹⁰ that allows credit bidding, Canadian courts have accepted credit bids as a reasonable means of financing the workout⁸ (Sarraf, 2011).

2.2.1 Basic example of the credit bidding process

Background

In the case of this example, a debtor owes one of his creditors an amount of \$10 million which is secured by the fixed assets portion of the debtor's total assets, of which a factory building is his most valuable asset.

If this debtor gets into financial difficulties, he can decide to sell off all or specific parts of his assets by means of a bankruptcy auction sale or a sale to a third party (i.e. 363 Assets sales) instead of going through the process of agreeing a traditional Chapter 11 reorganization plan (Mankovetskyi, 2011). This can be helpful to pay back his creditors as much as possible in a shorter time frame than with a reorganization plan. As this plan has to be voted by all claimants, he could lose valuable time and the asset could possibly lose some of its value.

If the debtor chooses to sell off his assets or even the whole company, the secured creditor can choose to use his right to credit bid during the sale of the collateral if he finds the bids too low and therefore have a low recovery on his outstanding claim. Below, we will show two different scenarios of a creditor using his right to credit bid with 2 different outcomes for the creditors and the debtor after the introduction of the credit bid:

First scenario:

The factory building is located in an area where currently a lot of construction is going on, which makes real-estate property located in this area temporarily less attractive. This implies that the building could be undervalued at the time the auction or sale would take place. The creditor who has a secured claim on this property (the creditor is a secured creditor as he has a secured claim on the building that is collateral for the loan he issued to the debtor) argues that if the collateral is sold at this time it will not be sold at a fair price according to his own valuations, taking into account the current construction going on in the area. He will then face a loss on the face value of the loan (which is \$10 million at the moment of the sale).

⁹ Stalking horse process= an initial bid on a bankrupt company's assets from an interested buyer chosen by the bankrupt company is a 'Stalking horse bid'. From a pool of bidders, the bankrupt company chooses the stalking horse to make the first bid. This is done to avoid low bids on its assets. Once the stalking horse bid has been decided, other potential buyers may submit competing bids for the bankrupt company's assets (Investopedia.com, 2017).

¹⁰ *Companies' Creditors Arrangement Act* is a Canadian Federal Act that allows financially troubled corporations the opportunity to restructure their financial affairs (PWC Canada, 2016).

If the expectations of the creditor are confirmed during the auction sale and only bids of \$5 million and \$6 million are submitted by interested bidders, this would imply a huge loss for the creditor (in this case \$4 million on the outstanding amount). The debtor will be able to pay him back partially with the proceeds from the sale, \$6 million in this case. For the rest of his claim, \$4 million, he has to wait for the outcome of the insolvency proceedings just like the other creditors.

But according to *Section 363(k) of the Bankruptcy Code*, this secured creditor can use his right to credit bid on the auction with the outstanding value of his secured claim, i.e. up to \$10 million, without having to borrow additional funds at a financial institution to fund this bid. If no other bidders submit a higher bid during the auction, the creditor will gain ownership of the building instead of losing \$4 million when the highest bid on the auction of \$6 million would have been accepted. Also, without credit bidding, the secured lender had to participate in the bidding process by submitting cash bids if he wanted to acquire this building instead of selling it to the highest bidder and subsequently losing money in this example. This implies he would need extra liquidity to fund his bid.

The creditor can now choose to look for another buyer for the factory building who will pay him more than the \$5-6 million bids that were submitted at the auction by bidding his claim to acquire the building. He can decide to keep the building in order to sell it when the construction in the area comes to an end and the value is back at the original level or maybe higher or find a third party to sell the building at a higher price than the \$6 million bids at the auction to recover as much as possible from his loan.

In this example, the creditor used his right to credit bid to protect him from losing money caused by the insolvency of a debtor to whom he issued a loan with a secured claim on the collateral. Other creditors, secured or non-secured lenders, will not be impacted by this credit bid as they had no claim on these fixed assets. If the highest bid at the auction would have been the winning bid, this \$6 million would have been used to pay back creditors, which would have been the secured lender first. But the secured creditor would have received much less without having the right to credit bid. The credit bidding only impacted the secured creditor with a claim on the factory building by providing him with more protection and had no effect on the recovery of the other creditors involved.

Second scenario:

The building is located in an upcoming neighbourhood and has potential to increase in value over the next few years. The debtor wants to sell his assets at a bankruptcy auction instead of agreeing a reorganization plan conform Chapter 11 of the Bankruptcy Code. Other investors also see the potential of this building and submit bids at the auction of respectively \$6 million and \$8 million to acquire the building.

The secured creditor however has the right to credit bid the outstanding value of his secured claim, which is worth \$10 million. As the building is expected to increase in value and the only bids currently submitted are below the potential value of the building, the secured creditor will credit bid his \$10 million claim to protect his principal from dropping in value. This way he is

protected from facing a loss on his loan due to the bankruptcy of the debtor. The introduction of the credit bid could lead to two different outcomes:

Firstly, if no other bids by third parties are submitted after the introduction of the credit bid by the secured creditor, the secured creditor will acquire the collateral for the bid he issued (he can credit bid up to \$10 million). This way he protect his outstanding claim and can choose to sell the collateral, in this case a building, to other interested parties at a price they agree upon and potentially make an additional profit but this is not the aim of secured creditors but could be an interesting possibility for other investors.

Another possibility could be if, after the introduction of the credit bid by the secured creditor, other parties are still interested in the building they can choose to submit a higher bid at the auction in order to acquire the building. Every bid higher than the \$10 million credit bid will normally be chosen as the winning bid after court approval and will thus acquire the building at this price.

However, if the secured creditor still thinks that the value of the building is higher than the amount of this bid (e.g. the highest bid is \$11 million but the creditor thinks he can sell the building for \$14 million in a couple of years), he can choose to use his credit bid of \$10 million and provide extra funds (e.g. cash) to submit a higher bid than the current \$11 million bid by another interested party.

If for example the secured creditor bids \$12 million (\$10 million credit bid and \$2 million in cash) and no other party submits a higher bid, the secured creditor will have acquired the building. This leads to a positive outcome of the auction as the collateral has been sold at a higher price than at the initial bid prices submitted before the introduction of the credit bid and \$2 million extra revenues can be used to pay back other creditors of the debtor.

As the bankruptcy auction lead to higher revenues, other creditors (subordinated or junior lienholders) will recover more from their loans issued to the distressed debtor. The introduction of the credit bid thus lead to higher competition during the auction and a better outcome for the creditors. This is seen as one of the advantages of credit bidding (also see chapter 2.3 and Van den berg (2016)).

However, in reality credit bidding does not always lead to a better outcome of the bankruptcy auction. Critics argue that the introduction of a credit bid could lead to a 'chilling' of the bidding. This leads to complex cases where other creditors question the legitimacy of the credit bid of a secured creditor. They claim that the credit bid will lead to a less competitive auction upon which a judge has to rule whether to accept the credit bid or order "for cause" under Section 363(k) and limit the amount of the credit bid.

In the following chapter we will look at recent, high-profile cases where credit bidding was used successfully and also a case (Fisker Automotive) where the credit bid was limited by the respective Bankruptcy Court as there was proof of malicious conduct by creditors and there were signs of a so-called 'bid-chilling' effect. In this specific case, the Court then ordered for "cause" and limited the amount the secured lender could credit bid during the bankruptcy auction sale.

2.2.2 Case study on credit bidding: 'Aéropostale Decision'

To illustrate how a normal credit bidding process works, we will use a recent case where credit bidding was successfully used by a secured creditor but also contested by the other creditors. This was the case during the bankruptcy auction of Aéropostale in August 2016. The Aéropostale case follows closely with the traditional understanding of Section 363 to permit the secured creditor to fully credit bid its claim (Chapman and Cutler LLP, 2016).

Background

Aéropostale is a retailer of casual apparel and accessories aiming at adolescents and young adults aged 18-22. The company operates with over 800 stores in the U.S and Canada. Due to a drop in their share prices and liquidity problems they were forced to file for Chapter 11 of the US Bankruptcy Code in the beginning of May 2016 with the court for the Southern District of New York. The retailer was seeking to immediately close 154 of its over 800 stores located throughout the United States and Canada as part of its reorganization plan (Paget, Kramer, 2016).

Under the authority of Section 363 of the Bankruptcy Code, Aéropostale wanted to sell off substantial parts of their assets (in this case, some of their stores) instead of going through the customary plan of reorganization under the authority of Chapter 11.

One of Aéropostale's largest creditors, Sycamore Partners and their affiliates, had agreed a secured term loan with Aéropostale. As part of this term loan, Aéropostale was required to enter into a sourcing agreement with one of Sycamore Partners' entities to buy up to 30% of their merchandise. Sycamore also owned 8% of the common stock of Aéropostale and 5% preferred stock as of May 23, 2014. Through this agreement, a Sycamore affiliate could appoint 2 members to the board of directors of Aéropostale (Chapman and Cutler, 2016).

Auction process

Sycamore Partners issued a **secured term loan to the amount of \$150 million** to Aéropostale. This secured loan entailed that Sycamore had the right to credit bid this amount during an auction aimed at selling off Aéropostale's assets as to protect the secured creditor against the insolvency of the debtor. They could also use the amount of the secured claim to issue a bid to acquire the company.

As Aéropostale filed for Chapter 11, they wanted to sell of their assets in a bankruptcy auction under the authority of Section 363. The aim was to recover funds to pay back their creditors as much as possible.

But Sycamore Partners thought they would recover less than the value of their \$150 million secured loan they issued in 2014. Therefore they wanted to exercise their right to credit bid the outstanding value of their secured claim in order to protect their initial investment from a substantially lower recovery caused by the bankruptcy auction sale. They submitted the value of their secured claim as a bid during the auction in order to acquire the company. But this credit bid would lead to a lower outcome for the other creditors of Aéropostale was argued. This is because of the 'bid chilling' effect due to the introduction of the credit bid.

In August 2016, Aéropostale and other debtors of the company filed a case against Sycamore Partners to disqualify them from their right to credit bid their outstanding claim during the auction sale of the companies' assets. They also claimed that Sycamore's claim should be subordinated against the other debtors of Aéropostale. They found that malicious conduct by Sycamore was part of the reasons that eventually led to the bankruptcy of Aéropostale. Also, they argued that if Sycamore used their right to credit bid this would lead to a 'chilling' effect on the bidding process by scaring away other potential third party bidders from participating during the bankruptcy auction. According to the debtors, the bankruptcy court should order for "cause" as is stated under Section 363(k) of the US Bankruptcy Code and therefore limit the amount that Sycamore could credit bid during the auction (Chapman and Cutler, 2016).

The bankruptcy court overruled this claim because they found no solid prove of malicious conduct by Sycamore prior to the filing of Chapter 11 by Aéropostale. Additionally, they stated that there was no clear evidence of a 'bid chilling' effect caused by the actions of Sycamore (in this case using their right to credit bid their secured claim during the auction sale). This resulted in the right for Sycamore to credit bid the full value of their outstanding claim, which was \$150 million (Chapman and Cutler, 2016).

If the auction doesn't lead to a bid higher than the credit bid of \$150 million, Sycamore could acquire Aéropostale at this price. But this was not the case here as other parties were involved in the bidding process to acquire Aéropostale as well. The higher competition eventually led to higher bids than the initial credit bid by Sycamore. This shows that there were no signs that the introduction of the credit bid by Sycamore had a 'bid chilling' effect and prevented a competitive bidding process.

Eventually, the auction ended on September 1, 2016 with a \$243 million bid by a group of bidders consisting of: Authentic Brands Group LLC, mall operators Simon Property Group and General Growth Properties and liquidators Gordon Brothers and Hilco Merchant Resources. Subsequently, Sycamore issued a statement after the auction declaring the following: "*We are pleased with the outcome of the Aeropostale bankruptcy auction, which will result in the repayment of our debt while enabling the company to keep open more than 200 stores, preserving thousands of jobs and continue to serve customers*" (Fortune, 2016).

From this case we can conclude that a secured creditor, Sycamore Partners, was able to protect its outstanding claim of \$150 million by using their right to credit bid the full amount of this claim during the bankruptcy auction sale of their debtors' assets.

Also, the credit bid eventually led to higher bids by other interested parties to acquire the distressed company, Aéropostale, which provides the debtor with additional liquidity to pay back their creditors. As part of this deal they can also continue their operations on a smaller scale (229 store remain operational) which saved jobs and economic value (Fortune, 2016).

Overall, we can say that the credit bid led to a positive outcome for the different parties involved. The secured creditor could protect his outstanding claim against a drop in value, other creditors will recover more from the asset sale as the credit bid led to higher competition and eventually a higher purchase price by the buyers. Some of the employees could keep their job instead of all employees losing their job due to the insolvency. Finally, the debtor recovered a higher amount for his assets and was able to pay back his creditor in a more adequate way than before the introduction of the credit bid. Also, the fact that Aéropostale can remain operational on a smaller scale shows that credit bidding can be an effective tool to serve as protection for secured lenders and preserve economic value to the society as a whole in terms of saving jobs and profits.

2.3 Advantages

When we defined credit bidding, it was stated that assets sales under Section 363 have become increasingly popular as an alternative to the traditional Chapter 11 reorganizations because they speed up the process and can be executed at lower costs. Also, companies' assets have become less firm specific meaning that more buyers for the assets can be found which is an advantage for the distressed company (Mankovetskiy, 2011).

Therefore, assets sales will often generate the same benefits as a lengthy reorganization process but in less time and at a lower cost for the company. This is advantageous for companies in financial distress and prevents assets from losing value due to a time-consuming restructuring process (Kling, 2012).

Some proponents claim that credit bidding is a well-calibrated tool to maximize the value of a bankruptcy estate due to several reasons. First, credit bidding can increase the often small pool of bidders which are familiar with the debtor's assets to buy them on a truncated timetable. Due to the limited time to submit bids at the auction, there can be a limited amount of bidders participating in the auction. Credit bidding leads to an extra bidder and could raise competition among bidders. Secondly, credit bidding constrains debtors from favouring "white knight" buyers¹¹ who do not offer the highest purchase price. Thirdly, credit bidding reduces the cost to submit a bid (they submit the value of their outstanding lien as a bid) and minimizes the transaction costs in general (Buccola, Keller, 2010).

The right of secured creditors to credit bid is intended to protect them against a sale of that collateral at an inadequate price. If they find the bid price on their collateral to low, they are able to credit bid the outstanding value of the debt in order to protect their interests (van den Berg, 2016).

Section 363(k), which is the legal base of credit bidding, is designed to protect secured creditors when their collateral is sold, just as section 1111(b) is designed to protect them against an erroneous judicial valuation and strategic lien stripping in the context of a plan that proposes to retain their collateral. The risks they face in a sale of their collateral under Section 363 of the Bankruptcy Code are likely to be below those to which they are exposed in a reorganization in which the debtor retains the collateral (Kling, 2012).

Proponents argue that credit bidding increases the competition during auction sales which leads to higher bids on the assets and facilitates a smoother insolvency process. Another way in which credit bidding is advantageous for investors is that the price of the secured claim has been fulfilled earlier. This means that there's no additional liquidity needed during the execution of the right to credit bid which facilitates the process and saves time and the effort of finding extra liquidity (van den Berg, 2016).

¹¹ Often, company officials seek out a white knight – sometimes to preserve the company's core business, and other times just to negotiate better takeover terms. Unlike a hostile takeover, current management typically remains in place in a white knight scenario, and investors receive better compensation for their shares (Investopedia.com, 2017).

2.3.1 Credit bidding and stronger capital rules for financial institutions (Basel III & IV)

Credit bidding could therefore be considered as an interesting addition to the current European bankruptcy law and insolvency proceedings as it provides protection to secured creditors against losing the value of their outstanding claims when their debtor becomes insolvent. By providing a protection tool to secured lenders during financial distress of their debtor, they can become less reluctant in providing credit to European companies and more risky projects requiring specific financing. This could have a positive impact on credit supply by financial institutions or investors focused on specific companies (e.g. innovative SMEs, distressed companies) that currently have difficulties finding adequate financing due to the high credit risk they entail for traditional lenders.

Also, due to stricter capital ratios for financial institutions (i.e. the Basel III & IV framework, transposed as CRR/CRD in European banking regulation) since the financial crisis in 2008, financial institutions have become more reluctant to provide higher risk loans to companies as they have to comply with the stricter capital rules. Banks are required to have higher quality capital on their balance sheets (i.e. CET1 capital and Tier 2 capital¹²) to be more protected against an economic downturn like we witnessed during the financial crisis of 2008 (European Commission, 2011).

By being able to credit bid their outstanding claim, secured creditors will be more protected against losses incurred by the insolvency of a debtor. As these loans face less risks against a drop in value due to the protection provided by credit bidding to secured creditors, these secured loans could be used as higher quality capital for banks to comply with the new rules. They could be placed on the balance sheet as a source of Tier 2 capital to increase their capital base and comply with the stricter rules.

With the presence of new capital sources to comply with the rules, the financial institutions could be less reluctant to provide credit to more risky projects and provide funding to companies otherwise not capable of getting loans under the current market conditions. In chapter 4, we will analyse interviews with respondents from the banking sector to see whether they think credit bidding could be an interesting tool for financial institutions to supply more loans as they will face lower credit risk due to credit bidding.

