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Global Insolvency Practice Course-2021/22

Assessment: Case study-1 analysis

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# **Question – 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?

**Answer:**

**Background and some assumptions:**

1. A brief synopsis of the case study in the form a table describing of what happened during the period from October, 2013 to May, 2016, in Appendix-1. This is prepared to facilitate the author of this assessment to have a better grasp of the case study .
2. Answering of the questions posed require making certain assumptions about the case study which have not been specifically spelt out as such in the case study. Some of the aspects of the case study seem to look similar to the acquisition of LeasePlan Corporation NV[[1]](#footnote-1) by *LP Group B.V., which represents a consortium composed of a group of long-term responsible investors and includes leading Dutch pension fund service provider PGGM, Denmark’s largest pension fund ATP, GIC, Luxinva S.A., a wholly owned subsidiary of the Abu Dhabi Investment Authority (ADIA) and investment funds managed by TDR Capital LLP[[2]](#footnote-2)*. So, it is thought appropriate to draw a few assumptions from this acquisition, though the case study might not have been drawn exactly from this particular real transaction in order to give a context to answer the queries raised in this question. The assumptions made are as follows:
   1. The group company of Lease Group Holding United Kingdom Ltd in Netherlands - Flow Management Holding BV (**FMHBV**) was doing quite well until 2011 and it has grown very well in the previous decade upto 2011. The structure of the group as given in the case study is enclosed as Appendix-2 for any easy reference at any point of time.

* 1. Fleet management business is a global business and it is assumed that 70% of the business of FMHBV is assumed to be from the states of the European Union.
  2. The tenure of the CEO, CFO and all other key members of Board of Directors and the Management Team had been reasonably long and there has never been disruption in the management because of any frequent change in the management.
  3. Huge homogeneity is assumed among the Top Management in view of their educational backgrounds (more so to do with CEO and CFO – Economics / Finance as such) and their long term association in the group – in terms of - say -almost two decades.
  4. The need for recruiting top management resources only from outside in a crisis situation is considered as absence of plan for succession of top management.
  5. FMHBV had opted for borrowings at a higher rate of interest (coupon rate) before 2011 which also could have affected the net profit adversely and cash flow.
  6. FMHBV is considered as one of the major five players in the industry.
  7. Frequent mis-information being fed to the consortium of banks as can be seen from Table-1 is assumed to be related to the possible failure of proper implementation of SAP – ERP standardised package across all the companies more or less at the same time replacing very customised ERP packages which were used by all the group companies instead of considering any intentional frauds committed by any officers as such[[3]](#footnote-3).

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **Table: 1: - Statement showing Actual / Estimated Profits / (Losses) stated as per the case study** | | | | | | | |
|  |
|  |  |  |  |  |  | **Eur Million** | |  |
| **Date / -->Year** | **2011** | **2012** | **Upto Sep 2013** | **Estimate-2013** | **Expected for 2014** | **Estimated 2015** | **Actual 2015** |  |
| 16/11/13 |  | (5.00) | (5.40) |  |  |  |  |  |
| 01/12/13 |  |  |  | (23.10) |  |  |  |  |
| 20/12/13 | 9.40 | (6.10) |  | (36.40) | (5.70) |  |  |  |
| 21/02/14 |  |  |  |  | (3.70) |  |  |  |
| 31/03/14 |  |  |  |  | (8.50) | 30.00 |  |  |
| 30/06/14 |  |  |  |  | (27.50) |  |  |  |
| 30/10/14 |  |  |  |  | (39.00) | (10.00) |  |  |
| 31/05/16 |  |  |  |  |  |  | (9.00) |  |

**Causes of financial distress:**

1. An integrative framework[[4]](#footnote-4)(see Figure-1) suggested by Kamel Mellahi and Adrian Wilkinson could be effectively used to reasonably understand the causes of failure connected with this case study. They broadly consider Environment factors and Ecological factors as deterministic aspect whereas Organisational factors and Psychological factors as voluntarist aspect. The intention here is not to connect each factor mentioned in the framework to the case study; but, to look into what factors could have caused the financial stress in broad terms in the context of the case study.

