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Case Study 1

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*1. What were in your opinion the causes of financial distress at Flow Management (see e.g. Mellahi & Wilkinson, 2004)? Could the financial distress have been prevented? If yes, explain how. If no, why not?*

1. On balance the information from the case study indicates that internal factors and management decisions weighed more heavily in causing the financial distress at the Flow Management Group. These internal factors can be distilled in three main areas; namely:

1. the management compensation system was flawed resulting in:
2. incentives which valued one single year’s accounting profits with no penalty if those accounting profits were later determined to be incorrectly declared; and
3. aggressive accounting decisions which resulted in paper gains by bringing forward speculative profits.
4. ineffective internal financial systems and controls causing:
5. the reported information to depart from the true market environment;
6. data being analyzed by management that was inaccurate which in turn would result in bad decisions for instance in relation to pricing of services and staffing requirements;
7. formula errors to not be detected.
8. Decisions relating to capital structure:
9. The group appears to have relied heavily on debt as the solvency ratio was stated to be 5% meaning that 95% of the assets were funded by debt.

2. In my view financial distress could likely have been prevented if the following steps weretaken *ex ante*:

1. the incentive system was aligned to value long-term profitability, cash generation and solvency;
2. investments made into financial systems and controls to ensure better and more accurate information provided to management; and
3. less reliance on leverage.

3. I will add in one caveat to my response which is that external factors could in fact have played a role in the financial distress of the Flow Management Group; including: the stage of the business cycle at the time, the maturity of the industry, and the industry’s characteristics. Even so I do not think those factors were sufficient to overtake the internal factors which I have described above.

*2. What are in general advantages and disadvantages of an out-of-court restructuring (workout) as compared to a formal bankruptcy procedure? More specific, what are the advantages versus disadvantages in your country?*

1. I have read the paper from Jan Adriaanse and Hans Kuijl entitled *Resolving Financial Distress: Informal Reorganisation in the Netherlands as a Beacon for Policy Makers in the CIS and CEE/SEE Regions* in which they have identified the main advantages to out-of court restructuring as being: (a) flexibility; (b) silence; and (c) control.

2. Although I do not have sufficient empirical evidence upon which to draw a statistically significant conclusion, in my experience each of those advantages can very well be disadvantages. That is to say they are need not invariably be advantages. In particular “control” by existing management can be a significant impediment to an informal work-out especially in the context of family businesses. This is because in some situations the existing management can be entrenched, with a deep emotional and psychological attachment to the company. If the management is loathed or slow to change then their control can be a significant disadvantage to informal work-outs. In those instances, using publicity can be a means of dislodging the management as the reputational impact can be used to nudge them to change.

3. In my view the general advantage of an out-court work-out tends to be lower costs and speed to completion. In terms of the general disadvantages, I think out-of-court work-outs may not always lead to finality in that those restructurings sometime may not be as deep or transformative as processes involving a formal bankruptcy procedure.

4. By way of background, Jamaica passed the Insolvency Act in 2014 (“IA”). This statute which is still fairly new is based on the Canadian Bankruptcy and Insolvency Act. The IA was revolutionary in that it replaced a regime where the primary focus was on winding-up to one intended to foster a system and culture of rehabilitation. Having said that the IA is still new and as a result there are either gaps in the provisions or inconsistencies which have not yet gotten judicial consideration.

5. In general there is much uncertainty surrounding its operation. Accordingly both prior to and at the present time, the norm in Jamaica is for informal work-outs. That leads to a paradox whereby informal work-outs tend to have a hardened sub-set of potential out-comes and the formal restructuring does not. So that at present the general advantage with informal work-outs is that it gives far more certainty as the potential outcomes are familiar to the market. Of course typically informal work-outs are carried out in the “*shadow of the law*” against the background of a formal bankruptcy process, which is considered the outside alternative. In my jurisdiction however the formal bankruptcy process tends not to be the likely alternative, instead the alternative tends to be one of the subset of potential informal work-outs because the outcome and timing to get to that outcome under the formal IA tends to be extremely uncertain.

6. At this early stage of the development of IA in Jamaica the main disadvantage of the informal work-outs is that it prevents the development of the IA law, procedures, process and results in the existence of many “zombie companies” that only survive based on continuous life-support from the financial stakeholders invested in the company. Those assets are therefore not being put to their best use.