This would be an interesting option to stimulate the recovery of credit provision and to stimulate the economic activity in Europe. As we saw previously it is crucial for the European Union to have adequate credit provision by the financial institutions as this is the main source of financing economic activity in the European economy.

The possibility for secured creditors, i.e. financial institutions, to use their right to credit bid could help these institutions with their risk management. Because risky loans will more likely be classified as less risky assets on their balance sheet as they have the right to credit bid during the sale of the collateral on which they have a claim. They will be more protected against losses than before and could potentially be more encouraged to provide loans.

¹² CET1 capital= The highest quality of capital banks have on their balance sheets. This consists mostly of retained earnings and common equity. According to the new rules, banks should have a CET1 ratio of 4,5% by 2019

Tier 2 capital= Tier 2 capital is designated as supplementary capital, and is composed of items such as revaluation reserves, undisclosed reserves, hybrid instruments and subordinated term debt (Investopedia.com, 2017).

An important part of the capital requirements is determined by the amount of RWAs (Risk Weighted Assets) a bank has on its balance sheet. These RWAs are divided into groups. For less risky loans and investments, this risk-weighted value is low. For more risky assets and investments, this risk-weighted value is high (Perez, 2014).

A banks' assets are its main source of making profits and are mainly constituted out of loans. But not all loans have the same level of riskiness. Loans who are less likely to default are considered as less risky and have a lower risk-weight. If banks have more loans with a low risk-weight, for example because they can credit bid on the collateral during the insolvency of a debtor, they have to hold less capital to absorb shocks (Perez, 2014).

If financial institutions apply this protection tool, this could be a significant additional benefit of credit bidding during the difficult economic climate we currently face due to the financial and economic crisis. Policy makers in the EU should look at the advantages of credit bidding in their objectives of providing more funding to SMEs, as well as making sure banks are better capitalized to absorb shocks in the future. This research will look further into this and provide recommendations on the possible application of credit bidding in Belgium.

2.4 Negative consequences

As there are some clear advantages for the different parties involved in using credit bidding during insolvency proceedings, there has also been evidence on negative consequences emerging as well.

Kling (2012) stated that "*the ability of secured creditors to credit bid is not only an unnecessary protection but can also have undesirable consequences*". Allowing the secured creditors of insolvent companies to credit bid at a sale of the collateral they have a claim upon, can "chill" outside bidding and undermine a solid and value-maximizing sale process of the company's assets. This bid chilling can happen in 2 ways (Kling, 2012):

- Outside bidders could think that secured creditors have superior information regarding the real value of the debtor's assets. They fear that they could overpay for those assets and they will therefore not participate in the auction as they think the secured lien holders have an unfair advantage in the auction or third party asset sale. The problem here is that the secured creditors do not actually own the collateral but only have a claim on it.
- A secured creditor can use their right to credit bid to acquire the collateral and retain for itself any value above the amount of its claim to the detriment of junior lienholders or possibly equity holders. This was clear in the second scenario of the example in Chapter 2.2.1 where the building was worth more than the claim of the secured creditor so the secured creditor could maintain the extra profits if he sells the collateral later. The extra profits will not be taken into account in the bankruptcy estate, which is detrimental for the other creditors.

Therefore, in a bankruptcy auction, the introduction of a secured lien holder who is credit bidding on the collateral distorts the informational dynamics and incentive structure of the process in a way the introduction of a third-party bidder does not (Kling, 2012). The credit bid leads to

asymmetric information dynamics as third-party bidders perceive the secured creditor as more informed which could limit their bidding.

Hage (2015) stated in his research that “*Instead of being used as a shield to protect against a sale to a third party at a below-market price, credit bidding is increasingly used as a sword by secured lenders to acquire a company*” (See case *Fisker Automotive* below). This is one of the rising critics towards the use of credit bidding as critics argue that credit bidding is used less and less as a tool to protect creditors and investors, as was originally intended by the Bankruptcy Code.

Recently, some courts have limited creditors to credit bid the outstanding value of their claim during an auction sale or they have limited the bid to a certain amount. The courts have thus ordered “for cause” under the authority of section 363(k) of the US Bankruptcy Code.

Before 2014 this was generally limited to situations in which a secured creditor had engaged in malicious misconduct prior to the filing for bankruptcy (in most of the cases this was collusion) and were unsympathetic to arguments that credit bidding should be precluded as it chills the bidding process during an auction sale.

But in 2014 two courts, the Courts of Delaware and the Eastern District of Virginia, had raised concerns for secured lenders and purchasers of secured loans in the secondary market (e.g. distressed debt investors). In their respective case, these two bankruptcy courts had severely limited the ability of the secured creditors in question to credit bid their secured claims (they thus ‘capped’ the credit bid). The bankruptcy courts limited the secured creditor’s rights due to the following reasons “(i) *the desire not to chill the bidding of the 363 Sales* and (ii) *concerns raised by unsecured creditors regarding the extent and validity of the secured creditor’s liens on certain assets being sold*” (Chapman and Cutler LLP, 2016).

Credit bidding was under a lot of criticism since the rulings of the Bankruptcy courts in these cases. Critics argued it has more negative consequences than positive during insolvency proceedings and should therefore be more limited.

Also, they argue that credit bidding is not used by secured claim holders as it was originally intended by the Bankruptcy Code but more and more by distressed debt investors buying the secured loan at a discount in order to acquire the company by using their right to credit bid during a bankruptcy auction in order to make short-term profits.

Additionally, these 2 cases showed that if there are concerns over the validity of the lien, the Court could limit the credit bid of the secured lender. This would reduce the power of credit bidding as a protection mechanism for secured creditors. We will discuss the *Fisker Automotive* case extensively to see how this happened in practice.

2.4.1 Case study *Fisker Automotive*

The Fisker Automotive case in 2014 was one of the first bankruptcy court decisions where the court limited the ability of the secured creditors in question to credit bid their secured claims without there being proof of malicious conduct by the secured creditor (Chapman and Cutler LLP, 2016). This ruling led to uncertainty concerning the validity of using credit bidding as a secured creditor. For a while, credit bidding was less considered as a protection mechanism due to the uncertainty caused by these rulings as there now was a precedent for future cases where credit bidding could be used.

Background

Fisker Automotive Holdings Inc. (from hereon after “Fisker Automotive”) is an American company specialised in producing plug-in hybrid electric vehicles for the US market and was founded in 2007. In April 2010, the US Department of Energy (from hereon after “DOE”) entered into an agreement with Fisker Automotive to offer funding to the company in the form of a senior secured loan. 3 years later, in 2013, the DOE offered a public auction process for the purchase and sale of the secured loan and sold the loan for \$25 million to the highest bidder, which was Hybrid Tech Holdings LLC (“Hybrid”). This was only 15% of the \$168,5 million face value of the secured loan (Stroock & Stroock & Lavan, 2014). Fisker Automotive started to face difficulties due to the recall of their battery A123 in December 2011 and an additional recall in March 2012. Subsequently, Fisker Automotive had to file for bankruptcy on November 22, 2013 (Fortune.com, 2016).

Auction process

On the first day of their case, Fisker Automotive filed a motion to seek approval for a private sale to Hybrid. They argued that a sale to a third party or a time-consuming auction process would be too costly and would not result in increased valued for their estate and was therefore not advisable under the prevailing circumstances. The motion was followed by an asset purchase agreement between Fisker Automotive and Hybrid in which Hybrid would acquire all of Fisker Automotive’s assets by issuing a \$75 million credit bid as part of a Section 363 bankruptcy sale (Reuters, 2014).

Hybrid thus wanted to acquire the company by issuing a \$75 million credit bid as they had a secured loan with Fisker Automotive and argued that it would be beneficial for the company and the other creditors as well.

But the Official Committee of Unsecured Creditors (“The Committee”) objected to this motion because they did not agree with the argumentation of Fisker Automotive that this sale would lead to an optimal recovery of funds. They filed a separate motion to request a competitive auction to permit a competing bidder, which was Wanxiang America Corporation (“Wanxiang”), to participate and submit a competing bid in a bankruptcy auction (Stroock & Stroock & Lavan, 2014). The other creditors argued that the credit bid would prevent a competitive process and

they also found a third-party bidder willing to participate in the auction process which would lead to a better outcome for the unsecured creditors as well.

The Committee also disputed Hybrid's right to credit bid during the bankruptcy auction. They argued that "(i) *a material portion of the assets being sold were not subject to properly perfected liens or were subject to bona fide disputes that cannot be quickly resolved and (ii) 'cause' existed to disqualify or limit the credit bid at \$25 million (initially paid by Hybrid for the debt) in order to facilitate a competitive cash-based auction. The assets sold also included encumbered, unencumbered and disputed assets*¹³" (Stroock & Stroock & Lavan, 2014). The credit bid was used to acquire the company, not only assets that were subject to the lien Hybrid had on the encumbered assets. Also, there were disputed assets involved in the companies' assets which made it possible for the Bankruptcy Court to order for "cause" under Section 363(k) of the Bankruptcy Code.

During the sale hearing on January 10, 2014, the Debtors and the Committee stated the following: "(i) *if Hybrid's right to credit bid was disqualified or limited to \$25 million, there would be a strong likelihood that there would be an auction that has a material chance of creating material value for the estate over and above Hybrid's bid; (ii) if Hybrid's ability to credit bid is not capped, there would be no realistic possibility of an auction; (iii) limiting Hybrid's ability to credit bid would likely foster and facilitate a competitive environment; (iv) the highest and best value for the estate would be achieved only through the sale of all of the Debtors' assets as an entirety; and (v) within the entirety of the assets offered for sale are (a) material assets that consist of properly perfected Hybrid collateral, (b) material assets that are not subject to properly perfected liens in favor of Hybrid, and (c) material assets where there is a dispute as to whether Hybrid has a properly perfected lien, which dispute is not likely subject to quick or easy resolution*" (Stroock & Stroock & Lavan, 2014).

According to the Debtor's and the Committee, limiting Hybrid's credit bid will lead to higher competition on the auction and eventually a better result for all parties involved. They also argue that there's a lot of uncertainty towards the legitimacy of the secured claim Hybrid has on the collateral, this uncertainty could lead to huge time losses and a high probability of leading to lower profits from an auction sale as the assets could decrease in value in the meanwhile.

The Bankruptcy Court released a written opinion where they acknowledged of a secured creditor's right to credit bid under Section 363(k) of the Bankruptcy Code "unless the court for cause orders otherwise..". The Judge found, in a footnote, that a bankruptcy court may deny a credit bid "*in the interest of any policy advanced by the Code, such as to ensure the success of the reorganization or to foster a competitive bidding environment*". Furthermore, the Court determined that 'cause' existed in this case to limit Hybrid's credit bid to \$25 million. This is because an auction would otherwise not occur and Wanxiang indicated it would be willing to raise their offer during an auction. The Court found that Wanxiang was a credible participant in the auction to acquire Fisker Automotive's assets. Ultimately, the Court ruled for "cause" to limit the credit bid because otherwise "*the bidding will not only be chilled without the cap, bidding will be frozen*" (Stroock & Stroock & Lavan, 2014).

The amount Hybrid was allowed to credit bid during the auction was therefore capped at \$25 million by the Bankruptcy Court of the Eastern District of Virginia. The auction eventually ended

¹³ Encumbered assets are assets which are subject to a secured claim or lien. Unencumbered assets are asset that are free and clear of any secured claims or liens (Investopedia.com, 2017).

with Wanxiang as the highest bidder at the bankruptcy auction and they successfully acquired Fisker Automotive's assets with a \$149,2 million cash bid (Rosenblum, 2014).

The Fisker Automotive case is a good example on how the use of a secured creditor's right to credit bid during a bankruptcy auction can impact the bidding process during an auction negatively. Hybrid acquired the secured loan for only 15% of the face value, i.e. \$25 million, and wanted to credit bid for \$75 million during the bankruptcy auction to acquire substantially all of Fisker Automotive's assets. If no other bidders participated and the credit bid was the highest bid, Hybrid would have gained high profits but the other creditors would have recovered much less from the auction sale.

Eventually, Wanxiang won the auction with a final bid of \$149,2 million which is double the amount of the initial credit bid by Hybrid. This would mean that other creditors of Fisker Automotive would not have been paid back as much if Hybrid was allowed to credit bid during the auction and the bidding was chilled.

But due to the cap on the amount Hybrid could credit bid during the auction there was a competitive auction process which led to a higher end value for all parties involved. This way there was additional liquidity to pay back creditors of Fisker Automotive. If the credit bid was not limited by the Bankruptcy Court the bidding process on Fisker Automotive's assets could have been 'chilled' because other bidders would not have participated in the bidding process and the final bid of \$149,2 million would not have been reached. In this case, credit bidding would have led to a negative effect on the auction process and not led to an optimal outcome for all parties involved.

The Fisker Automotive case was an important ruling by the Bankruptcy Court (i.e. the Eastern District of Virginia) as they set an example that courts can not only rule for 'cause' when there's evidence of malicious conduct by the secured creditor but they can also cap the credit bid prior to the auction to prevent credit bidding on having a 'chilling' effect during the bidding process. This cap was placed in order to gain higher bids by other interested parties by raising the competition during the auction and reaching a more desirable outcome for all creditors.

The Fisker Automotive case placed a lot of uncertainty over the credit bidding process and caused a huge amount of uncertainty for secured creditors whether they could continue using their right to credit bid during a bankruptcy auction. Because now their credit bid could be limited due to the new case law provided by the Fisker Automotive and Free Lance-Star Publishing Co of Fredericksburg cases (their credit bid was also capped by the Court of the District of Delaware).

2.4.2 Aéropostale decision subsiding the Fisker Automotive threat:

After the ruling in the Fisker Automotive case by the Eastern District of Virginia and the Free Lance-Star Publishing Co of Fredericksburg by the District of Delaware, the right to credit bid by secured creditors was under threat. It was unclear whether secured creditors seeking to credit bid could use this right to the full amount of their secured claim or other Courts would follow this new example of extending the right to limit the credit bid 'for cause'.

In the Aéropostale case, the debtors argued that Sycamore should not be permitted to credit bid the full amount of their secured claim loan as (i) this would chill the bidding and (ii) Sycamore's debt should be subordinated as they claimed that Sycamore's unfavourable acts pushed the debtor into bankruptcy, i.e. there was malicious conduct by Sycamore prior to the filing for bankruptcy (Chapman and Cutler, 2016). Because 2 courts had limited the ability of secured creditors to credit bid in their respective cases, there was case law to support their claims.

But the Bankruptcy Court for the Southern District of New York overruled these claims and permitted Sycamore to credit bid up the full amount of their loan to Aéropostale. The Court found no sound proof of malicious conduct by Sycamore prior to the bankruptcy. Also, the Court noted that the possible 'chilling' of the bidding due to the credit bid is not sufficient to justify limiting the credit bid of Sycamore for 'cause'. The Court therefore subsided the impact of the Fisker Automotive ruling (Chapman and Cutler, 2016).

Also, in their *Final Report and Recommendations on the Reform of Chapter 11* (2014), the American Bankruptcy Institute stated that only disputing the 'bid chilling' effect is not enough for a Court to order for "cause", as we saw during the Fisker Automotive case. They made the following recommendation on the process of credit bidding during 363 Asset sales: "*In a sale under section 363 of the Bankruptcy Code involving a secured creditor's collateral, the secured creditor should be permitted to credit bid up to the amount of its allowed claim relating to such collateral unless the court orders otherwise for cause. For purposes of this principle, the potential chilling effect of a credit bid alone should not constitute cause, but the court should attempt to mitigate any such chilling effect in approving the process. Section 363(k) should be clarified accordingly*" (American Bankruptcy Institute, 2014, p. 145-146).

Conclusion

The Aéropostale decision provides secured creditors with some certainty that the bar to preclude or limit secured creditors to credit bid has been raised. Due to the ruling of the Court, secured lenders are provided with enough protection and reassurance they have the right to credit bid up to the full amount of their secured claim. The argument of a bid chilling effect alone is not sufficient for a Bankruptcy Court to order for 'cause'. Credit bidding can still be seen as a strong protection mechanism for secured creditors when their debtor faces bankruptcy and wants to set up an auction process or sale to a third party instead of a reorganization plan.

This additional reassurance can be important for investors and lenders to keep providing credit to companies as they will continue to be protected by their right to credit bid if they have a secured claim on the collateral for this loan. This can be important during times of economic downturn and decreased loan provision by financial institutions.

2.5 Credit Bidding in Canada

As Credit Bidding is commonly used in the United States as a process of protecting creditors against a loss of the amount of their claim on a collateral, this insolvency tool is also on the rise in Canada. It's a part of the *Companies' Creditors Arrangement Act or CCAA*, which is the Canadian counterpart of Chapter 11. There are several factors which have contributed to the rise of Credit Bidding in Canada: First, it has become more common for CCAA proceedings to involve a sale of all or a substantially part of an insolvent debtor's assets.

Second, these large asset sales are increasingly being conducted by the way of competitive auction processes at which one or more bids compete to acquire these assets.

Third, these auctions are increasingly being attended by debtor-in-possession investors¹⁴ who seek to acquire a company and/or its assets by either (a) exchanging their debt into equity of the reorganized company or (b) credit bidding that debt in the event that the restructuring proceeds by way of a sale process (Latham et al., 2011).