Figure-1: A Proposed integrative framework for determining causes of failure

*![Diagram

Description automatically generated]()*

1. An attempt is made to consider how the four broad factors mentioned in the Figure-1 could have contributed to the failure in the case study:
   1. **Environmental factors** : The Gross Domestic Product(**GDP**) growth rates of the European Union were 2.10% and 1.90% respectively for the calendar years 2010 and 2011, and the comparable growth rates were 0.00% and -0.7% for the calendar years 2012 and 2013[[5]](#footnote-5). Any dip in the Gross Domestic Product could be considered as a possible broad indicator of general dip in many businesses and especially to do with Logistics and Transport business and as a result in Fleet Management Business also. It cannot be ruled out that such a dip in GDP did not affect the business of FMHBV. From this perspective, economic changes which have happened during 2012 and 2013 could have affected the business of the group. In the long term, there may be a compulsion for the industry to move towards vehicles with less CO2 emissions possibly towards electrical cars and also to adhere to the related regulatory changes which could call for huge investments in the long run. Similarly, there has been thinking about very disruptive technology to the extent of use of artificial intelligence including the concept of driver-less vehicles which may affect this industry very significantly in the long run. But, these possible regulatory change and technological factors did not affect the industry during 2012 to 2014. It is said that Generation Y’ (those born between 1977 to 1994) has a preference for ‘*shift from ownership to sharing will further increase relevance of fleet management’* as per a study by Deloitte*[[6]](#footnote-6).* The same report highlights about the possible reduction of proportion of privately owned vehicles during 2012 to 2021 at by about 7% and Fleet Management companies acquiring such market share. This factor could have contributed positively to the industry during the said period.

* 1. **Ecological factors** : Deloitte’s study referred above, states that consolidation has been happening in the Fleet Management industry in Europe during 2010-2016 and top five players have been able to hold a market share of more than 50%. FMHBV can be assumed to have been a player in the consolidation process of the industry and also holding significant market share among the top five players in the industry. This could be viewed as a time of higher population density in the Fleet Management Industry which essentially means that significant growth can happen only when one acquires the market share of others and does not happen just because of the higher demand from new customers to the industry. We could view that this product/service and industry could be in the initial middle to middle-middle stages of maturity in the industry cycle where growth is there but it is not growing at steep high rate of growth. As far as the size and the age of the organisation in this case are considered, they cannot contribute to any sudden failure which can have the impact of going out of business because of any minor shocks in the environment.
  2. **Organisational factors**: If top management has gone through more or less a successful period for quite some time – say 5 to 10 years during their long tenure, there is every possibility of acquiring some sort of complicity, over-confidence about their ability to run the organisation always on a growing path and sometimes acquiring uncalled for ‘hubris’[[7]](#footnote-7). If there is homogeneity of thinking among the members of top management team, they may resort to taking decisions based on what worked well on in the past rather than trying new ideas / possibilities without realising the external context could be very different from what it was in the past. Many times, past success could be the reason for a current failure. It is said *‘success breeds failure*’ and *‘failure breed further failure’* (Argenti, 1976; Starbuck et all, 1978)[[8]](#footnote-8). This happens when management is more burdened by the past beliefs and practices which worked well in an earlier set of circumstances and which may have absolutely no relevance in the changed circumstances. It is not ruled out that the reasons for issuing bonds with higher coupon rates could be with the overconfidence by the top management that the business could be run with the same level of profits what used to be earlier and the same level of growth which they have achieved in turnover and profits earlier could be achieved in the coming years also. Issues do arise out of management succession; absence of management succession plans can disrupt the business in a negative manner.

Large management bonuses wrongfully given to CEO and CFO to the tune of Eur 3 million, wrongful booking of contingency gain during 2012, wrongful booking of paper profit which may not get realised in the near future and the failure to check real costs and compare with the pricing over time signify total organisational failure which could be attributed more to long tenure of the members of top management as well as to do with homogeneity in the thinking patterns and something to do with group-think (if they were to think differently, such wrongful acts could not have happened since normal checks and balances would not have allowed some of the intentional errors possibly blunders to happen.

* 1. **Psychological Factors** : *The Threat Rigidity Effect Theory (Straw et all., 1981) argues that individuals, groups and organisations tend to behave rigidly in threatening situations[[9]](#footnote-9).* The management which has been successful in the past when it has failed in a set of changed circumstances is more likely to be defensive when they come across failure which normally results in denying the real reasons for the failure especially if it is to do with lack of anticipation of the crisis in advance, start rationalising the reasons for failure.