*3. Were the turnaround/reorganization approaches as presented in the reading material (see e.g. Adriaanse & Kuijl, 2006, Pajunen, 2006, Sudarsanam, S, Lai, J., 2001, Schmitt, A., Raisch, S., 2013) applied in this case? If yes, explain in what way. If no, detail what in your opinion should have been done differently.*

1. Some of the concepts described in the reading materials were applied in this case study. It was readily apparent that an informal “financial structuring” as defined by Adriaanse & Kuij 2006 was the outcome That is to say existing creditors “voluntarily committing to revising the terms of their repayment obligations” (defined as a workout agreement). Also present was the concept of stakeholder influence articulated by Panjuen 2006. In this case the key stakeholders namely the Banks and the Shareholder were crucial to arriving at the work-out agreement. In contrast, trade creditors and employees were not consulted.

2. In terms of whether the overall approaches presented by the reading materials were actually applied I am less convinced. In Adriaanse & Kuij 2006 the authors specifically state that it is not ideal to merely carry-out a financial restructuring without a “business restructuring”. In my view the management initially presented grand business restructuring proposals but the ultimate business restructuring was minor and superficial in effect.

3. As it is my view that no true business restructuring was conducted very little was done either in terms of retrenchment or recovery (Schmitt, A. Raisch S., 2013). Especially lacking was recovery which would have focused on improving the strategic positioning of the business. The restructuring in the case study appeared geared towards preparing the company for a sale as a “*going concern*” (rather than on a “*forced sale basis*”) and not geared towards a sustainable recovery.

4. Again from the perspective of Sudarsanam, S, Lai, J., 2001, some of the concepts were applied but I do not think it is possible to say with any confidence that the restructuring efforts would result in FM 2 BV becoming a recovery firm without additional steps being taken.

5. To reiterate it is my opinion that the financial restructuring was really intended as a bridge to a sale. Banks are in my experience quite conservative. In this case they partially became the risk bearing capital when they decided to take shares in FM 2 BV. To carry out a business restructuring will typically require an additional capital investment. For instance to pay redundancies or to invest in assets or to prepare non-core assets for sale. The Banks being conservative may very well have been hesitant to commit additional capital for a business restructuring or would not be willing to commit additional human resources to monitor and manage the process. That being the case it is not clear to me that given that the key creditors were banks that a business restructuring or applying the approaches relating to business restructurings would have resulted in a more favourable outcome. More pointedly the sale of the interest of the Banks to a third party (i.e the takeover situation) could potentially have been the better outcome. So that a sale to a new strategic player willing to put in fresh capital, with the vision and staying power to make strategic decisions and to ride-out the volatility may in my view be the better outcome. The running of a leasing business is not the core operations of a bank and I am not convinced that a bank/s would have any expertise to make good decisions relating to strategic matters in relation to that business.

6. Ultimately it is my considered opinion that the Banks should have considered selling their interest to a third party. That third party would be fully on notice as to the financial situation. As a condition of the sale the third party would invest in risk bearing capital (equity) as well.

7. In summary, adopting the analysis of Pajunen 2006, the key stakeholders in this case study were a consortium of banks. Against that background it is not entirely clear to me that the overall wider approaches suggested in the reading materials would be practical. More specifically whether Banks should be managing strategic decisions and evaluating the likely impact of a potential business restructuring on the performance of the business. Bearing that in mind the approach which was taken (a financial restructuring to carry out a going concern sale) could in the end result in a *pareto* superior outcome assuming the financial structuring was a segue way to a sale to a strategic buyer.

*4. Banks C and D seem to frustrate the process at a certain point. What could have been the (rational and/or opportunistic) reason(s) for them to behave like that? What would you have done in that situation in your role as advisor of the other two banks?*

*Part (a) - What could have been the (rational and/or opportunistic) reason(s) for them to behave like that?*

1. The interests of Banks C and D were not fully aligned with Banks A and B because, based on my reading of the case study, Banks C and D had an additional Eur 35 Million in unsecured debt over and about the debts of Banks A, B, C and D -see table in response to question 7. The exposure of Banks C and D particularly in respect of their unsecured debts appeared to be larger than that of Banks A and B.