The increased appearance of these three factors has thus influenced the rise of credit bidding in Canada but there's still relatively few case law in Canada compared to the US. This could be because there have been relatively few cases in Canada where secured creditors have sought to use a credit bid to acquire the assets of a debtor in the context of a competitive and/or contested auction process (Latham et al., 2011).

Credit bidding continues to be accepted by Canadian courts. In a recent case, the White Birch case, showed how Canadian jurisprudence treated Credit Bidding and provided some important conclusions on how Credit Bidding is used in Canada (Latham et al., 2011):

- The terms of the underlying credit and security documentation are highly relevant to a secured party's right to credit bid, and in particular to a secured party's (or its nominee's or agent's) right to credit bid on behalf of others.
- Secured creditors can credit bid up to the full face value of their secured debt in a sale of their collateral, and that bid will be valued on a dollar-for-dollar basis.
- A credit bid can only be applied to the collateral for that debt. That said, a credit bid can be used as part of an overall bid for encumbered assets and unencumbered assets, provided that cash (or some other form of acceptable consideration) is provided for the unencumbered assets.
- If participants in an auction have concerns about the ability of a party to credit bid, or the manner in which they may credit bid, it is very important for those parties — whether they are creditors or other bidders — to raise those concerns early on in the process.
- This case may result in a greater emphasis being placed by Monitors on creating clear rules for credit bidding in advance of an auction, and Monitors may increasingly seek to have those rules approved by the CCAA courts in advance.
- The CCAA Court recognized that “bitter bidders” may have standing after a sale process to argue that there has been non-compliance with the Court-approved process. Beyond

¹⁴ Debtor-in-possession financing (DIP financing) is financing arranged by a company while under the Chapter 11 bankruptcy process. DIP financing is unique from other financing methods in that it usually has priority over existing debt, equity and other claims (Investopedia, 2017).

that, Canadian courts remain generally unsympathetic to “bitter bidders”¹⁵ and continue to place considerable emphasis on the sanctity and finality of a Court-approved process.

2.5.1 Case study credit bidding in Canada: the bankruptcy of White Birch

In Canada, there have been relatively few cases where credit bidding was used successfully by secured lenders to protect the value of their claim. There has been less need for Canadian courts to consider the validity or the value of a credit bid during a bankruptcy auction compared to a more traditional form, a non-credit bid (Latham, O’Neill, 2011).

However, a couple of years ago in 2011, there was the case of cross-border CCAA and Chapter 11 proceedings due to the White Birch Paper Company bankruptcy case. In this specific case, credit bidding was front and centre in Canada as the winning bid for almost all of the debtor’s assets acquired the assets by submitting a credit bid during a competitive and contested CCAA auction process (Latham, O’Neill, 2011).

This case is an interesting example of how the credit bidding works as the secured creditors’ credit bid was highly contested by the other creditors and bidders at the auction. We will elaborate on the characteristics of this specific case and the arguments raised by the opposition and see how credit bidding is also possible in Canada. This could help us in assessing whether or not credit bidding is possible in the EU and more specifically Belgium.

Case background

White Birch Paper Company is part of a larger group of companies, named White Birch, involved in the paper product sector. They own and operate three pulp and paper mills and a saw mill in Canada and a fourth mill in the United States through its affiliate Bear Island LLC.

Overall, White Birch’s assets are located for 80% in Canada and 20% in the US. On February 24, 2010, White Birch filed for bankruptcy in Quebec under the CCAA and Bear Island filed for Chapter 11 of the US Bankruptcy Code in Virginia. As of this date, White Birch owed \$428 million in principal and \$9.77 million in interest under a First Lien Term Loan (First Lien Debt), which was secured by the Debtor’s fixed assets. There was also a Second Lien Debt consisting of \$100 million in principal and \$4 million in interest among other debt obligations (Latham, O’Neill, 2011).

Auction process and controversy

An asset sale process became the preferred alternative to a Debtor-In-Possession facility, which was secured by all assets of the Debtor and provided by a group of lenders drawn from the First Lien Debt syndicate. But efforts towards developing a plan of arrangement were discontinued. The sale process, a going-concern sale of the Debtors’ fixed assets (which were collateral for the First Lien Debt) and the Debtors’ current assets was initiated in April 2010 with the approval of a

¹⁵ The party that used their right to credit bid were referred to as “Bitter bidders” because they had lost an auction and were not satisfied with the result (particularly as they had not previously objected to any of the Orders that had approved credit bidding earlier in the case, and had even attempted to credit bid themselves at the auction).

Sale and Investor Solicitation Process (SISP). The SISP outlined the solicitation process, the conduct of the auction and the process and requirement for court approval by the CCAA Court of Quebec (Latham, O'Neill, 2011).

The SISP only received 1 offer that satisfied their requirements to be considered a valid bid at the auction. The offer came from BD White Birch Investments LLC (BDWI), formed by Black Diamond Capital Management LLC, Credit Suisse Loan Funding LLC, Caspian Advisors LLC and their affiliates. This asset vehicle held 65,5% of the First Lien Debt. BDWI was selected as the "stalking horse"¹⁶ bid and entered into an Asset Sale Agreement (ASA) with the Debtors. Substantially all assets of the Debtor were covered, including the fixed assets (the DIP, First and Second Lien Debt) as well as the current assets (in this case: accounts receivable and inventory, only encumbered by the DIP). On September 10, 2010, BDWI was selected as the stalking horse bidder by the CCAA Court and the US Bankruptcy Court so credit bidding was permitted for amounts due under the DIP or the First Lien Credit Agreement. On the last day of the Bidding Procedures, the Debtors received an offer from Sixth Avenue Investment Co. LLC ("Sixth Avenue"), which was funded by a group of lenders holding 10% of the First Lien Debt (Minority Lenders). This bid was recognised by the Debtors and subsequently an auction was scheduled on September 21, 2010 in New York (Latham, O'Neill, 2011).

BDWI's final bid for the Debtor's assets amounted to \$236,1 million and was declared as the winning bid of the auction, the bid was structured as follows (Latham, O'Neill, 2011):

- A cash amount of \$94,5 million, of which \$90 million was allocated to the unencumbered current assets and \$4,5 million was allocated to repay the debt related to legal hypothecs affecting fixed assets (i.e. properties in Quebec)
- Credit bid of \$78 million on the First Lien Debt, allocated to the Debtor's Canadian fixed assets which were collateral on that debt
- \$36,7 million of assumed liabilities
- \$26,9 million in cure costs

This implies \$126,7 million was allocated to the Debtor's current assets and \$82,5 million to the Canadian fixed assets. In comparison, Sixth Avenues final bid consisted of \$175 million in cash, \$36,7 in assumed liabilities and \$26,9 million in cure costs. This means that under Sixth Avenues bid, \$173,4 million was allocated to the Debtors' current assets and \$35,3 million to the Debtors' fixed assets (Latham, O'Neill, 2011).

The Debtor and the Monitor of the auction determined the offer from BDWI, which was \$500.000 higher, consisted the highest overall value for the Debtors' total assets and the highest possible recoveries for the Debtors' creditors and thus sought court approval for the sale of White Birch's assets.

However, the Minority Lenders did not agree with this winning bid at the sale approval hearing. They raised 3 interesting objections (we will discuss them and show how the Justice ruled in his Reasons):

¹⁶ Stalking horse bidder= an initial bid on a bankrupt company's assets from an interested buyer chosen by the bankrupt company. From a pool of bidders, the bankrupt company chooses the stalking horse to make the first bid (Investopedia, 2017)

- 1) The Agent did not have the right to credit bid because the Minority Lenders did not consent to a credit bid on their behalf. The judge, Justice Mongeon, reasoned: “*BDWB is comprised of a group of lenders under the First Lien Credit Agreement and hold 65% of the First Lien Debt and according to the First Lien Credit Agreement they are entitled to make decisions with respect to the First Lien Debt and use their right to use their security as a tool for credit bidding during the auction*”. The Justice thus affirmed that the Majority Lenders were authorized to direct the Agents to credit bid and the Minority Lenders were bound to that instruction under the First Lien Credit Agreement (Latham, O’Neill, 2011). This implies they did not need 100% of the First Lien Debt to use their right to credit bid their secured claim.
- 2) The Agent was not entitled to credit bid under Quebec law as there’s no equivalent to Section 363(k) of the US Bankruptcy Code in the federal statutes of Canada. However, in his Reason, Justice Mongeon acknowledged that there were existing precedents under CCAA¹⁷ and found that the concept of credit bidding was not foreign to Quebec law (Latham, O’Neill, 2011). Therefore, there is a legal base for secured lenders in Canada to credit bid during a bankruptcy auction.
- 3) The value of a credit bid should be limited to the market value of the collateral. The minority lenders found that a dollar of credit bidding should not be considered to be the equivalent of a dollar in cash, so the credit bid should be limited to the market value instead of the full face value of the secured debt. This would mean that the BDWI credit bid was not greater than the Sixth Avenue credit bid and could not be approved as the winning bid. But BDWI argued that a dollar of credit bid is equal to a dollar of cash as a credit bid is nothing more than enforcement upon the collateral in respect of which the secured creditor has already paid its \$1, this means they should not provide additional liquidity for their credit bid as this was already paid at the beginning of the loan. Justice Mongeon affirmed that a credit bid may be made up to the face value amount of the credit instrument upon which the credit bidder is allowed to rely, his findings are also consistent with prevailing US law (Latham, O’Neill, 2011).

Conclusion

The White Birch CCAA proceedings has been one of the most significant and extensive discussion and consideration of credit bidding in Canada. The case leads to some important conclusions towards the use of credit bidding in Canada(Latham, O’Neill, 2011):

- Credit bidding continues to be accepted in Canada by the Canadian Courts
- Terms of underlying credit and security documentation are relevant to a secured party’s right to credit bid and to a secured party’s right to credit bid on behalf of other (see Majority vs Minority Lenders in the White Birch case)
- Secured creditors can credit bid up to the full face value of their secured debt during a sale of their collateral and this will be valued on a dollar-for-dollar basis (See Chapter 2.2 and Van den Berg, 2016)
- A credit bid can only be used on the collateral for that specific debt on which the creditor has a claim. But a credit bid can be used as part of an overall bid for encumbered assets if an appropriate amount of cash is provided for these unencumbered assets. This could be interesting for distressed debt investors.

¹⁷ Re Maax Cooperation on July 10, 2008 and Re Brainhunter on January 22, 2010.

- If participants in an auction have concerns on the ability of a party to credit bid, it is important to raise their concerns early on in the process (See Chapter 2.3 and Kling, 2012).
- Canadian Courts remain unsympathetic to “bitter bidders” and continue to place emphasis on the sanctity of a Court-approved process

2.6 Case for Credit Bidding in the EU

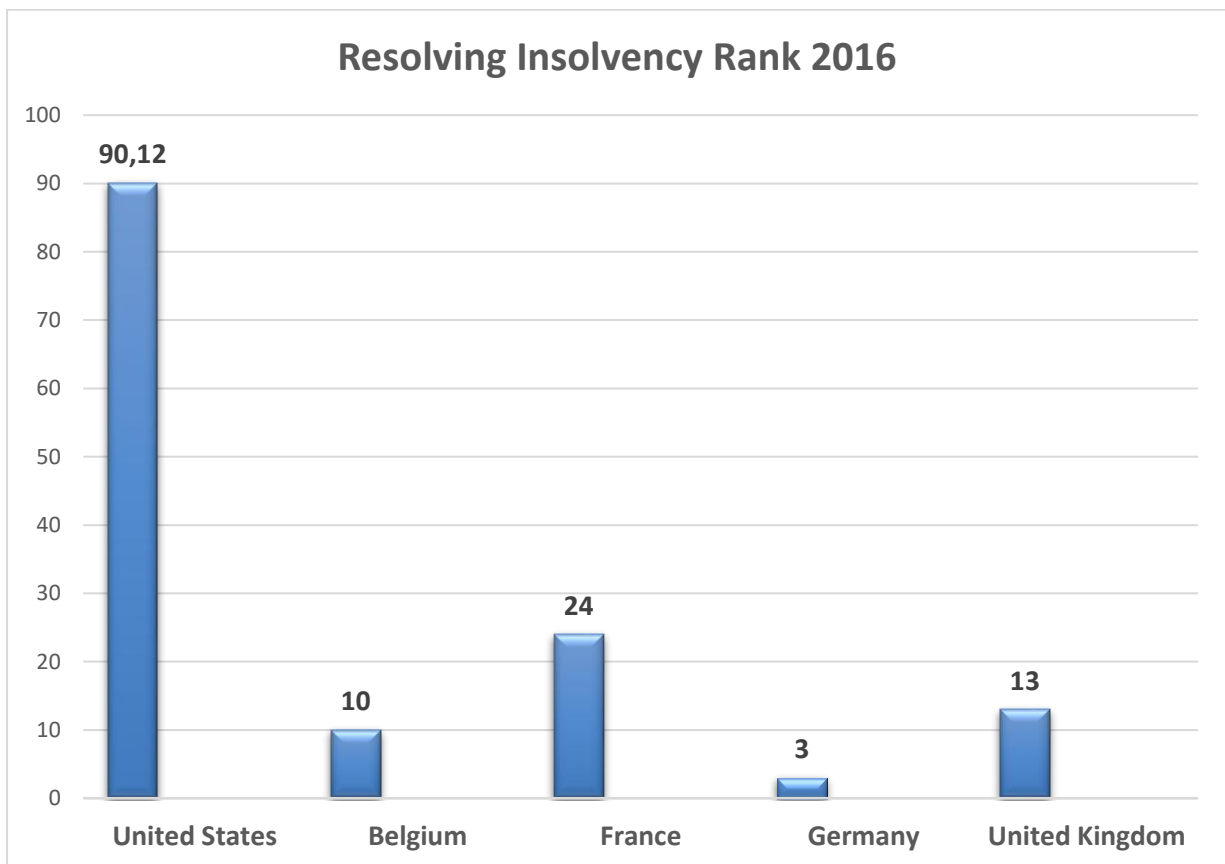


Figure 1 Resolving Insolvency Rank

Source: Resolving Insolvency- Doing Business Rank 2016 (World Bank Group, 2016)

The United States gains the highest ranking overall in terms of resolving insolvency, followed by France, the United Kingdom, Belgium and Germany (World Bank Group, 2016).

The United States' high ranking is due to the success rates seen of Chapter 11 proceedings. The rankings of the European countries are interesting as they show how these countries lag behind in terms of resolving insolvency and doing business compared to the United States (World Bank Group, 2016).

Insolvency proceedings are currently costing too much and taking too much time to accomplish. Therefore a framework similar to the 363 Sales in the US could speed up reorganizations and insolvency proceedings and therefore preserve valuable economic value otherwise lost in a time consuming process of reorganization. In Belgium, there's already a legal framework to sell assets of a distressed company in order to reorganize or liquidate a company under the authority of the WCO (see chapter 3.1) but it doesn't lead to similar results as in the US and provides no protection for secured lenders during such sales.

Also, the use of credit bidding could have a positive impact on credit supply by investors which are currently hesitant to invest in businesses due to the difficult economic times we're currently facing in the EU since the financial crisis in 2008. If they could use their right to credit bid, they could become be less reluctant in providing credit or funding to businesses as they are able to protect the value of their collateral during insolvency proceedings by credit bidding at an auction or during a sale to third parties of the companies' assets.

Currently, credit bidding is not existing in the same form in the EU as it exists in the US. This report aims to research the credit bidding tool during bankruptcy auctions and third-party sales and find out whether or not there's a legal base for credit bidding in the EU (and more specific Belgium) during a bankruptcy auction or asset sales outside of the traditional course of proposing a reorganization plan as part of insolvency proceedings. As it could have positive implications for the enormous amount of bankruptcies we see in the EU (see Introduction), it could be useful to look whether credit bidding is possible and the positive consequences it could have on the reorganization or sale of insolvent companies by speeding up the traditionally lengthy insolvency proceedings.

3 Application of credit bidding under Belgian law

In the Introduction, we mentioned that there has been a significant rise in bankruptcies in the European Union since the financial crisis in 2008 with an all-time high of 189.855 bankruptcies in 2013. This number eventually decreased slightly in the years after but they are still significantly higher than before the financial crisis. If we look at the number of bankruptcies in Belgium over the past 10 years, we can see the same evolution as in the European Union as a whole.

Before the financial crisis in 2008, the number of bankruptcies were around 7.600 in Belgium (See Figure 2) but started to increase strongly in the years following the crisis. The numbers reached an all-time high in 2013 of 11.740, similarly to the EU numbers. During recent years, there has been a declining trend in the number of bankruptcies but they are still higher than before the crisis.

Year	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Flanders region	3.893	3.994	4.273	4.983	4.918	4.908	5.356	5.742	5.285	4.769	4.760
Brussel region	1.501	1.485	1.813	1.788	1.915	2.348	2.263	2.652	2.203	2.142	1.954
Walloon region	2.222	2.201	2.390	2.649	2.737	2.968	2.968	3.346	3.248	2.851	2.456
Total Belgium	7.616	7.680	8.476	9.420	9.570	10.224	10.587	11.740	10.736	9.762	9.170

Figure 2 Number of bankruptcies in Belgium by region 2006-2016

Source: Algemene Directie Statistiek - Statistics Belgium.