2. Bearing that in mind, Banks C and D may have been posturing in order to obtain concessions from other major stakeholders (the Shareholder, Banks A and B). Post-signing of the standstill agreement, Banks C and D would have lost all of their leverage as their influence flowed from them being able to take unilateral enforcement action. Prior to signing the standstill agreement it could have been a rational act on the part of Banks C and D to signal that they were willing to go pass the point of no return so that the other stakeholders would need to make significant concessions or take drastic action to get their support. This would be in the nature of brinkmanship.

3. In summary probably the soundest explanation is that their actions or inactions were intended either to appropriate a larger share of the pie to themselves or in order to grow the pie longer term by causing other stakeholders to contribute (such as causing the Shareholder to provide additional risk bearing capital).

4. Although there is not much of a foundation for this explanation, but one which in practice is very relevant, is the role of individuals. The key persons within Banks C and D may not have wanted to get involved fairly early in the process for fear that it would collapse and they would be blamed as having been participants in a failed process. By the same token when the key persons at Banks C and D got some visibility of an acceptable deal, they may have gotten back involved effectively “*free riding*” on the efforts of the other participants. The individuals in Banks C and D would then have seen it as having been a rational decision not to participate early in the process.

*Part (b) - What would you have done in that situation in your role as advisor of the other two banks?*

5. I would first analyse the various transaction documents governing the various facilities. If the working capital facility was a syndicated loan facility, I would specifically review the voting rights provisions. After analysing the transactions documents I would try to understand the issue with the securities as well as appreciating the overall capital structure and maturity profile of the issuer’s indebtedness.

6. After getting an appreciation for the more granular details of the rights of key creditors (including Banks A, B, C and D), I would then consider what were the possible outcomes. In evaluating the possible outcomes I would either probability weight them or consider them on a probable recovery basis.

7. In terms of the quantitative analysis I would ask the Banks to release to me information from the outside accounting firm as well as to get support from the accounting firm in coming up with the scenarios. Once that activity was completed we could then consider the various methods of dealing with Banks C and D. Among the first I would suggest is getting the key persons in Banks A, B, C and D into dialogue including sharing with them the results of the analysis and trying to understand their position and if it could be accommodated.

8. In my experience banks do not typically have much of an appetite to buy out another bank in a distressed situation thereby increasing their exposure to a distressed debtor. The case study suggested Banks A and B were considering this possibility. If I were advising Banks A and B the analysis would have had to have shown substantial excess returns or that Banks A and B would have various means to realize value or to exit (such as a sale to a third party) for me to suggest a buy-out of Banks C and D was warranted. Again in my experience banks tend to be more conservative than non-deposit taking institutions or strategic investors. Increasing exposure to a distressed debtor could very well earn a bank a call from the regulator of banks.

*5. Which of the eight principles of the ‘Statement of Principles for a Global Approach to Multi-Creditor Workouts II’ can be found in the workout process of Flow Management (explicit or implicit)?*

I have set out in the table below my response to question 5. Column 3 sets out my view as to how well each principle was adhered. 0 means that it was not considered at all and 5 means that it was very closed adhered to.

|  |  |  |
| --- | --- | --- |
| **Extract of Principle** | **Further Information** | **0 to 5** |
| **First Principle**:“Where a debtor is found to be in financial difficulties, all relevant creditors should be prepared to co-operate with each other to give sufficient (though limited) time (a “Standstill Period”) to the debtor for information about the debtor to be obtained and evaluated and for proposals for resolving the debtor’s financial difficulties to be formulated and assessed, unless such a course is inappropriate in a particular case.” | This was not implemented at the start of the process when the Banks (A, B, C and D) met with the debtor in November 2013 as the Banks commenced taking remedial action within one month in December 2013; including doing the following:1. Putting pressure on the Shareholder to increase solvency by injecting additional equity of Eur 35 Million and raising an additional Eur 12.5 Million -15 Million;
2. Accruing default interest.

This principle was not entirely absent as a Standstill Agreement was eventually consummated. | 2 |
| **Second principle:**“During the Standstill Period, all relevant creditors should agree to refrain from taking any steps to enforce their claims against or (otherwise than by disposal of their debt to a third party) to reduce their exposure to the debtor but are entitled to expect that during the Standstill Period their position relative to other creditors and each other will not be prejudiced. Conflicts of interest in the creditor group should be identified early.” | The Banks had issues relating to perfection of their securities. In January 2014 the Banks signaled that they were willing to sign a standstill no later than March 31, 2014. The purpose of the signal appears to have been to better prefect their secured interests. Even so, at the time of the grant of security it would have been contemplated that the facilities were secured, so that taking post-completion steps to ensure effective perfection were not truly opportunistic.  | 0.5 |
| **Third Principle:**“During the Standstill Period, the debtor should not take any action which might adversely affect the prospective return to relevant creditors.” | This seems to have been adhered to however part of the reason may have been that the Banks used the “carrot” of a standstill to gain time to improve their security. That is to say the standstill was used by the Banks for the debtor to maintain the status quo whilst the Banks improved their position. | 4.5 |
| **Fourth Principle**:“The interests of relevant creditors are best served by co-ordinating their response to a debtor in financial difficulty.” | Although there was no strict co-ordination committee or co-ordinator authorised to represent the Banks, their was essentially co-ordination in my view. For instance the Banks (A, B, C and D): (a)appointed a Chief Restructuring Officer; (b)agreed to waiver Eur 152.5 Million; and (c)agreed to receive equity in consideration for the waiver.  | 4 |
| **Fifth Principle**: “During the Standstill Period, the debtor should provide, and allow relevant creditors and/or their professional advisers reasonable and timely access to, all relevant information relating to its assets, liabilities, business and prospects, in order to enable proper evaluation to be made of its financial position and any proposals to be made to relevant creditors.” | This seems to have happened (even if the information was not reliable) but according to the case study it improved later in the process - probably after the appointment of the CRO. | 2.5 |
| **Sixth Principle:**“Proposals for resolving the financial difficulties of the debtor and, so far as practicable, arrangements between relevant creditors relating to any standstill should reflect applicable law and the relative positions of relevant creditors at the Standstill Commencement Date” | Based on the following statement “*the contents of the financial restructuring agreement reflect the relative positions of the financiers involved*.” It does appear to have been adhered to.However, we are also told that “*Flow Management Holding BV will be liquidated in an undisclosed manner*”. So one may question whether the scope of the restructuring agreement was comprehensive enough to cover all creditors or merely the more important creditors. | 4 |
| **Seventh Principle:** “Information obtained for the purposes of the process concerning the assets, liabilities and business of the debtor and any proposals for resolving its difficulties should be made available to all relevant creditors and should, unless already publicly available, be treated as confidential.” | Not adhered to the extent that press releases were issued at various times even the group was privately held. It is not entirely clear why press releases were issued. Potentially press releases may have been used to communicate to broader stakeholders such as employees or unions. However, it may also have caused potential buyers to be less interested as the news tended to be bad. | 0 |
| **Eighth Principle:** If additional funding is provided during the Standstill Period or under any rescue or restructuring proposals, the repayment of such additional funding should, so far as practicable, be accorded priority status as compared to other indebtedness or claims of relevant creditors. | This may have been adhered to in part. We are told additional working capital is repaid early in January 2015 totaling Eur 25 Million. However, the Shareholder provided an additional Eur 35 Million as an unsecured loan and it is not apparent if that was repaid.  | 2 |

*6. Suppose it is not possible to convince other creditors to adopt the Statement of Principles in a given situation, are there any other possibilities for “soft law” to use (perhaps specifically in your country/region)? If yes, explain in what way. If not, do you see any alternative (informal) possibilities?*

1. Typically, the distinguishing characteristic of “soft law” instruments is that they are not *ipso facto* binding. Participants must consensually agree to be bound by their terms or principles. (see Wessels and Boon, 2019).

2. In Jamaica it would be unprecedented at this time for any stakeholder or participant (even an insolvency practitioner) to voluntarily agree to formally or even informally agree to adopt any form of soft law instrument to govern their actions in a restructuring.