The macroeconomic situation (i.e. slow economic growth) is an important reason for this rise in bankruptcies as there's currently a low economic growth which is also caused by the lower credit provision to enterprises. Especially SMEs and innovative companies requiring specific financing are heavily impacted by the current economic climate and its impact on the financial markets.

However, measures to prevent bankruptcies in Belgium do not work as they were intended. The WCO ("Wet Continuïteit der Ondernemingen"), a law that was introduced on January 31 2009, to give temporary protection against creditors to companies in distress, is not functioning as was aimed. Companies operating under this legal framework risk being epitomized of not being able to pay back their creditors. This eventually leads to bankruptcy rather than prevent it.

As current insolvency proceedings do not function properly or take too much time it could be interesting to look at new measures to help companies in distress as well as protection mechanisms to protect creditors against the insolvency of a debtor in financial distress. One possibility is to sell off parts of a companies' assets on a public auction in order to recover liquidity to pay back creditors. We will see in Chapter 3.1 that this is possible under Belgian law

under Article 32 W. 27 mei 2013¹⁸. This article states that the trustee, appointed by the bankruptcy court, has to organize the sale of the assets which are crucial for the complete or partial continuation of the economic activity. He looks for buyers and has to look for potential buyers who can preserve the continuity of the economic activity, taking into account the rights and claims of secured lenders (Graydon, 2017).

He can decide between a public auction or a sale by mutual agreement (In the Fisker Automotive case in chapter 2.4.1, Hybrid wanted to buy Fiskers' assets under a mutual agreement before the start of the bankruptcy auction process. This was eventually denied by the Court).

But if a distressed company decides to sell of parts of its assets or even all of their assets, this leads to a significant credit risk for their creditors who face losses on their outstanding loan. Therefore, a tool to protect secured creditors during such bankruptcy asset sales, similar to credit bidding in the United States, could be interesting for creditors in Belgium as well. Especially to reduce the credit risk for financial institutions.

In Chapter 2 of this report, we described how credit bidding was used under United States and Canadian law. In the US, credit bidding is a commonly used tool as a protection mechanism for secured lenders during bankruptcy auctions and third-party sales. It protects their secured claim from being sold at a lower price due to a bankruptcy auction or sale to a third party. The secured creditor can then use his right to credit bid the outstanding amount of his secured claim during the sale of the assets under the 363(k) of the Bankruptcy Code.

In chapter 2 it was mentioned that there were some interesting positive consequences related to the use of credit bidding such as increased competition during a bankruptcy auction because of the introduction of an additional bid by the secured creditor. Another important advantage was the higher protection for the secured lenders which could eventually lead to more credit provision.

But there were also negative consequences described such as a potentially bid chilling effect as the introduction of a credit bid could scare away potential third-party bidders due to asymmetric information dynamics. This could prevent a value-maximizing auction process due to the withdrawal of third party bidders (Kling, 2012).

Another disadvantage was the existence of the so-called 'vulture investors'. This specific type of investors are looking to acquire a company at a significantly lower price by using their right to credit bid during a bankruptcy auction, when they bought the secured loan at a discount from the previous secured creditor, in order to make short-term profits (See the Fisker Automotive case in chapter 2.4.1 as an example).

In Chapter 2, we defined credit bidding in the United States and Canada and used some recent, high-profile cases to explain how the credit bidding process works and how there are different outcomes possible after the introduction of a credit bid. Due to the ruling of the Judge during the Aéropostale case, credit bidding is again considered as a powerful tool during bankruptcy auctions. Therefore it could be interesting to see if credit bidding is also possible as a protection tool for secured creditors in Belgium during a sale of the debtors' assets.

¹⁸ Art. 32 W. 27 mei 2013 replaced art. 62 W.31.1.2009(Also known as "Wet Continuïteit der Ondernemingen")

In chapter 3.1, we will give an overview on the Belgian insolvency procedure and how a company becomes insolvent. In chapter 4 data collection by interviews will be conducted to provide an answer to this question.

3.1 Bankruptcy in Belgium

When a company is considered as bankrupt in Belgium, this implies that the company is not capable of paying their bills to creditors (e.g. they cannot pay their suppliers, pay back the principle and interest of their loans to creditors, pay their employees' salaries). There are two conditions that have to be fulfilled to be considered bankrupt: Companies are not capable of paying back creditors or bills on a structural basis and are showing no visible signs of improvement towards being able to pay back creditors (Graydon, 2017)

If a company shows signs of insolvency, there are 2 possible ways to start the bankruptcy proceedings in Belgium. First way is that the owner of the company files for bankruptcy with the *Rechtbank van Koophandel*¹⁹ in the district it is located. It's also possible for a creditor to file for bankruptcy of a debtor if the debtor is not able to fulfil his commitments towards the creditor (Graydon, 2017).

But in 2009, a new law (called "Wet Continuïteit der Ondernemingen or WCO" in Dutch language) has been carried out by the Belgian government to prevent bankruptcies due to a high number of companies in distress. This law aims to protect companies who are still capable to survive if they would have temporary protection against their creditors and reorganize their business/operations. The aim of this law is to provide companies who show signs of possible survival the opportunity to restructure in order to be capable of surviving in the longer term. This was to save otherwise lost economic value and employment caused by the high amount of bankruptcies. These companies first have to go through the process of WCO before filing for bankruptcy. The WCO consists of two different phases: Preventive phase and the juridical reorganization.

3.1.1 Preventive phase

This phase of the WCO provides companies the possibility of a reorganization 'out-of-court', which means that in principle no judge has to be included in the process. This a reorganization between a debtor and some of his creditors and is confidential.

Article 8-12 WCO states that the *Rechtbank van Koophandel* tracks debtors in difficulties by conducting data collection and commercial investigations. They want to make distressed companies conscious of their problems and encourage them to find solutions to get out of their current precarious state (CAP-netwerk, 2014).

Under article 15 of the WCO, distressed debtors have the possibility to conclude an agreement with their creditors on how they will pay back their loans and how much they will pay back. This is referred to as an 'out-of-court settlement'. The debtor is free to choose with which creditors he

¹⁹ This court has jurisdiction to settle disputes between companies. This court has the authority to act during bankruptcy and reorganization of insolvent companies in Belgium (Hoven en rechtbanken, 2017).

concludes an agreement but needs at least 2 creditors for this agreement to be valid. These creditors have to represent a majority of the debt. This amicable settlement is confidential and can only be published if the debtor agrees to it. The Court does not interfere during this phase. The advantages of this type of agreement between a distressed debtor and his creditors are the following: it is confidential, the debtor and creditors are free to decide on how they conclude the agreement and it is cheaper than starting an insolvency proceeding (CAP-netwerk, 2014).

Under article 13 WCO, a negotiator can be appointed by the debtor to assist him in the process of negotiating a settlement with the creditors and how to restructure the company and the modalities of paying back their debt. But under article 14 WCO, every interested party can appoint a judicial trustee if they suspect malicious conduct by the debtor or his representatives that endanger the continuity of the company. The chairman of the Court decides the mission of this trustee and aims at ensuring the continuity of the company (CAP-netwerk, 2014).

In chapter 2.1, this report showed that under US law credit bidding by secured creditors was possible during this phase. The debtor can make an agreement with some creditors but if he decides to sell off assets as part of this reorganization plan, the secured creditor can use his right to credit bid his outstanding claim in order to protect his interests. In chapters 4 and 5, we will discuss if this is also possible under Belgian law after consulting with industry experts.

3.1.2 Juridical reorganization

If the preventive phase of the WCO does not lead to recovery of the distressed company, the company can file a motion with the Court, i.e. the *Rechtbank van Koophandel* in Belgium, to start the procedure of juridical reorganization.

This procedure starts with a suspension of payments for a certain period (maximum 6 months, which can be prolonged to 18 months). During this suspension, the company cannot be forced to pay back existing debt (debt that existed pre-petition). The aim of this procedure is defined in article 16 WCO: “*The aim of the procedure of juridical reorganization is to guarantee the continuity of the company in distress or the continuity of the activity*”²⁰. During this period of suspension, 3 possible alternatives are provided to the debtor (CAP-Netwerk, 2014):

- Amicable settlement (article 43 WCO): This alternative is quite similar as the ‘out-of-court settlement’ we discussed during the first phase of WCO. The debtor can still decide with which creditors he agrees a settlement and what type of agreement. The only difference is that this time the settlement is agreed under supervision of the Court.
- Collective agreement (article 44-58 WCO): Under this alternative, the debtor has to propose a plan of reorganization. All creditors affected by this plan have to vote for this plan, which can be a time-consuming process. If the majority of the creditors, representing the majority of the debt, agree to this plan and the Court approves it will be binding for all creditors of the company. This way it is possible to impose measures on creditors even though they did not agree with them personally.

²⁰See http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2009013133 for the Dutch text of the WCO

- Transfer under judicial authority (article 59-70 WCO): If the two previous alternatives are not possible, a transfer under judicial authority can be conducted. This can be initiated by the debtor or initiated by the *Procureur des Konings*²¹, a creditor or other stakeholders from the company. In both cases, a trustee will be appointed to transfer part of the company or the whole company without consent by the debtor. The Court will decide the price and to which party the company will be transferred. Generally, this option is considered as an alternative to a bankruptcy. The debtor will be declared bankrupt or be liquidated after the transfer of the company (CAP-netwerk, 2014). This way, the company is transferred going concern and will be able to continue its economic activity without the debtor. This was the aim of the WCO when it was introduced in 2009. This way employment and economic value can be preserved which is beneficial for a country's economy.

This third step shows some similarities with credit bidding as we discussed previously, namely the companies' assets can be transferred going-concern to a third party which could be the creditor. Then the creditor would have acquired the company at a price which is approved by the Court and could look for an interested party to recover as much as possible from their secured claim.

3.1.3 Bankruptcy law of 1997

If the WCO process has not been successful or the company shows no signs of possible survival after going through the process of WCO, it will file for bankruptcy with the competent court (i.e. the *Rechtbank van Koophandel*). The motion can be filed by the debtor as well as by the creditors of the distressed company.

After filing the motion, the Court will appoint a *curator* (which is equivalent to the trustee under the US Bankruptcy Code). The trustee will draw up an inventory of all tangible and intangible assets, as well as all debt of the company in distress and the claims resting upon the collateral. All assets that can be seized will be sold to pay back creditors (Graydon, 2017).

After the assets are sold, the different creditors will be paid back as much as possible with the revenues from the sale. During most of these sales, the revenues will not be adequate to cover the amounts due to the creditors of the distressed company. Creditors will only recover a fraction of what the debtor owed them.

Currently, there are no legal provision for using credit bidding in Belgium as a secured creditor during the sale of their collateral after their debtor has entered into the insolvency procedure or filed for bankruptcy such as in the US, as we discussed in chapter 2 of this report. Therefore, data collection via semi-structured interviews and questionnaires will be used to assess whether credit bidding can be used or is used under a different form in Belgium. If not, recommendations will be provided on the possible application of credit bidding as a secured creditor in Belgium.

²¹ This public servant is comparable to the District Attorney in the US

3.2 Methodology and data collection on credit bidding in Belgium

As credit bidding is frequently used in the US and Canada and leads to positive outcomes for the secured creditors as the debtor, it could be interesting to look into this framework in Belgium. For this research we will collect data on the possible application of credit bidding in Belgium. More specifically, interviews will be conducted with lawyers specialized in insolvency procedures and the restructuring of distressed companies under the WCO and the bankruptcy law of 1997. On the other side, interviews will be conducted with experts from the financial sector on whether or not credit bidding is possible in Belgium or there is another similar tool to protect secured creditors used by financial institutions and whether they think credit bidding could be a useful tool for Belgian secured creditors.

This report aims to find out if credit bidding is possible as a protection mechanism to protect secured creditors against a bankruptcy or insolvency of their debtors and consequently could lead to more credit provision by financial institutions as currently is lacking in the EU and Belgium.

As stated in chapter 2.3.1, financial institutions (especially banks) play an important role in financing the European economy and therefore the interviews are focused on the experiences from the banks. Also, via the interviews this research wants to see whether banks believe this could be an interesting tool to protect their interests and could lead to more credit provision from their side.

For the purpose of this research qualitative data will be used to provide recommendations. This type of data is more suited due to the exploratory phase of the research and as a result a more open style of questioning will be used. The aim is to acquire specifically chosen individuals beliefs and attitudes towards the topic of credit bidding. An advantage of this method of data collection is the use of interviews which requires a smaller number of participants (Currie, 2005).

The interviews are preceded by a thorough literature review on the concept of credit bidding, mostly by using sources in the United States as credit bidding is a more common practice there. Most used sources were legal provisions and reviews focused on law and finance.

For this research, a homogenous sampling technique was used as research on this topic is still in an exploratory phase and this method samples respondents with specific knowledge (Saunders et al., 2009). The use of interviews was chosen as the best method to gather reliable data to provide a concise answer to the proposed research question (Saunders et al., 2009). Some participants, especially experts active in financial institutions, were interviewed by using semi-structured interviews with a list of questions to be covered but there was also room for extra input and questions. As these experts are active in the sector this research aims to provide recommendations on the application of credit bidding. The data was recorded via audio and note taking, which was permitted by the interviewees. The validity of the collected data depended largely on the design of the questionnaire and therefore the questionnaire was pilot tested to ensure the reliability of the questions and the responses (Saunders et al., 2009, quoted by Jeffers, 2016).

According to Saunders et al. (2009) there can be some concerns with data collected from semi-structured interviews, including: reliability due to a lack of standardization, interviewer and respondent bias, validity and ability to generalize. However, this research does not aim to generalize for a population but use a limited amount of unrepresentative cases (Yin, 2003, quoted by Jeffers, 2016).

Concerning the reliability, according to Marshall and Rossman (1999) the premise of un-standardised research methods is to gather new insights and not to emulate in further studies. Also, all respondents received brief information and outline of the purpose and nature of the specific study.

According to Currie (2005), to improve the credibility of the collected data and to enhance validity and reliability, respondents are provided explanatory literature and documentation in order to help them support their answers.

When analysing the results of the collected data, the respondents will be referred to their number. This is to guarantee anonymity and collaboration without bias. A short description of the respondents is provided with their specific number to provide their perspective and specific knowledge within the field this research is located in:

- 1) CEO of a smaller bank in Belgium, focused on credit and deposits. Former Head of Restructuring at a large Belgian bank with 30 years of experience with the restructuring of various banks and companies following the financial crisis in 2008.
- 2) Senior legal advisor at a large Belgian bank with over 30 years of experience in corporate law, focused on insolvency and restructuring.
- 3) Head of Credit risk and Portfolio management at a large Belgian bank. This respondent has a long experience with companies in distress and the risk management of distressed credit from a financial institutions' perspective.
- 4) Partner in Insolvency and restructuring in a Belgian law firm. Over 30 years of experience as a Trustee with the *Rechtbank van Koophandel* in Brussels
- 5) Founding partner at a small Belgian law firm with over 30 years of experience in different legal topics, including insolvency proceedings and restructuring.
- 6) Senior legal advisor focused on insolvency and restructuring of distressed companies at a large Belgian bank

The objective of the data collection was to have respondents with a different perspective towards the topic credit bidding. Therefore an equally weighted combination of lawyers, employees from financial institutions were chosen. This specific sample of respondents have been chosen to have an idea of the perspective from people working in the field of insolvency and restructuring at financial institutions and people with a legal background working with insolvent companies both as an advisor and as a trustee for the bankruptcy court. The sample is not representative for the whole population but rather exploratory to find data on credit bidding.

4 Results

Question 1: Have u heard of the concept of credit bidding as it is used in the US before this interview?

From the interviews, we can conclude that only 1 respondent out of 4 operational in a financial institution was familiar with the concept of credit bidding as it is applied in the US. The other 3 respondents had never even heard about the use of credit bidding as a secured creditor and heard about the concept for the first time right before the interviews were conducted.

By looking at the answers from respondents 4 and 5 (respondents with a legal point of view), we can observe that respondent 4 was already introduced to the concept of credit bidding during an international conference for trustees and corporate lawyers focused on insolvency proceedings in Lisbon. He specifically noted that the concept was a common practice in some countries but completely unknown in other countries, among which Belgium in which he is mainly active. Respondent 5 states that he had never heard of this concept before during his practice in Belgium.

Therefore we can conclude that the concept of credit bidding as a secured creditor is currently unknown in Belgium. Even industry experts in the field of insolvency and restructuring of distressed companies were not familiar with the concept and had never witnessed such practice in Belgium. The 2 respondents who were familiar with the concept or had some knowledge on it had specific knowledge on the Chapter 11 framework in the US due to conferences or specific interest in concepts outside of the Belgian market.

The fact that credit bidding is relatively unknown in Belgium implies that in order to introduce or apply such concept would take considerable effort in informing all stakeholders involved in the current Belgian insolvency procedure. As long as the knowledge of the concept is low, it will not be applied in Belgium due to uncertainty and lack of knowledge on the benefits and drawbacks linked to credit bidding.

To apply credit bidding in Belgium, huge efforts in terms of research and dispersing knowledge on the benefits and risks will be necessary.