3. Jamaica is small in terms of the number and variety of financial players. The main informal alternative to *soft law* is purely strategic actions. In particular emphasizing to all key stakeholders that these situations are not *one-shot* so that being too hard or rough in this situation could come back to haunt said participant in a subsequent situation. Reputation becomes a factor in that the player that fails to participate could develop the reputation of being unreasonable. This could then hurt that player in other areas of their business. This is not “soft law” in the true sense of the phrase.

4. From a “soft law” perspective for distressed companies in Asia there are a number of potential options; including:

1. The Asian Banker’s Association Informal Workout Guidelines (2005);
2. The Japanese Guidelines for Out of Court Workout (2001).

5. Both of these soft law instruments have been around for at least a decade and a half so that borrowers, lenders, insolvency practitioners and judges in that region may be comfortable with agreeing to govern their relations based on those principles.

6. In looking at some of the principles articulated in those instruments, insolvency practitioners in Jamaica may inadvertently abide by principles stated therein even if not expressly or consciously.

7. Having said that the only sure way to implement any of these soft law instruments would be to incorporate the soft-law instrument by reference into the original loan documentation. So that the lender would have agreed to abide by that soft-law instrument if the borrower goes into financial difficulties. A lender would be unlikely to tie their hands by committing to abide by soft-law instruments (especially if there are multiple financial creditors) after the borrower has gone into financial difficulties.

8. In turn attorneys would be unlikely to unilaterally incorporate a soft law instrument in drafting loan documentation, without the soft-law instrument having been approved or endorsed by a trade body such as the Jamaica Chamber of Commerce or the Jamaica’s Bankers Association.

7. Explain in detail the essence and result of the restructuring agreement as signed on the 4th of July 2015.

1. Although the case study refers to signing a restructuring agreement, based on my experience and the number of transaction steps potentially involved it is more probable that a “Restructuring Support Agreement” was signed. The difference is relevant to the extent that the entering into the agreement does not itself effect the transactions contemplated therein. Rather the signatories to the agreement commit to take the necessary steps so far as within their power (including voting in favour when necessary) to effect the transactions.

 *(a) Summary*

2. From a high level my view is that the “*in the money*” stakeholders (the consortium of banks) have essentially hived-down the assets (the shares held by FMH BV) into a new HoldCo. (Flow Management II BV or “FM 2 BV”). The shares of HoldCo. were then transferred to the aforementioned “in the money” stakeholders in exchange for partial reductions in financial liabilities. Any “out of the money” stakeholders remaining in FMH BV would likely lose the entirety of their investment when it was wound up.

3. The HoldCo. and its subsidiaries would have less financial leverage overall and be in a better position for a going concern sale.

 *(b) Discussion*

1. *Capital Structure*

4. At a more granular level, FMH BV is a holding company with its assets being its shareholding in six (6) operating entities including FMW BV. The table below depicts the capital structure of FMW BV:

|  |  |  |  |
| --- | --- | --- | --- |
| **Type** | **Stakeholder** | **Principal** | **Notes** |
| Secured Debt  | Banks A, B, C and D | Eur 360 Million | This is consensual debt from sophisticated creditors that are in the business of lending.They have pledges on most assets of FMW BV.They potentially took steps to prefect their securities after the FMW BV got into financial difficulties. |
| Unsecured Debt | Banks A, B, C and D | Eur 55 Million | This is consensual debt from sophisticated creditors that are in the business of lending. |
| Banks C and D | Eur 35 Million | This is consensual debt from sophisticated creditors that are in the business of lending. |
| Lease Group Holding UK Ltd (the Shareholder) | Eur 35 Million  | This is a consensual debt granted by a parent to its subsidiary. |
| Other sundry unsecured creditors | Not provided | Some of these creditors will include both consensual and non-consensual creditors and sophisticated and un-sophisticated. |
| Equity | FMH BV | Not provided | This is the risk bearing capital. |

5. The secured creditors so far as we know have the highest priority claim as their rights extend to the assets of the FMW BV (in property law their rights are *in rem*). The unsecured creditors are subordinated to that of the secured creditors and not in the nature of a claim over specific assets rather their rights are in *person am* against the company itself. The equity holders only have a residual claim for any excess after discharge of the debts.

1. *Details of restructuring agreement*

6. The restructuring agreement as a preliminary would prohibit any of the creditors or parties to that agreement from taking any enforcement action during the period of its implementation. The parties to the restructuring agreement are likely to have been:

1. Banks A, B, C and D;
2. The Shareholder;
3. FMH BV;
4. The Board of Directors and the Chief Restructuring Officer (“CRO”).

7. The Board of Directors and CRO would likely have formed a subsidiary to hold their interest in FM 2 BV. If so that new entity may also have been a party to the restructuring agreement. The other sundry unsecured creditors are unlikely to have been a party or represented in the restructuring agreement.

8. FMH BV would first hive-down its six (6) operating entities into FM 2 BV. FMH BV would in effect be transferring its shareholdings in exchange for issuance of shares in FM 2 BV. This is typically referred to as a “hive-down” or “reconstruction’ in tax law.

9. The shares in FM 2 BV would then be transferred to the consortium of banks and the entity owned by the Board of Directors and CRO. In exchange for this transfer of shares the following will occur:

1. The consortium of banks (A, B, C and D): (i) waive Eur 97.5 million of debt in FMW BV; (ii) cancel Eur 55 million of debt in FMW BV; and (iii) release all claims against FMH BV and the Shareholder;
2. Banks C and D would write off Eur 32.5 million;
3. FMH BV and the Shareholder would release all claims against FM 2 BV and its subsidiaries.

10. FMH BV would likely have no assets at this stage and would be wound up. Any creditors remaining in FMH BV and the Shareholder would not likely receive any return of their debts or capital respectively.

11. The result of the implementation of the restructuring agreement would be that:

1. FMW BV would now have a new parent company in FM 2 BV;
2. FMW BV would have Eur 185 million less debt owing to the consortium of Banks (Eur 152.5 million to less to Banks A, B, C and D; and Eur 32.5 million less owing to Banks C and D).

It is unclear whether the Shareholder’s Eur 35 million in unsecured debt remains at FMW BV and whether the sundry unsecured creditors will also be subject to a hair-cut. In relation to the former the uncertainty is because we are told the Shareholder cancels all “claims” against at FM 2 BV and its subsidiaries. That would seem to include its claim to recover its unsecured debt. In the latter the uncertainty is because the hive-down was of shares in the operating companies held by FMH BV meaning that all assets and liabilities at the operating company level (including the unsecured indebtedness) would have been transferred when FM 2 BV acquired the shares of those operating companies.

*8. Which (potential) legal and/or non-legal cross-border issues – if any – do you* *recognize in the Flow Management restructuring process?*

1. In my view from a practical perspective I do not see any material cross-border issues whether legal and/or non-legal. There are three reasons why, the first is that the Shareholder has agreed to the restructuring including the releasing of any claims against FM 2 BV and its subsidiaries (that would include FMW BV). That essentially takes away a significant stakeholder that in looking at the final result of the restructuring resulted in the loss to the Shareholder of not only FMW BV (FMW BV is the entity over which the banks had secured interests) but also to the five (5) other operating entities –we are not told that the Banks have any secured claim to these assets or any guarantee from these entities.

2. The second reason is that the restructuring does not appear to require significant multi-jurisdiction recognition. Save and except that the shares in each of the six (6) operating entities will need to be transferred from FMH BV to FM 2 BV. The six (6) operating entities are located in various countries including both common law and civil law jurisdictions. Local share registries will like have to be amended to recognize the share transfers. Even so each of those entities is wholly owned by FMH BV so that the transfers to FM 2 BV should be without issue.

3. The third reason is that my understanding is that FMH BV is really a holding company and does not have significant creditors. Therefore, the transfer out of its subsidiaries will only impact the Shareholder and the upstream owners. Accordingly, the end result of the restructuring which involves the liquidation of FMH BV will not impact any significant creditors.

4. From a more hypothetical perspective one may question the scope of the releases. More specifically whether the releases by the Shareholder are sufficient in scope to prevent claims from the Johnson Family, LLS Private Equity Fund Ltd (UK) and Cinderella Investments Ltd (UK) against FM 2 BV or its subsidiaries.