Question 2: Do you have any experience with this concept in Belgium or is there a similar framework? In other words, is it possible to use credit bidding as a secured creditor in Belgium?

During analysis of the responses from the interviews, it was clear that all respondents stipulate that there is no available framework similar to credit bidding under Belgian law. Respondent 1 notes that in order to apply credit bidding in Belgium, there should be specific benefits to use credit bidding. He also states that currently he does not see any benefits to use credit bidding in Belgium. He also refers to the differences between the US and Belgium in terms of failure of a company, there is a considerable difference in terms of 'trial and error' and therefore another look at insolvency. According to him, creditors in a Belgium have a 'laissez-faire' mentality towards insolvency, as soon as a debtor enter the WCO framework they are deemed as unable to survive. This framework could only work if a financial institution provides cash to the debtor but this is hardly done.

He thinks that credit bidding would take away the debt but does not create any liquidity and

consequently does not see any advantage as a creditor. He also states that it is probably not allowed under Belgian law for a creditor to take over the claim. Therefore there are no benefits to use credit bidding compared to the systems already available for creditors in Belgium according to him. He remains sceptical towards the use of credit bidding in terms of the benefits and risks as the current procedure of public auctions already provide adequate guarantees that the price will not be too low for a secured creditor.

Respondents 2 and 3 share the same opinion as respondent 1. Respondent 2 notes that due to the current regulations and legal structures in Europe and Belgium there are limitations to the use of credit bidding. For financial institutions it is not easy to apply new concepts like credit bidding as they have to operate conform the tight regulations for banks. He also states that under Belgian law, it is currently not possible to use the secured claim in order to acquire the collateral under the Belgian law on mortgages.

Respondent 3 mentions his 10 years' experience in working with distressed loans during which he never experienced the use of credit bidding. Directly bidding on the collateral with the secured claim is a practice which has never been used in Belgium according to him. There are however some mechanisms to raise the price during an auction of the collateral. If they do bid during an auction, they will use additional liquidity but not by using the secured claim.

Both respondent 2 and 3 state that if a bank would engage in such transactions and acquire the collateral, they have no structures within the bank to manage such assets in terms of insurance, maintenance. This is not a part of their core business and therefore they are not keen in engaging in such transactions.

Respondents 1,2 and 3 which are employed in a financial institution are all interested to compare the legal systems in the European context with the Anglo-Saxon system to find out what causes the differences in application of concepts such as credit bidding. They would like to see the underlying structures causing the acceptance in the US but currently not in Belgium.

Respondent 4 indicates that the concept and application of credit bidding could be an interesting possibility for Belgium. More specifically for secured creditors as it leads to positive results without interfering with the interests of other creditors and therefore credit bidding could be advantageous for all parties involved. He also mentions that according to him there are no provisions in Belgian law that would block credit bidding, the framework is not explicitly mentioned in Belgian insolvency law but also not prohibited. In a legal system which is characterized by freedom of contract, it should be possible to use a similar protection tool as a secured creditor.

Some respondents mentioned the use of leasing, which shows some similarities with credit bidding but this cannot be seen as an equivalent as leasing exists in the US as well and is a different concept than credit bidding. The use of debt-for-equity swaps was mentioned as well but this has some differences with credit bidding as the swap converts debt into ownership of the company and is not an acquisition of only the encumbered assets.

We can conclude that it is currently not possible for a secured creditor in Belgium to use credit bidding as a protection tool against the insolvency of a debtor. However, most respondents state that the current legal systems provide adequate protection to creditors so they do not see the added value of using credit bidding in Belgium. Also, the legal uncertainty of credit bidding could mean that creditors will not use credit bidding in order to be consistent with current Belgian law.

Question 2.1: If yes, is this used frequently or is it rather exceptional?

Respondent 1 thinks it could be used in the form of a cession of claims or by Special Purpose Vehicles but has some doubts whether this could be used in Belgium during a public auction as we have documented in the US. According to him it's only possible during a private sale to a third party but this leads to a risk of a possible conflict of interests which will be difficult due to strict compliance within banks. Cession of claims seems the most similar tool according to him but notes the differences in mentality between the US and Belgium in using such mechanisms. He suggests the use of crowdfunding platforms where creditors can sell their claims to the highest bidder.

Respondent 4 states that banks do not use a similar framework as credit bidding as they only use existing procedures and are more reluctant to experiment with new initiatives, such as credit bidding even if this could be advantageous for their business.

Question 2.1.1: How do other creditors react if a secured creditor uses a credit bid?

The interviews have showed that credit bidding does not exist in Belgium so there is no evidence on the reaction of other creditors after the introduction of a credit bid. Therefore no conclusions can be made on this in Belgium.

Question 2.1.2: Can you name some recent cases where credit bidding was used in Belgium?

Not applicable as credit bidding is not used in Belgium.

Question 2.2: If no, do you think it could be advantageous to use credit bidding in Belgium to provide more protection to creditors?

As mentioned in previous questions, respondents from the banking sector were no supporters of using credit bidding in Belgium as they already feel adequately protected by the current mechanisms that exist in Belgium for creditors. A common response is that currently it does not exist but it could be useful to look into the specifics of credit bidding and the benefits as well as the risks it entails. This has to be carefully looked into before we could make recommendations on the application of credit bidding in Belgium.

According to respondent 4, it would be desirable to assess advantages and disadvantages of credit bidding for all involved parties during insolvency procedures and identify where credit bidding could lead to positive results compared to the current legal framework. The aim of this research is to look into those cases, see Chapter 2.3 and 2.4 as well as the different cases that illustrate these different situations by using recent bankruptcy sales.

Respondent 5 states that he does not have knowledge of a similar framework in Belgium. However, he does see some similarities with the transfer of shares or part of the assets of a debtor to the creditor under WCO (see Chapter 3.2). Also, there are similar characteristics with existing procedures such as factoring, credit insurance and specialized companies buying claims that were regarded as not able to recover (he provides the example of the company Fiducree which recovers funds from distressed debtors in order to recover as much as possible for a

creditor from the claim he has on a debtor).

But these tools for creditors cannot be seen as similar as credit bidding as they are more costly to the secured creditor while credit bidding does not require additional funds from the secured creditor to gain possession of the assets in order to recover the amount of his claim. There are available tools for creditors in order to recover their claim on a distressed debtor but they are more expensive than the use of credit bidding as we saw in chapter 2. Credit bidding is a zero sum game while the tools discussed by respondent 5 imply transaction costs for the creditor as these require specialized services from other parties to recover funds from his secured loan or pay for insurance against the possible loss of a loan due the insolvency of the debtor.

We can conclude from the responses that in its current form, credit bidding is not desirable to be introduced into the Belgian insolvency proceedings. This can be explained by differences in the legal systems between the US and Europe but also the fact that secured creditors indicate that they already feel adequately protected in Belgium and therefore see no need to introduce additional tools. Additionally, as credit bidding is not part of the Belgian law it leads to legal uncertainty if it were to be applied. Therefore secured creditors will not risk to apply credit bidding if it does not have legal effect towards third parties.

Question 3: Could the possible application of credit bidding encourage financial institutions to provide more loans due to the higher protection against losses by credit bidding?

Respondent 1 does not see the added value of using credit bidding in his daily operations, the possible use of credit bidding will not lead to a higher provision of credits. He acknowledges the fact that credit bidding works in the US but it will not have the same impact within the Belgian legal framework. Also, due to the upcoming entry into force of IFRS 9 (International Financial Reporting Standards), banks will have to book their credit losses faster than now. Banks are very interested in new techniques to reduce losses but not in a technique that require more capital as credit bidding implies according to the respondent.

Respondent 2 raises the same concerns. He mentions that financial institutions remain open towards new systems to improve their current processes but remains sceptical towards the use of credit bidding in their structure. It would also be too costly to implement into their existing structures. An important side note in his opinion is that applying credit bidding as a financial institution would lead to additional questions in terms of fiscal treatment as well if they gained possession of the assets after successfully credit bidding at the asset sale.

According to respondent 3, the current legal environment in which banks operate is not the cause of the lower credit provision. Therefore he sees no incentives to apply credit bidding as credit provision has nothing to do with legal obstacles and low protection of creditors. The fact that government agencies and Febelfin (the Belgian Financial Sector Federation) are not considering a similar framework to credit bidding shows that the current insolvency proceedings for financial institutions are working as they should.

We should also look into the differences between the US and Belgium in terms of ownership after providing a mortgage. This is an example of the differences in both legal systems leading to the successful application of credit bidding in the US while this would be less interesting in Belgium. Other investors in Belgium, such as family offices or investors, will be more served by using credit bidding. Due to economic incentives respondent 3 sees ways in which such investors could be benefitted by the use of credit bidding as an offensive strategy while this is not the case

for their activities as a bank. Their core business remains providing loans on which interests are paid.

Respondent 4 raises doubts to whether financial institutions will be encouraged to provide more loans due to higher protection against the credit risk as a result of the use of credit bidding. According to him the current abundant banking regulation is not always rational and banks will not be less reluctant to provide more credit due to higher recovery of secured claims. Banks react slow to new developments so their strategy towards credit provision and credit risk management will not be heavily impacted due to the introduction of a framework similar to credit bidding.

This view is shared by respondent 5 who states that research for new tools and protection mechanisms could be interesting. But he expresses his doubts that this could eventually lead to the application of these new tools as the Belgian mentality is not likely to apply them. Therefore he remains hesitant to the concept of credit bidding leading to financial institutions providing more credit.

From the answers from the experts in the financial institutions we can conclude that they see no incentives in using credit bidding as part of their activities. They have expressed no desire whatsoever in the application of credit bidding as a financial institution in order to be more protected against financial distress of a debtor. Also, they do not think that the use of credit bidding as a protection tool could lead to higher credit provision by financial institutions. They would not use credit bidding to provide more credits. It was also briefly mentioned that current legal structures are not the main reason why credit provision is at a lower level.

Question 4: Do you think there's a profitable market for distressed debt investors?

All respondents indicated that there is a profitable market for distressed debt investors in Belgium. Respondents 4 and 5 had less knowledge on this topic but respondent 5 stated that due to negative experiences in the past with this type of investors he remains sceptical towards the use of credit bidding for these investors.

Respondent 1 states that this market is big enough in Belgium but there is a huge need for professionalism and regulation. This practice is mainly conducted by using securitisations which provide additional liquidity to the markets.

Question 4.1: If yes, would they be helped by using credit bidding?

Respondent 1 indicates that the possible application of credit bidding could be interesting as an offensive strategy for vulture investors looking for bargains on the market. This is done by buying claims at a discount and then recover as much as possible from this claim by going through the insolvency proceedings. They will be more served by using credit bidding compared to financial institutions in the Belgian legal system. This opinion is shared by respondent 2 and 3 as well. Respondent 3 indicates there is a big enough market for these investors in Belgium but he raises doubts to whether these investors will find distressed debt at such a discount to make profits. With the use of credit bidding, the original holder of the claim should be better off holding on to this claim and use his right to credit bid instead of selling it at a discount. The bank he works at rarely buys Non Performing Loans but there is a profitable market for this, he stated that they have sold some of their NPLs to banks with a more Anglo-Saxon profile recently.

We can conclude that credit bidding could be an interesting tool as an offensive strategy for distressed debt investors and that there is a large enough, profitable market for this in Belgium.

5 Discussion

Objective 1

The first objective was set to define the credit bidding framework in United States in order to be able to understand the concept and its characteristics before studying the possible application in Belgium. To reach this objective we conducted a literature review of US and Canadian literature in the fields of Law and Finance.

In chapter 2.1 and 2.2 of this report we defined credit bidding as it exists under United States law. We saw that instead of going through the traditional reorganization process under Chapter 11 of the US Bankruptcy Code, insolvent companies or companies in financial distress increasingly choose to sell all or substantially all of their assets under the authority of 11 U.S.C. § 363(b). This section permits the bankruptcy court alone to approve a sale after a notice and a hearing (Kling, 2012). The main reasons for this were increased efficiency and less time-consuming than the traditional process.

It is during such asset sales that secured creditors can use their right to credit bid their outstanding claim as to protect their interests. This right is given under the authority of Section 363(k) of the US Bankruptcy Code: "*Sales under section 363(b) of property that's subject to a lien that secures an allowed claim, unless the court for cause order otherwise, the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property*" (Kling, 2012). This provision is the legal base of credit bidding.

Credit bidding is a defensive tool for secured creditors to protect their interests in the case of a bankruptcy of their debtor. During a sale of the collateral of their secured claim, they can use the full amount of their claim to submit a bid during an auction process or a sale to a third party. The aim of this provision in the law was to provide additional protection for secured lenders against a possible bankruptcy of their debtor so they could protect their interests.

In chapters 2.2.1 and 2.2.2, we used a basic example and a recent bankruptcy case (i.e. Aéropostale) to illustrate how the credit bidding mechanism can be applied in practice. These examples showed how the secured creditor was able to protect his claim against a drop in value caused by the bankruptcy of his debtor while also having a positive impact on the recovery of other creditors involved in the insolvency proceedings.

Objective 2

To be able to determine whether credit bidding can be an interesting addition to the Belgian insolvency framework it was needed to ascertain the positive consequences as well as the negative effects associated with the use of credit bidding. This was conducted by using specialized literature on the topic as well as case studies to illustrate the theory with what happened in practice.

As a result of the increased use of asset sales under Section 363 instead of a reorganization due to a less time-consuming process and less firm specific assets, credit bidding has been elevated to the forefront of defensive strategies for secured creditors (Mankovetskyi, 2011).

Proponents claim the following advantages of credit bidding: can increase the number of bidders during an auction and thus increase the competition which could lead to a higher end value of the bankruptcy estate. Secondly, it constrains debtors from favouring certain preferred buyers offering a lower price for the assets. Lastly, it reduces transaction costs (Buccola, Keller, 2010). Also, creditors are not anymore required to provide liquidity to bid on the collateral and protect them from a sale at a lower value which reduces the costs for secured creditors to protect their interests.

In the basic example and the Aeropostale and White Birch cases in this report we saw that the introduction of the credit bid led to higher competition during the auction process and eventually led to a higher end value of the assets.

We can conclude that credit bidding protects secured creditors against a sale of their collateral at an inadequate price but also benefits other creditors as it can raise the level of competition during the bidding process on the assets. The lower transaction costs could speed up the recovery process and is advantageous for all parties involved.

There have been some concerns raised towards the use of credit bidding as well. One of the main arguments of opponents of credit bidding is the fact that using credit bidding as a secured creditor could 'chill' outside bidding on the collateral during the bankruptcy auction. This is due to asymmetrical information dynamics or a sale after the acquisition of the collateral leading to additional profits for the secured creditor will not be taken into account in the bankruptcy estate. These factors are detrimental to junior creditors and even equity holders.

Another critic that is causing concern is that credit bidding is not only being used by secured creditors to protect the value of their claim but increasingly by secured lenders and investors to acquire a company. This means credit bidding is not only being used as a defensive strategy as was intended but also as an offensive strategy to make profits. We saw an example of this during the Fisker Automotive case in chapter 2.4.1 where the secured creditor, Hybrid, had bought the secured claim for only 15% of the face value but wanted to credit bid up to the full amount of the secured claim during the auction to acquire Fisker Automotive. Eventually, the Court had limited the secured creditor to credit bid the full amount of the claim as to not chill outside bidding. Later this was subsided by the Aéropostale ruling and the recommendations for Chapter 11 by the American Bankruptcy Institute in 2014.

Objective 3

The case studies used for objective 2 were also used to fulfil objective 3. The case studies were analysed and discussed briefly in order to see how credit bidding is applied in practice and how the auction process is impacted. We also analysed the outcomes for all involved parties, not only the secured creditors.

In chapter 2 we used a basic example and 3 recent, contested cases from the US and Canada to illustrate the concept of credit bidding and the outcomes for the different creditors involved in the process.

In the Fisker case we saw that the secured creditor, Hybrid, wanted to use his right to credit bid his secured claim during the bankruptcy auction in order to acquire the company. This was highly contested by the other creditors as they acquired the claim for 15% of the value and therefore should not be able to credit bid up to the full amount. The Court confirmed this and capped the credit bid. As a result of the limit placed on the credit bid, other buyers entered the auction. The competitive auction process eventually ended with a higher winning bid which enabled to pay back the secured creditor and other creditors as well. At the same time the assets were sold going concern to the highest bidder, Wianxiang, so the economic value of the assets was preserved. This was the first case where the court had ordered for cause due to the possible bid chilling of the credit bid as well as doubts surrounding the imperfect liens of the secured creditor on the collateral (Chapman and Cutler, 2016).

However, the Aeropostale case in chapter 2.2.2 subsided the threat towards the use of credit bidding caused by the Fisker case. In this case the secured creditor, Sycamore Partners, used their right to credit bid during the auction to protect the value of their claim. This right to credit bid was confirmed by the Court and they denied the claims of the possible bid chilling effect caused by the credit bid. Sycamore was thus entitled to credit bid the value of their claim during the bankruptcy auction to acquire the company. But other bidders also participated during the auction process and the auction eventually ended with a higher bid than Sycamore's credit bid and resulted in a higher recovery for the other creditors of Aeropostale as well as a continuation of the operations on a smaller scale leading to fewer job losses caused by the insolvency of the debtor.

This case confirmed the validity of a credit bid and was a good example of how a secured creditor could protect his claim by credit bidding during the bankruptcy auction. Also, the introduction of the credit bid did not scare away third party bidders and resulted in a higher end bid which was advantageous for all parties involved, not just the secured creditor.

These outcomes from the Aeropostale case were also observed during the White Birch Paper case in Canada. This case confirmed the validity of credit bidding under Canadian law by the Canadian Bankruptcy Court. Also, the introduction of the credit bid by the majority of secured creditors did not prevent a competitive bidding process and led to a higher winning bid at the bankruptcy auction.

These cases show the strong legal base and the presence of precedents in order to use credit bidding as a secured creditor in the United states and Canada.

Objective 4

This objective corresponds closely to the research question of this report: can credit bidding be applied in Belgium?

In order to provide a concise answer to this, semi-structured interviews were conducted with specifically selected experts from the financial sector as well as respondents with a legal background specialized in insolvency proceedings in Belgium. This is because of the exploratory phase this research is currently in and no literature or research into this topic has been published to date.

After thorough studying the legal framework in Belgium, it can be concluded that there are no legal provisions in Belgian law which permit credit bidding as a secured creditor. So there is currently no legal base to use credit bidding in Belgium.

This was confirmed in the interviews with the industry experts. All respondents stated that credit bidding currently does not exist in Belgium and there are no legal provisions permitting to use credit bidding as a secured creditor. Respondent 2 states that credit bidding cannot be applied in Europe and thus Belgium because current regulations and legal structure does not accept credit bidding. In his opinion, taking over the collateral as a creditor by using the secured claim is not possible. All respondents mention the fact that during their experience they have never faced a similar concept such as credit bidding in Belgian insolvency proceedings.

Some respondents mention concepts with some similarities to credit bidding such as leasing, debt-for-equity swaps but none of these concepts can be seen as an equivalent to the concept of credit bidding as was defined in this report. In their opinion, by using a cession of the claim there could be possibilities but they were not inclined to start using this technique in their operations.

Therefore, it can be concluded that credit bidding has not been used in Belgium yet and there are currently no legal provisions in the Belgian legal framework that permit credit bidding but also no provisions prohibiting the use, as was mentioned by respondent 4.

There are concepts with the same characteristics but these are still different in many aspects and can therefore not be seen as equivalent frameworks to credit bidding.

The most similarities can be found with the transfer of assets under judicial authority (Art 59-70 WCO) where parts of or the whole company can be transferred to a third party. This could be a way where secured creditors acquire their collateral or the whole company after which the rest of the company will be liquidated. However, from the interviews with experts from the financial institutions we noticed resistance towards acquiring the assets themselves as they did not want to manage the assets themselves.

This option is less preferred by banks but could be an interesting possibility for other types of investors such as family offices or investment firms.

Objective 5

This objective aims to determine whether credit bidding could be an interesting addition to the current insolvency proceedings to provide additional protection to secured creditors. In order to assess if credit bidding could be useful for secured creditors in Belgium, literature reviews were used to assess the impact of credit bidding next to interviews to see the point of view of secured creditors in Belgium.

In theory, the concept of credit bidding would be an interesting protection tool for secured creditors in Europe and Belgium against the insolvency of a debtor. By providing additional safeguards to secured creditors they could eventually be less reluctant to provide loans to companies.

To assess whether this would also be the case in practice, interviews with industry experts from financial institutions were conducted to question them on the possible application of credit bidding as a protection tool for themselves as secured creditors. As banks play an important role

in financing economic activity in Europe, their opinion and views were important to answer this question.

From the opinions given by the respondents from the financial institutions, we can conclude that secured creditors and more specifically banks are not very open to applying a protection tool such as credit bidding. They do not see the added value to use credit bidding in their operations. For them it would mean that they acquire the collateral but they have no experience in handling these assets and face higher costs for the asset management if they credit bid successfully. However this is not part of their core business. Another argument is that the upcoming IFRS 9 regulation which will make it even more complex to use credit bidding as a financial institution and add more complexity to the current procedures.

Financial institutions claim they remain open towards new tools and mechanisms to improve their systems and operations but they do not see any benefit in applying credit bidding themselves under the current Belgian framework. There are also additional problems in terms of fiscal treatment which could increase the costs for banks when using credit bidding and acquiring the collateral themselves. They face too many risks if they win the bidding process and subsequently acquire the collateral. This is different to the investors using credit bidding in the United States as they have more experience in handling the specific assets on which they credit bid. There are less cases with banks using credit bidding in the United States.

An important remark that was made by respondent stated that according to him it is not the legal environment which leads to the current low credit provision but it is mainly caused by the absence of good projects to provide funding to. This is an important reason why banks do not see credit bidding as a solution to the current tight credit provision in Europe and Belgium.

Respondents with a legal perspective state that banks will not be more encouraged to provide more loans due to the higher protection against credit losses. Respondent 5 expressed his doubts whether application of new tools such as credit bidding would lead to more credit provision as Belgian mentality is not likely to apply the new tools. This is confirmed by the country study by Hofstede (2001). Belgium scores 94 out of 100 on the index to measure uncertainty avoidance while the US scores 46 out of 100 on the same index (cfr infra). This could be another reason why secured creditors in Belgium will be less inclined to apply a new tool such as credit bidding as they do not like the uncertainty this creates by introducing credit bidding. More research into this topic could be helpful to adapt the mind-set towards credit bidding.

Objective 6

This objective aims to look at the differences between the legal system in the United States and Belgium to ascertain which differences cause the existence of credit bidding in the US but not in Belgium.

As was mentioned by some of the respondents during the interviews, there are substantial differences between the 2 legal systems. In order to determine why credit bidding could not be accepted in Belgium as it is in the US, we should take a look at some of the differences between the 2 legal systems in terms of culture in the country as well as how the legal system work.

Culture

To compare the 2 countries in term of culture and mentality, the framework of Geert Hofstede from 2001 will be used. In his study, Hofstede aimed to examine how cultural attributes affected behaviour and values of individuals within the workplace. The model of national culture is comprised of 6 dimensions which govern preferences for one scenario or state of affairs over another (Geert Hofstede, 2001). In Figure 3, the 6 factors for the United States and Belgium were listed as follows:

Country	Power distance	Individualism vs collectivism	Masculinity vs Femininity	Uncertainty avoidance	Long-term Orientation	Indulgence vs Restraint
United States	40	91	62	46	26	68
Belgium	65	75	54	94	82	57

Figure 3: Cultural dimensions and corresponding scores of countries in comparison (Hofstede, 2001).

In the factor measuring individualism vs collectivism, we can see a huge difference between the 2 countries. This high score for the US, combined with the fairly low score on the Power distance factor, implies that the American society is more loosely-knit with the expectation that people look after themselves and do not look at authorities for support (Hofstede, 2001).

On the factor Masculinity vs Femininity, the US scores relatively high and combined with the low score for uncertainty avoidance this is reflected in the following: the US has a 'winner takes it all' culture where they aim at showing off their successes. With a score of 54, Belgium has an intermediate score. Hofstede concludes that a confrontational, win-lose negotiating style (typical in the Anglo countries) will not be very effective in Belgium (Hofstede, 2001).

This results could impact the differing views towards the use of a concept such as credit bidding. In Belgium this will be less accepted as they strive less to win above all, Belgians value to reach a mutual agreement rather than just win (this was also mentioned by the respondents from the financial sector).

In the US, the creditor using credit bidding will be less restricted by his own feelings in applying credit bidding and possible negative impact on other creditors. He only wants to protect his own interests by using his right to credit bid, together with the presence of assessment systems mainly based on precise target setting to determine a job well done (Hofstede, 2001). This is more difficult in Belgium where personal relations will have a greater impact.

On factor 4, uncertainty avoidance, the difference in the score for the US and Belgium is the highest. This score shows that there's a higher degree of acceptance for new ideas and a higher willingness to try something new or different in the US. At the same time, they do not require a lot of rules (Hofstede, 2001). Belgium has one of the highest scores on this factor. This certainty is often reached through academic work to respond to the need of detail, context and background. In management structure, rules and security are necessary and if lacking, they create stress. Belgium is one of the highest scorers, demonstrating the societies overall dislike for ambiguity and undetermined outcomes. (Hofstede, 2001). This factor could explain the difference between the United States mentality towards a concept like credit bidding and the Belgian mentality which is more hesitant. The results of the interviews showed that the industry experts required more detailed studies to reduce uncertainty. Also, it was mentioned multiple times that the current legal

structures in Belgium were adequate so a new concept was less required. Therefore, a lot of studies into credit bidding from a Belgian legal point of view will be necessary in order to create acceptance towards the concept of credit bidding as it currently creates uncertainty, which most Belgians want to avoid.

The low score on the Long-term orientation factor by the US can be interpreted as follows: *“Americans are prone to analyse new information whether it is true. American businesses measure their performance on a short-term basis which drives individuals to strive for quick results within the work place”* (Hofstede, 2001). Belgium scores very high on this factor, meaning they are a pragmatic culture. As a culture with a high score on long term orientation, it can be suggested that individuals within Belgium show a propensity for adaptation in situations wherein it requires time held traditions to be modified in order to suit current scenarios (Hofstede, 2001). This was also observable during the interviews where the respondents were looking at the utility and the use of credit bidding to see whether they could see the benefits of using it themselves but preferred the current legal structures in Belgium as they experienced them as sufficient to fulfil their needs.

Legal systems

During the interviews was mentioned multiple times that the differences between the legal systems in the US and Belgium could impact the possible application of credit bidding in Belgium. Figure 4 gives an overview of the differences between a common and civil law system. This can provide some insights to explain the application of credit bidding.

	Civil law	Common law
Legal system	Legal system originating in Europe whose most prevalent feature is that its core principles are codified into a referable system which serves as the primary source of law	Legal system characterized by case law, which is law developed by judges through decisions of courts and similar tribunals
Role of judges	Chief investigator; makes rulings, usually non-binding to 3rd parties. In a civil law system, the judge's role is to establish the facts of the case and to apply the provisions of the applicable code. Though the judge often brings the formal charge	Makes rulings; sets precedent; referee between lawyers. Judges decide matters of law and, where a jury is absent, they also find facts. Most judges rarely inquire extensively into matters before them, instead relying on arguments presented by the part
Countries	Spain, China, Japan, Germany, most African nations, all South American nations (except Guyana), most of Europe	United States, England, Australia, Canada, India
Precedent	Only used to determine administrative or constitutional court matters	Used to rule on future or present cases
History	The civil law tradition developed in continental Europe at the same time and	Common law systems have evolved primarily in England and its former colonies,

	was applied in the colonies of European imperial powers such as Spain and Portugal.	including all but one US jurisdiction and all but one Canadian jurisdiction. For the most part, the English-speaking world operates under common law.
Type of argument and role of lawyers	Inquisitorial. Judges, not lawyers, ask questions and demand evidence. Lawyers present arguments based on the evidence the court finds.	Adversarial. Lawyers ask questions of witnesses, demand production of evidence, and present cases based on the evidence they have gathered.
Evidence Taking	Evidence demands are within the sovereign inquisitorial function of the court — not within the lawyers’ role. As such, “discovery” by foreign attorneys is dimly viewed, and can even lead to criminal sanctions where the court’s role is usurp	Widely understood to be a necessary part of the litigants’ effective pursuit or defense of a claim. Litigants are given wide latitude in US jurisdictions, but more limited outside the US
Evolution	Both systems have similar sources of law- both have statutes and both have case law, they approach regulation and resolve issues in different ways, from different perspectives	

Figure 4: difference between common and civil law (Diffen.com, 2017)

Figure 4 compares common and civil law. The United States’ legal system is based on the common law system with a high emphasis on precedents and case law. The Belgian system originates from a civil law system with a high importance for a referable system which has to be followed. This could be an explanatory factor in why credit bidding is a common practice in the United States but not seen as an interesting tool for Belgium.

During the interviews, some respondents stated that in the Belgian system it is less likely that credit bidding will be used as there are currently no legal provisions to use credit bidding as a secured creditor. Therefore in a civil law system, credit bidding will be less preferable as there is no legal base so it creates uncertainty when being used by a secured creditor. A secured creditor will thus not be inclined to use credit bidding as he is not certain it will be accepted when challenged by other involved parties in the insolvency process.

In the United States there has been a high number of cases where credit bidding was successfully used and approved by the Court so in a common law system there is a strong legal base for credit bidding as there is abundant case literature on the use and therefore continues to be accepted by the Bankruptcy courts.

This difference can be seen as a determining factor in why credit bidding is not seen as an adequate tool for additional protection by secured creditors. They only see additional uncertainty created by the concept in Belgium. This is due to a limited knowledge on the concept as well as the absence of a legal base for the concept which makes credit bidding not interesting to apply as a secured creditor under a civil law system like Belgium.

This difference should be studied more thoroughly from a legal point of view to determine what the different underlying structures are that make credit bidding not possible under Belgian law but increasingly used in the United States.

Recommendations

Objective 7 aims to provide recommendations to Belgian policy makers to assess whether or not credit bidding could bring an added value to the current insolvency proceedings.

By studying existing literature on credit bidding, we found that credit bidding could bring significant advantages for secured creditors as a protection tool during the insolvency of a debtor. In the United States this is already frequently being used and there is a strong legal base to apply credit bidding as a secured creditor.

However if we look at Belgium, industry experts are reluctant to use credit bidding in their operations as there is no legal base for it. Also, they state that they feel adequately protected by the current legal structure in Belgium. They feel no need to experiment with a new protection tool such as credit bidding.

Further research into the differences between the Chapter 11 proceedings and the Belgian insolvency proceedings should be conducted to assess the reasons why credit bidding is not seen as a useful tool by the financial institutions in Belgium. We saw that there are also differences in terms of culture but this cannot be the only explaining variable. The respondents have all mentioned the difference between the two legal systems as an important explanation why credit bidding is not interesting in Belgium currently.

It could also be interesting for European and Belgian policy makers to look into other legal structures to provide more opportunities for secured creditors to sell their secured claims in other ways than currently available to them. Respondent 1 introduced the possibility of a system where a crowdfunding platform could be used to provide creditors with the opportunity to sell their claims via an open bidding process where interested parties could bid on these claims. In frameworks like this, the use of credit bidding could seem more interesting as a protection tool for secured creditors. By using a platform like this, it is possible to create a bidding process such as is currently possible in the United States. In a setting like this, the concept of credit bidding will prove to be more appealing to secured creditors than is in the current setting of insolvency of a debtor.

A new system such as this crowdfunding platform could bring more liquidity into the European economy and provide financial institutions with a tool to sell off their claims, mostly their Non-Performing Loans. Policy makers should look into new concepts like this in order to stimulate the economy by creating more liquidity which can then be used to provide more credit to European businesses.

6 Conclusion

Since the financial crisis in 2008 there has been a rise in the number of bankruptcies in the European Union, with the same trend being observed in Belgium.

But current insolvency proceedings have not led to lower numbers of bankruptcies as was intended (see WCO). The high number of bankruptcies and subsequent losses for creditors have caused a significant drop in credit provision by financial institutions and investors as they fear to incur high losses due to the current volatile economic environment.

Credit bidding, as it currently exists under United States law, is a tool to protect secured lenders against a drop in value of their secured claim when a debtor becomes distressed. Evidence from US bankruptcy cases showed that credit bidding was an adequate tool to protect secured lenders by using their right to credit bid during a sale of the collateral of their secured claim. Also, after the introduction of the credit bid during the bankruptcy auction sale of the distressed debtor's assets the auction ended with higher bids than before the introduction of the credit bid. This shows that credit bidding not only protects secured creditors against the insolvency of a debtor but also the other creditors of the company can benefit as they will have a higher recovery on their claim if the credit bid leads to higher competition during the sale of the debtors' assets.

In some cases (re *Aéropostale* and *White Birch Paper*), minority lenders raised concerns after the introduction of a credit bid by a secured creditor. They claimed that the credit bid prevented a competitive bidding process and they also questioned the validity and thus requested the Court to rule "for cause". But in both cases, this request was denied as there was no proof of malicious conduct and bid chilling due to the credit bid. These rulings have made an end to the uncertainty regarding the right to credit bid the full amount of the claim a secured creditor has. Credit bidding is now a powerful tool for secured creditors to protect their secured claim in the US and Canada.

Interviews with industry experts have showed that there is no similar framework available for secured creditors in Belgium. The financial institutions have also expressed their reluctance towards the use of a concept like credit bidding. The main reason was that it creates legal uncertainty as there is currently no legal base for credit bidding or an equivalent protection mechanism.

This can be caused by differences in culture between the two countries but will most likely be caused by the differences between the two legal systems, lying in the differences between common and civil law systems.

Therefore the conclusion of this research is that credit bidding cannot be applied under Belgian law and secured creditors in Belgium have showed little or no interest in using a similar concept in their operations.

The most similar concept in Belgium to credit bidding is the transfer of assets going-concern with judicial authority. This way the Judge could decide to transfer the company or a significant part of the assets to the creditor at a Court approved price. But financial institutions were reluctant to this idea as this would lead to additional questions in asset management which is outside the core business of the banks in Belgium. However, for other types of investors this could prove to be an interesting option which is quite similar to the credit bidding concept in Belgium.