5. In regards to non-legal matters from my perspective I do not see any real non-legal issues that arise from this restructuring. The reason being is that in the end result FMH BV is being wound up and so far as I understand FMH BV is a holding company. Typically holding companies do not have significant creditors so that its liquidation should not cause significant problems.

6. If in contrast the restructuring process involved liquidation of FMW BV then that could cause significant non-legal issues particularly based on the impact on the Netherlands (such as loss of Dutch jobs) from companies ultimately owned by American and British interests including a private equity firm which tend to utilize leverage to increase their returns.

7. Another area which at least anecdotally causes non-legal cross-border issues in a restructuring process is moving the domicile of a significant entity. In this case FMW BV is Dutch and FM 2 BV also appears to be Dutch. So that also does not arise.

9. In October 2014 four scenarios have been drawn up. Why *was* or *wasn’t* calling for a moratorium (see scenario 4) a good option given the situation at that time? [you are allowed to give your opinion based on your own countries’ Bankruptcy Act; be as detailed as possible]

1. *Moratorium*

1. The Jamaican Insolvency Act, 2014 (“IA”) does not include a set moratorium procedure which would see a formal suspension of the requirement to meet liabilities. The IA does however include provision for implementation of a “stay” on enforcement action if a company files either a Notice of Intention to File a Proposal (“NOI”) or a Proposal. The option to file a NOI or a Proposal is only available to a person facing “imminent insolvency” or that is “insolvent”.

2. I would not advise a company in the position of FMW BV to file a NOI or a Proposal. That is for two reasons, the first is that the process at present is extremely uncertain. In drafting the IA the intention was to adopt a similar process to the Canadian Bankruptcy and Insolvency Act, but with additional flexibility. The issue is that this additional flexibility has led to significant uncertainty in relation to interpretation and consequently how any particular situation may be resolved. The second reason is that it will result in the appointment of a licensed trustee. Adding in an additional party in this scenario would in my view only cause additional disruption and slow the process of restructuring down more.

3. In this scenario Banks A, B, C and D had already entered into a Standstill Agreement in the middle of August 2014, so that they would have already agreed not to carry out enforcement action. A formal moratorium (i.e. a formal suspension of payments) would likely have affected other creditors such as trade creditors, suppliers and/or employees. That could have resulted in some or all of those groups of persons taking steps (albeit prudently) to limit their exposure to FMW BV. That could then have caused other creditors (in particular non-consensual creditors) to lose confidence in FMW BV. This could lead to a race to collect as described by Adriaanse and Kuijl 2006 which then could result in the company spiraling into deeper financial difficulties as trade creditors and suppliers cease to extend any credit to FMW BV.

4. It is not clear if the moratorium in Dutch law also involves a stay on enforcement action. If it does then it would give additional protection to the NOI process similar to Jamaica. If it does not then it could expose the company to a floodgate of litigation as creditors could potentially rush to exercise their claims. Either way a moratorium would likely add in another stakeholder to the process whether the court or a trustee, which could disrupt the on-going negotiations.

5. The moratorium or in Jamaica the Proposal process would be a last result if the parties in the informal work-out negotiations failed to arrive at an amicable restructuring.

1. *Scenario 4*

6. Scenario 4 required that the Banks provide bridge financing. In jurisdictions which have advanced and developed debtor-in-possession regimes this would probably have been feasible. In Jamaica the IA does not *ipso facto* provide for DIP financing, instead it would be necessary to obtain a court order for interim financing. In Jamaica banks would be hesitant to seek recourse to this uncertain procedure involving lending to an already distressed debtor even if in theory the IA contemplates the possibility of an interim financing order that would give super-priority to their bridge loan debt. In my experience this type of indebtedness is more likely to come from a non-deposit taking institution that is active in the mezzanine debt market. The issue with bringing in a mezzanine debt provider is that the existing Banks would not take kindly to another lender being involved in a process that would contemplate that new lender getting super-priority.

7. I am not certain why an additional scenario was not considered for the Banks to market their debt to seek to obtain a clean exit. That new lender could then seek to restructure the company including granting potential bridge financing. Banks being highly regulated and conservative, would in my view be unlikely to take on additional exposure by granting a bridge financing facility even if supported by an interim financing order from the court.