In order for a system like credit bidding to be applied in Belgium, further research has to be conducted to determine the legal obstacles preventing credit bidding in Belgium and which

changes in the legal framework should be made in order for credit bidding to be successfully used in Belgium.

Limitations and further research

This research faces some limitations in terms of available sources on the topic in European and Belgian academic literature. As the concept does not exist in Belgium, there have not been any studies conducted on the topic and there is no data to be found on the possible application of the framework.

Interesting for future research would be to collect quantitative data on the use of credit bidding in the United States and Canada to have a deeper insight into the framework and provide more recommendations on the possible use of credit bidding.

Also, the limited knowledge on the concept has proven to be an obstacle to conduct an in-depth review of the current insolvency proceedings with industry experts. In order to determine the obstacles for the application of credit bidding in Belgium, more research with a legal focus should be conducted on the topic in Belgium. These studies could provide more details on why credit bidding is not possible and is not seen as an interesting tool for secured creditors in Belgium while it is currently a strong protection mechanism in the United States and Canada and continues to be widely accepted in their legal framework.

Further research should also be conducted into new tools and frameworks for creditors in Belgium to sell their claims, e.g. the crowdfunding platform which was mentioned, and how credit bidding could prove to be interesting in these cases. This could be a more interesting tool for creditors in Belgium compared to the credit bidding framework.

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Appendix A: Questionnaire interviews with industry experts:

‘Credit bidding during insolvency proceedings: application in Belgium’

Credit is a protection mechanism used to protect a secured creditor against a debtor in distress, within or outside of the insolvency proceedings. Under this framework a secured creditor, a financial institution or investor, can use the value of his secured claim on the collateral of a loan to acquire the collateral if the debtor wants to sell of the collateral because of the financial distress. This way, the secured creditor is protected against a drop in value of the collateral due to the financial difficulties of the debtor.

This interviews aims to collect additional data from experts in this specific industry for this research focused of the application of credit bidding under Belgian law. This research wants to analyse if credit bidding as it is frequently used in the United States, can be used in Belgium and lead to the some positive results. This will be done by conducting interviews with specific questions to industry experts as there is currently no data available on the concept of credit bidding in Belgium and the European Union. This method has been chosen as this research is in the exploratory phase.

Question 1: Have u heard of the concept of credit bidding as it is used in the US before this interview?

Question 2: Do you have any experience with this concept in Belgium or is there a similar framework? In other words, is it possible to use credit bidding as a secured creditor in Belgium?

Question 2.1: If yes, is this used frequently or is it rather exceptional?

Question 2.1.1: How do other creditors react if a secured creditor uses a credit bid?

Question 2.1.2: Can you name some recent cases where credit bidding was used in Belgium?

Question 2.2: If no, do you think it could be advantageous to use credit bidding in Belgium to provide more protection to creditors?

Question 3: Could the possible application of credit bidding encourage financial institutions to provide more loans due to the higher protection against losses by credit bidding?

Question 4: Do you think there’s a profitable market for distressed debt investors?

Question 4.1: If yes, would they be helped by using credit bidding?

Question 4.2: If no, Could these investors fill a gap in the Belgian financial market?

Appendix B: Interview transcripts:

The interviews with the industry expert from the Belgian financial and legal sector were conducted in Dutch as it was easier for the respondents and more suited to discuss the Belgian legal framework due to the specific terminology used.

Transcript interview 1:

Vraag 1: Heeft u reeds van het concept credit bidding zoals dit in de VS gebruikt wordt gehoord?

Ja ik had hierover al gehoord net als over Debtor-In-Possession financing, hetgeen een variant is op credit bidding.

Vraag 2: Wordt dit volgens u in België toegepast onder dezelfde vorm of onder een andere vorm? Is het mogelijk om credit bidding toe te passen als bevoorrechte schuldeiser?

Credit bidding wordt pas interessant als er voordelen aan verbonden zouden zijn (burgerlijk, op fiscaal vlak) maar deze zie ik niet in België. Mentaliteit in de Verenigde Staten is compleet anders tegenover falen van bedrijf, de WCO werkt niet zoals Chapter 11 doet in de VS. Trial and error is hier anders, er zijn meer falingen in de VS die nadien toch succesvol gebleken zijn. De reden waarom iemand in default kan gaan verschillen, kan intern (door opleiding) en extern (markt, familiezaken, jobverlies) te verklaren zijn. Externe fouten moeten niet gepenaliseerd worden zoals momenteel nog steeds gebeurt.

Het zit in de genen, WCO is aangepaste wet op de faillissementswet van 1997, maar deze wet loopt reeds fout in de toelatingsvoorwaarden aangezien het toetsingsrecht volledig is weggevallen voor rechters. Schuldeiser doet aan laissez-faire, men denkt meteen dat hij failliet zal gaan. WCO werkt pas als je cash geeft en onze bank doet dit bv door hypotheek te nemen bij de schuldenaar zelf (persoonlijk engagement is zeer belangrijk om krediet toe te staan).

Credit bidding neemt de schuld weg maar creëert geen liquiditeit. Waarom de schuld wegnemen? Wat valt er te winnen voor mij als schuldeiser?

Wat er regelmatig gedaan wordt door banken en ook door onze bank is dat indien er iemand niet meer betaalt dan wordt er overgegaan op een openbare verkoop met een notaris. Bank is meestal uitvoerende partij. Indien bod voldoende is voor schuldvordering is dit oké voor ons. Indien de bod onder bedrag van schuldvordering ligt (bv 80 geboden terwijl vordering 100 is) en dit is de enigste biedingsdag zal de immobiliën vennootschap onder ons bedrijf een hoger bod doen waardoor er een 2^e zitdag komt. Indien er niet boven bod van ons gegaan wordt, komt gebouw in immobiliën vennootschap terecht en knappen wij eigendom op om de waarde te verhogen waarna wij eigendom verkopen en deze opbrengst zal in immobiliën vennootschappen komen die deelmaakt van onze overkoepelende vennootschap zodat opbrengsten intern blijven. Dit wordt regelmatig toegepast in de bankenwereld maar ligt onder vuur door het Optima-schandaal.

De vraag die ik mij stel bij credit bidding is: Mag dit wel als bank om vordering over te nemen, wat is het voordeel aan credit bidding dan in België tegenover huidige systemen die wij reeds gebruiken. Credit bidding kan zin hebben bij een onderhandse verkoop maar is risicovoller. Dit doen banken niet voor compliance, door belangenconflicten die kunnen plaatsvinden.

Belgische systeem zoals we het nu kennen maakt mij pessimistisch over het gebruik van credit bidding. Ik zie niet welke voordelen er nu eigenlijk zijn om credit bidding in België toe te passen. Welke risico's zijn er aan verbonden? Openbare verkoop geeft reeds voldoende garanties om te zorgen dat verkoopprijs niet te laag is. In VS zijn er genoeg garanties voor het gebruik van credit bidding. Subrogatie door cash te geven is ook mogelijk maar dan moet je weer cash gebruiken. Je moet conform de Basel reglementering blijven als bank.

Vraag 2.1: Indien ja, wordt dit regelmatig toegepast of eerder uitzonderlijk?

Ja volgens mij eventueel mogelijks mits cessie schuldvordering of Special Purpose Vehicles of via een Dading. De vraag blijft of dit gaat in een openbare verkoop zoals uitvoerig gedocumenteerd is in de VS. Gaat volgens mij in België enkel bij een onderhandse verkoop maar je kan in België dan niet aan de notaris zeggen dat je activa gaat overnemen maar hier niet cash voor gaat betalen en enkel de schuldvordering inzetten. Ik denk niet dat je op een andere manier een bod gaat kunnen doen of betalen dan met cash dus credit bidding toepassen lijkt mij eerder onmogelijk.

Beeldt u in dat u naar een openbare veiling trekt en hier een credit bid uitvoert, dit lijkt mij echt niet mogelijk onder Belgisch recht. Bij een onderhandse verkoop eventueel wel mits rekening houdend met de risico's die erbij betrokken zijn (banken moeten rekening houdend met compliance en belangenconflicten, zeer strenge reglementering hieromtrent).

Cruciale vraag lijkt mij: wat met cessie van schuldvorderingen? Hierbij draagt schuldeiser de schuldvordering over. Bij dading zal er altijd iemand benadeeld worden. Bij pand effecten kan er belangenconflict ontstaan. Terwijl door mentaliteitsverschil in VS hier geen problemen bij zijn, men houdt geen rekening met de persoon die zou kunnen verliezen door gebruik credit bidding of ander hulpmiddel om uw belangen te beschermen als schuldeiser. Het verschil in mentaliteit tussen rechtssystemen blijft een zeer belangrijke factor.

Ook in de rest van de Europese landen, op enkele uitzonderingen na, zie ik dit concept niet gebruikt worden. Dit doordat er een compleet andere cultuur heerst dan in de Angelsaksische wereld. In Frankrijk is er een compleet juridische procedure waar enkel advocaten mogen deelnemen aan de verkoopsprocedure. In Nederland zijn vorderingen gelinkt aan levensverzekeringen dus schuld is enorm groot waardoor credit bidden nog moeilijk zal blijken.

Ander idee zou zijn om een crowdfunding platform te organiseren waar vorderingen te koop aangeboden worden. Hier kan men dan biedingen doen op de aangeboden schuldvorderingen en ik als bank verkoop aan hoogste biedingen. Dan is er nog onderscheid tussen schuldvordering, hypothecaire of bevoorrechte schuldvorderingen, interesten die je gaat aanbieden.

In verband met de cessie van de schuldvordering= het in betaling geven van de schuldvordering zou een mogelijkheid zijn maar dit is volgens de huidige wetgeving niet mogelijk om toe te passen.

Er zijn ook incassobureau's die de restvordering doet van de insolventie maar dit is geen bieding want je verkoopt vorderingen aan 20-25% aan incassobureau. Maar je zou terug dit crowdfunding platform kunnen aanbieden waar deze bureaus kunnen bieden op de aangeboden schuldvorderingen. Voordeel voor schuldeiser is dat hij van de schuldvordering verlost is.

Om te concluderen stel ik dat in het huidige juridische kader het niet mogelijk is op dezelfde manier maar vraag ik mij af of er een ander juridisch kader bestaat waarin het wel mogelijk zou zijn en wat zijn hierbij de risico's en voordelen. Risico's zijn momenteel groot, hoe kan ik de risico's verkleinen in huidige kader.

Vraag 2.1.1: Hoe reageren andere schuldeisers op een credit bid?

Eerder wantrouwig

Vraag 2.1.2: Heeft u weet van enkele recente dossiers waarin credit bidding gebruikt werd?

Nee

Vraag 2.2: Indien nee, Is het volgens u opportuun om credit bidding ook in België te gebruiken om zo meer bescherming aan schuldeisers te bieden?

Dat zie ik niet zo, bescherming aan schuldeiser is voldoende. Bescherming zou enkel zeer defensief gebruikt kunnen worden.

Vraag 3: Zou het mogelijke gebruik van credit bidding financiële instellingen ertoe aanzetten om meer kredieten toe te staan?

ik zie geen voordelen om dit zelf te gaan gebruiken. Dit gaat er niet toe leiden dat ik meer kredieten zal toestaan. Mijn enige optie die ik zie is enkel het platform starten waarop dan schuldvorderingen verkocht kunnen worden door banken en waar andere partijen kunnen bieden op deze schuldvorderingen maar dit heeft weinig te maken met credit bidding. Systeem tijdens biedingen werkt in VS maar werkt niet onder huidige juridische structuur. CB is gevaarlijk met IFRS want je moet minderwaarde meteen gaan afboeken waardoor je meteen verliezen gaat hebben. Dus dit brengt extra risico's, zeker nu IFRS 9 eraan komt. Banken zijn wel geïnteresseerd in nieuwe technieken maar niet in deze technieken die meer kapitaal consumeren.

In Europa: wat zijn de garanties voor de markt, wat zijn de voordelen voor de schuldeisers tegenover huidige systeem? Ik zie ze niet. Ik zie geen enkele manier waarop ik dit concept zou kunnen gebruiken in mijn huidige situatie.

Als bank het zekerheidsonderpand overneemt leidt dit tot problemen hoe je deze activa gaat managen. Dit behoort niet meer tot de core-business van de bank en haar activiteiten. Sterkte banken zou moeten zijn dat zij weten hoe zij risico's moeten aanpakken en verminderen.

Vraag 4: Denkt u dat er in België een voldoende grote markt is voor investeerders die probleemkredieten opkopen om winst te maken? Zouden zij gebaat zijn bij het gebruiken van credit bidding?

Vraag 4.1: Indien ja, zouden zij gebaat zijn bij het gebruiken van credit bidding?

ja, mits professionalisme en mits pricing en mits regulering. Markt is groot genoeg in België, praktijk wordt wel degelijk gedaan in titrisaties en die geven liquiditeit. Ook door lage interestvoeten wordt dit voldoende gedaan.

Ja vulture investors vinden dit interessant, aangezien zij koopjes zoeken. In procedure van een schuldvorderingen wil men deze opkopen om een koopje te doen. Credit bidding zou voor hun wel een hulpmiddel kunnen zijn in tegenstelling tot financiële instellingen.

Transcript interview 2:

Vraag 1: Heeft u reeds van het concept credit bidding zoals dit in de VS gebruikt wordt gehoord?

Nee, het was voor mij een concept waar ik nog niet eerder van gehoord had voor dit interview.

Vraag 2: Wordt dit volgens u in België toegepast onder dezelfde vorm of onder een andere vorm? Is het mogelijk om credit bidding toe te passen als bevoorrechte schuldeiser?

Bij het eventuele gebruik van credit bidding in België zit je uiteraard met beperkingen vanuit de verschillende wetten dus je zit als het ware gebonden binnen de huidige structuur. Niet alleen in België maar ook in Europa moeten we zeker rekening houden met de strengere regulering voor banken die ons beperken in onze activiteiten. Dus operaties als credit bidding kunnen wij niet zomaar gaan toepassen als wij conform de wetgeving willen opereren. Naar Belgisch recht is het overnemen van de eigendomstitel niet mogelijk bij een hypotheek. Enige regelgeving die dit toestaat is in de regelgeving rond schepen.

Leasing toont inderdaad gelijkenissen maar heeft toch een compleet andere opzet dan het concept credit bidding en kan dus niet als equivalent beschouwd worden.

Vraag 2.1: Indien ja, wordt dit regelmatig toegepast of eerder uitzonderlijk?

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Vraag 2.2: Indien nee, Is het volgens u opportuun om credit bidding ook in België te gebruiken om zo meer bescherming aan schuldeisers te bieden?

Op basis van de huidige systemen in de insolventiewetgeving hebben schuldeisers voldoende bescherming dus ik zie geen noodzaak om het concept credit bidding in te voeren. Er is helemaal geen kennis omtrent dit onderwerp in onze wetgeving. Ik vraag mij ook af wat er gedaan wordt met de activa nadat zij aangekocht worden door de schuldeiser? Je moet weten wat je met het activa zal doen als je het gekocht heb vermoed ik. Waarom nog credit bidden als er reeds geïnteresseerde partijen zijn als schuldeiser, indien zij na het verkrijgen van de activa meteen een koper hebben had deze koper toch zelf direct kunnen deelnemen aan het biedingsproces?

Schuldeisers in België zijn relatief goed beschermd met de zekerheidsmechanismen die er in België bestaan. Dit is wel verschillend tegenover het Amerikaanse systeem waar misschien minder bescherming bestaat voor de schuldeiser. Schuldenaar is beter gepositioneerd in VS. Schuldeisers staan minder sterk bij insolventie van de schuldeisers dus meer op zoek naar alternatieve pistes om bescherming te bieden aan schuldeisers. De vraag blijft of we op dit moment over voldoende andere middelen beschikken als schuldeiser om onze doelstellingen te bereiken? Ik denk dat dit momenteel wel het geval is. Deze zullen zelf nog vereenvoudigen eens de nieuwe Belgische pandwet er zal zijn. om meer bescherming te hebben nemen wij binnen de huidige systemen een hypotheek of een pand, dit lijkt ons genoeg ter bescherming dus extra hulpmiddelen zijn niet per se nodig. Deze

bestaande zekerheden zijn tegenstelbaar tegen derden, terwijl gebruik van credit bidding niet dezelfde zekerheid zou verschaffen momenteel.

Dus via deze kanalen is er voldoende bescherming. Wij voelen niet de nood om het risico te nemen om concepten zoals credit bidding toe te passen, zelf al is dit maar tijdelijk, om eigenaarschap te nemen over een activiteit/actief waarover wij onvoldoende kennis hebben als wij met het huidige insolventieproces reeds een groot deel van ons risico kunnen beheren.

Toepassing van credit bidding zou voor meer rechtszekerheid zorgen indien het bij een openbare verkoop gebruikt wordt. Bij een onderhandse verkoop loopt men het risico dat de verkoop niet tegenstelbaar verklaart wordt vanwege een niet-marktconforme prijs.

Er zijn 2 verschillende systemen (Angelsaksisch en het Europese rechtssysteem). Wij zien deze echter niet samenkomen op dit moment doordat de verschillen te groot zijn. Er zijn momenteel meer vragen dan antwoorden bij credit bidding.

Vraag 3: Zou het mogelijke gebruik van credit bidding financiële instellingen ertoe aanzetten om meer kredieten toe te staan?

Als er nieuwe regelgeving is met nieuwe systemen die onze processen verbeteren zullen wij hier uiteraard naar kijken maar invoering van nieuwe processen binnen de financiële instellingen zijn meestal duur en tijdrovend dus wij zijn niet meteen eisende partij voor nieuwe regelgeving of concepten.

Een kanttekening die men ook moet maken bij het gebruik van credit bidding vanuit het standpunt als financiële instelling is de fiscale regeling als via het credit bid de activa verworven worden. Bv registratierechten, btw die betaald moeten worden.

Vraag 4: Denkt u dat er in België een voldoende grote markt is voor investeerders die probleemkredieten opkopen om winst te maken? Zouden zij gebaat zijn bij het gebruiken van credit bidding?

Vraag 4.1: Indien ja, zouden zij gebaat zijn bij het gebruiken van credit bidding?

Deze soort investeerders bestaan zeker en zouden gebaat kunnen zijn bij het gebruik van credit bidding.

Transcript interview 3:

Vraag 1: Heeft u reeds van het concept credit bidding zoals dit in de VS gebruikt wordt gehoord?

Het concept was mij tot voor uw mail onbekend.

Vraag 2: Wordt dit volgens u in België toegepast onder dezelfde vorm of onder een andere vorm? Is het mogelijk om credit bidding toe te passen als bevoorrechte schuldeiser?

In het beheer van distressed loans wordt in en out-of -the-box gedacht. In mijn 10 jarige ervaring binnen het domein van kredieten in problemen en herstructureringen heb ik dit nog niet meegemaakt en zelf zeker nog niet uitgevoerd. Zelf als schuldeisers rechtstreeks bieden met de vordering hebben wij in België nog niet gedaan. Wij hebben wel structuren om bv de prijs te verhogen.

Indien wij activa verwerven als bank is dat niet altijd eenvoudig. Stel dat wij activa aankopen door onze vordering in te zetten en het actief verwerven dan weten wij niet wie dit zal beheren, verzekeren, onderhouden etc. Dit behoort niet tot onze metier waardoor wij al een derde partij voor ons asset management moeten aanspreken en dan spreek ik enkel over onroerend goed maar evt bedrijven met voorraden zoals fruit zouden nog een zwaardere aanpassing van ons vereisen.

Wijzelf hebben dus nooit zelf activa aangekocht en dit laten compenseren door de schuld. In de gevallen waarin wij toch meebieden op de activa gebeurt dit met additionele liquide middelen, niet de schuldvordering.

Mapping van de omgevingen waarin CB gebruikt wordt zou interessant kunnen zijn, Angelsaksisch geïnspireerde landen kunnen overtuigd zijn terwijl dit dan voor Europees recht helemaal geen nut heeft. Hiervan zijn nog voorbeelden die in beide rechtssystemen anders ervaren worden, zoals distressed debt wordt in Nederland, Polen, UK helemaal anders behandeld dan hier bij ons in België. Men gaat daar bv verder, dingen die wij in België niet kunnen doen en ook niet direct voorstander van zijn momenteel.

Leasing vertoont gelijkaardige kenmerken als CB. Waar de leasinggever wel eigendom terug mag verwerven bij niet-betaling van schuldenaar maar dit is niet gelijkaardig als credit bidding lijkt mij. Een andere optie die gelijkenissen met credit bidding vertoont is debt-for-equity swaps maar dit is eerder een conversie van de schuld in aandeelhouderschap van de onderneming, je neemt dus ook geen activa over. Dus is het nog steeds niet gelijkaardig aan het concept van credit bidding.

Vraag 2.1: Indien ja, wordt dit regelmatig toegepast of eerder uitzonderlijk?

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Vraag 2.2: Indien nee, Is het volgens u opportuun om credit bidding ook in België te gebruiken om zo meer bescherming aan schuldeisers te bieden?

Als je credit bidding zou gebruiken ga je als het ware andere risico's nemen dus er is geen reden om dit te gaan doen als de bestaande systemen wel degelijk werken.

Wij hadden wel internationale klanten die vorderingen van banken in Latijns-Amerika kochten en die maken dan een regeling met die landen om bepaalde assets te verwerven om aan de schuldvordering te voldoen. Dit is niet gelijkaardig met credit bidding maar het zou hier wel bij gebruikt kunnen worden. In internationale context zijn er andere structuren en systemen waardoor credit bidding misschien wel interessant zou zijn. Hier heb ik echter zelf weinig kennis omtrent.

Het blijft interessant om na te gaan welk verschil juist tussen het rechtssysteem in de VS en België ertoe leidt dat het daar wel gebruikt wordt maar hier niet. Is hun cultuur minder gereguleerd of is er een groot mentaliteitsverschil?

Vraag 3: Zou het mogelijke gebruik van credit bidding financiële instellingen ertoe aanzetten om meer kredieten toe te staan?

Juridische omgeving waarin de banken opereren is niet van die aard is dat het kredietverlening afremt. Dus credit bidding zou geen extra incentive zijn om meer kredieten te gaan toestaan aangezien kredietprovisie momenteel minder te maken heeft met eventuele juridische obstakels. Banken hebben cash en zoeken om kredieten te verschaffen maar vinden niet voldoende projecten. Bescherming heeft hier minder mee te maken. Wij als bank zijn in onze rechtsomgeving wel zeer goed beschermd dus we kunnen misschien minder open staan voor nieuwe concepten.

Voor bankiers zijn de bestaande systemen beter geschikt tijdens de insolventieprocedure. Het is ook in geen enkele belangengroep geopperd om een soortgelijk concept bij ons in te voeren, niet vanuit overheidsinstellingen, niet vanuit Febelfin. Wij leggen dan ook verantwoordelijkheid van het beheer van de activa na de verkoop bij de curator. Het is niet evident als financiële instelling om activa te gaan beheren ,buiten de kredieten die wij toestaan of schuldpapier op onze balans.

In België is na het afsluiten van een hypotheek de schuldenaar eigenaar van het onroerend goed, ook al is hij niet in orde met de betalingen aan de schuldeiser terwijl dit in de VS anders is, waar banken eigenaar van het zekerheidsonderpand blijven. Dit toont dat er toch achterliggende structuren in beide systemen zijn waarmee we rekening moeten houden bij het beoordelen van concepten zoals credit bidding. Wij zitten binnen een streng afgelijnd juridisch kader dus het is niet altijd evident om te gaan experimenteren met nieuwe concepten. Andere investeerders gaan misschien wel voordelen uit het concept halen die wij als banken momenteel niet nodig achten.

Voor een investeerder, niet een bank, kan dit interessanter zijn. Het enige interessante voor de banken aan credit bidding zou kunnen zijn dat het gebruik ervan de prijs tijdens de verkoop omhoog jaagt, in theorie. Het risico van de assets te verwerven gaan wij uiteraard eerder niet nemen.

Family offices en andere markspelers kunnen misschien wel geïnteresseerd zijn om credit bidding voor een offensieve strategie te gebruiken. Ik kan mij om economische redenen wel voorstellen dat zij op die manier delen van of de volledige onderneming opkopen als aanvulling op een reeds bestaande participatie. Wij vanuit de bank doen dit echter niet, wij willen leningen geven en zijn niet geïnteresseerd om de onderneming eventueel over te

nemen. Onze core business blijft om leningen uit te geven waarop dan interesten betaald worden.

Vraag 4: Denkt u dat er in België een voldoende grote markt is voor investeerders die probleemkredieten opkopen om winst te maken? Zouden zij gebaat zijn bij het gebruiken van credit bidding?

Vraag 4.1: Indien ja, zouden zij gebaat zijn bij het gebruiken van credit bidding?

Er bestaat zeker een markt voor distressed debt investors hier in België. Ik vraag mij echter wel af of deze door credit bidding een meerwaarde kunnen realiseren hier bij ons. Voor de curator blijft de vordering bv 100 ook al heeft de investeerder deze lening aan 15 opgekocht dus hij zal 100 betalen aan investeerder, dit zal echter niet snel voorvallen want waarom zou men deze lening zo laag doorverkopen? De originele houder van de zekerheidsvordering zou toch zelf beter voor credit bidding gaan ipv de lening door te verkopen?

Onze bank zelf koopt amper non-performing loans of distressed debt om hieruit winst te maken. Wijzelf doen dit niet maar er is wel degelijk een markt hiervoor en wordt regelmatig gedaan. Onze bank heeft zelf wel enkele participaties in NPLs doorverkocht aan banken met een meer Angelsaksisch profiel, zoals Nederlandse banken.

Transcript interview 4:

Vraag 1: Heeft u reeds van het concept credit bidding, zoals dit in de Verenigde Staten gebruikt wordt, gehoord?

Ik heb een seminarie specifiek over de toepassing van credit bidding in insolventieprocedures bijgewoond op een internationale conferentie van curatoren en aanverwante personen en andere dienstverleners rond insolventie, in Lissabon. Het viel mij toen op dat in sommige landen dit een bekend en vaak voorkomend mechanisme is terwijl in andere landen het zich niet voordoet.

Vraag 2: Wordt dit volgens u in België toegepast onder dezelfde vorm of onder een andere vorm? M.a.w., is het mogelijk om credit bidding toe te passen als bevoorrechte schuldeiser of als schuldeiser met een zakelijk recht?

Het concept en de toepassing ervan zoals het op die conferentie was uiteengezet leek mij ook voor ons land interessant. In bepaalde situaties kan dit voor een schuldeiser, specifiek die met een zakelijk recht, een meerwaarde bieden die geen negatieve weerslag, integendeel, heeft op de andere schuldeisers of de schuldenaar. In die gevallen kan het een mechanisme zijn dat in het voordeel speelt van alle betrokken partijen. Bijvoorbeeld in het geval dat een hypothecaire schuldeiser door de toepassing van credit bidding verzaakt aan een saldo van zijn vordering, waar bij ontstentenis aan credit bidding deze bij veronderstelling niet integraal voldane schuldeiser een niet bevoorrechte schuldvordering zou behouden en daarmee in concurrentie zou komen met andere schuldeisers.

Ik zie geen bepalingen in de bestaande wetgeving die een toepassing van credit bidding als dusdanig in de weg zouden staan. Het mechanisme is niet wettelijk geregeld maar evenmin verboden. In een rechtssysteem dat gekenmerkt is door contractsvrijheid zie ik geen beletsel voor de toepassing ervan, voor zover aan alle andere vereisten van de insolventie- en andere wetgeving is voldaan.

Vraag 2.1: Indien ja, wordt dit regelmatig toegepast of eerder uitzonderlijk?

Ik heb geen kennis van een concrete situatie waarin toepassing is gemaakt van credit bidding. Volgens mij komt dit doordat de bevoegde departementen van de banken (die er het meeste voor in aanmerking komen) steeds werken met de bestaande structuren en niet specifiek gericht zijn op het experimenteren met nieuwe initiatieven die nog niet in de rechtspraak geroedeerd zijn.

Vraag 2.1.1: Hoe reageren de andere schuldeisers op de introductie van een credit bid?

Ik heb er geen idee over aangezien ik geen toepassingen heb meegemaakt in de praktijk, in ons rechtssysteem. Er is abundantie literatuur over de mogelijkheid van toepassing, én over concrete toepassingen, in andere rechtssystemen, en op het eerste gezicht bestaat er kritiek

van andere schuldeisers. In een aantal gevallen kan de toepassing van credit in het voordeel zijn van alle schuldeisers, maar dat is niet noodzakelijk altijd het geval.

Vraag 2.1.2: Heeft u weet van enkele recente dossiers waarin credit bidding gebruikt werd?

Neen.

Vraag 2.2: Indien nee, Is het volgens u opportuun om credit bidding ook in België te gebruiken om zo meer bescherming aan schuldeisers te bieden?

Volgens mij is het wenselijk om onderzoek te verrichten naar de voor- en nadelen van credit bidding voor alle betrokken partijen in een situatie van insolventie, en die gevallen te identificeren waarin credit bidding een nuttig en waardevergroterend mechanisme kan zijn. Vervolgens is onderzoek vereist naar de concrete realiseerbaarheid ervan in de bestaande wetgeving en naar eventuele suggesties om de wetgeving te verbeteren.

Vraag 3: Zou het mogelijke gebruik van credit bidding financiële instellingen ertoe aanzetten om meer kredieten toe te staan aangezien ze beter beschermd zijn tegen verliezen?

Dat zou kunnen maar ik heb een onvoldoende kennis van de factoren die spelen in de beoordelingswerkwijzen van de financiële instellingen om mij een opinie te kunnen vormen over de weerslag op de concrete toekenning van kredieten. De uitvoerige (vaak grensoverschrijdende) reglementering die de banksector beheerst is niet altijd volledig rationeel. Naargelang de letter van de reglementering kan een verbetering van de verhaalbaarheid van schuldvorderingen toch zonder effectief blijven op het beleid van de banken.

Vraag 4: Denkt u dat er in België een voldoende grote markt is voor investeerders die probleemkredieten opkopen om winst te maken?

Ja, die praktijk bestaat bij ons maar ik heb onvoldoende informatie daarover om er een gefundeerde opinie of beoordeling over te kunnen geven.

Vraag 4.1: Indien ja, zouden zij gebaat zijn bij het gebruiken van credit bidding?

Ik vermoed van wel, maar onderzoek en vraagstelling in de sector dient hierover plaats te vinden.

Vraag 4.2: Indien nee, is er nood aan dit soort investeerders op de financiële markt in België?

Niet van toepassing aangezien die investeerders al actief zijn op de Belgische markt.

Transcript interview 5:

Vraag 1: Heeft u reeds van het concept credit bidding zoals dit in de VS gebruikt wordt gehoord?

Ik had nog nooit van credit bidding gehoord

Vraag 2: Wordt dit volgens u in België toegepast onder dezelfde vorm of onder een andere vorm? Is het mogelijk om credit bidding toe te passen als bevoorrechte schuldeiser?

Vraag 2.1: Indien ja, wordt dit regelmatig toegepast of eerder uitzonderlijk?

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Vraag 2.2: Indien nee, Is het volgens u opportuun om credit bidding ook in België te gebruiken om zo meer bescherming aan schuldeisers te bieden?

Ik heb evenmin kennis van een toepassing van deze praktijk in België. Wel ken ik de overname van de aandelen of (een deel van de) activa van de schuldenaar door de schuldeiser, meestal gebeurt dit enkel bij dreigende insolventie.

Ook zie ik bepaalde overeenkomsten met factoring, kredietverzekering, de in pandgeving van de handelszaak en de opkoop van verloren gewaande vorderingen (zoals Fiducure dit doet).

Het is steeds interessant om de mogelijkheden van nieuwe betalingssystemen en nieuwe zekerheden in het handelsverkeer te bestuderen en ze eventueel nadien ook toe te passen. Onder voorbehoud van verdere studie zou de introductie ervan inderdaad nuttig kunnen zijn

Vraag 3: Zou het mogelijke gebruik van credit bidding financiële instellingen ertoe aanzetten om meer kredieten toe te staan?

Ik stel mij de vraag of de Belgische mentaliteit van waar is voor een dergelijke figuur. Ik geloof ook niet dat deze figuur van aard zal zijn om de professionele kredietverleners te motiveren om meer kredieten toe te staan

Vraag 4: Denkt u dat er in België een voldoende grote markt is voor investeerders die probleemkredieten opkopen om winst te maken? Zouden zij gebaat zijn bij het gebruiken van credit bidding?

Vraag 4.1: Indien ja, zouden zij gebaat zijn bij het gebruiken van credit bidding?

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Vraag 4.2: Indien nee, is er nood aan dit soort investeerders op de financiële markt in België?

Het lijkt mij moeilijk om hiermee winst te maken, laat staan dat er een interessante markt zou bestaan of leefbaar zou zijn voor investeerders in probleemkredieten.

Er zijn te veel slechte ervaringen bij de handel in rommelkredieten en bij opkopers van verloren gewaande vorderingen, waardoor ik hic et nunc niet overtuigd ben in de haalbaarheid van dit "traject".

Transcript interview 6:

Vraag 1: Heeft u reeds van het concept credit bidding zoals dit in de VS gebruikt wordt gehoord?

Zowel ik persoonlijk als de juridische dienst binnen de bank heeft geen kennis over het concept credit bidding.

Vraag 2: Wordt dit volgens u in België toegepast onder dezelfde vorm of onder een andere vorm? Is het mogelijk om credit bidding toe te passen als bevoorrechte schuldeiser?

Vraag 2.1: Indien ja, wordt dit regelmatig toegepast of eerder uitzonderlijk?

Vraag 2.2: Indien nee, Is het volgens u opportuun om credit bidding ook in België te gebruiken om zo meer bescherming aan schuldeisers te bieden?

Dit concept bestaat naar mijn ervaring niet in België waardoor ik hier moeilijk aanbevelingen kan over geven.

Vraag 3: Zou het mogelijke gebruik van credit bidding financiële instellingen ertoe aanzetten om meer kredieten toe te staan?

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Vraag 4: Denkt u dat er in België een voldoende grote markt is voor investeerders die probleemkredieten opkopen om winst te maken? Zouden zij gebaat zijn bij het gebruiken van credit bidding?

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