Based on the above, in a nutshell, following broad reasons could have contributed to the financial distress of the company:

1. Decline in the general economic conditions as reflected by decline in the growth rates of GDP in European Union possibly covering almost 70% of the company’s business operations.
2. Steep rivalry in the competitive space of the industry as reflected by consolidation happening in the industry and also lack of steep growth in the industry which is an indication in the early/middle maturity stage in the industry cycle
3. Top management’s lack of anticipation or overconfidence / hubris on account of past success, longer tenure and homogeneity in the top management which must have allowed them to borrow with high leverage and also at cost of funds at a higher rate than what it should have been, intentional fudging of accounts to inflate profits, wrongful distribution of bonuses to CEO / CFO, inability to monitor real costs against the pricing, as well as lack of dynamism in understanding in what is happening in the markets and take course corrections regarding pricing of products/services offered coupled with controlling costs wherever needed. No doubt, any failure in the implementation of SAP-ERP package could have affected a good source of information restricting the top management to take appropriate decisions at certain stages.
4. Delays in taking corrective actions including infusion of the required equity reflect about the denial of real reasons for failure

**Possibility of avoiding the financial distress!?**

1. Any business is complex as well as dynamic and on an hindsight most of the times finding answers for what went wrong and what could have been done to avert a financial crisis could look simpler. This is so, because we have the luxury of analysing / splitting reasons and also give solution brick by brick for any issue faced. It is difficult to give a very straight forward answer of yes or no regarding whether the financial distress could have been avoided without putting many conditions to support whatever the line of argument we take.
   1. No company is in a position to change the external circumstances. If the business has gone down in view of general economic conditions. It affects all the companies in some way or the other depending on the regions / the kinds of business segments they cater to considering how the decline in economic conditions has affected the regions and the kinds of business segments.
   2. There must have been very high intensity of rivalry going on among the competitors in the industry during 2011 to 2016. Proper understanding by Strategy team of the company - of what is happening in the industry, how the players are playing out in the market and what strategic response needs to be given by the company in such circumstances could have helped the company to reduce the impact of the demand decline for the group on account of the stiff competition in the industry.
   3. Deloitte study referred to above, considers cost of funds and efficiency as key factors for the survival and growth of the Fleet Management industry. The same study shows that the return of total assets was only 1.9% p.a. in respect of LeasePlan even as of 2016 as compared to its other competitors at 2.7% p.a. (Arval BNP Paribas Group) and 3.6% p.a. (ALD Automotive). The Return on Equity for LeasePlan is the least as compared to the players mentioned at 14.9% p.a. – even for 2016(comparable figures for other players being 25% p.a. and 17.6% p.a.). It is mentioned in the assumptions, that some aspects of the case study have the resemblance of LeasePlan and liberty is taken to assume such assumptions to respond to the queries raised. These data lead one to conclude that possibly, the company in the case study had higher leverage and could have borrowed funds at a higher rate of interest. This may lead to visualise that it is quite possible that the coupon rates and the maturity dates agree for many of the bonds issued by the company could not have been considered costly or for a shorter term based on the prospects for the industry at the time of the issue. If the top management had been quite dynamic, it should have anticipated that with the changed economic scenario and possible expected demand decline which could have been felt on a day to day basis in a running business. If it were the case, the top management should have focused efficiency in its operations – which means that proportion of operational costs to revenue need to be lower than what it was. This can also mean lowering the costs of the operations or improving the pricing mechanism (either through price increase on the products/services or adding ‘value added’ products/services with higher net margins). From this perspective, the top management if it were to be with a dynamic perspective, should have looked for more equity, funds with lower coupon rates and longer maturity period as well as looked at improving the margins on operation either by reducing possible costs or/and improving the price mechanism. It could have been done well in advance before the impact of the business decline is anticipated or felt in the initial period itself (say in 2011).
2. It could be said with the ‘hindsight bias’, that the company could have averted the financial distress if it had taken actions mentioned above. But, when the issues are to do with the organsiational and psychological factors playing more role than the ecological and environmental factors in this case, is it reasonable to expect that the existing management could have taken the suggestions mentioned? The answer to the question could be negative and as a result it could be too much to expect that this financial distress could have been avoided without the change in the management.

# **Question – 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*?

**Answer:**

Out-of-court restructuring(workout) refers to an arrangement between creditors and debtor without intervention of any court as per bankruptcy procedure.

1. **General Advantages:** General advantages of such a process as compared to a formal bankruptcy procedure could be listed as follows:
   1. Less costly since there would not be need of appointment of an administrator and other professionals which needs to be done in most of the jurisdictions across the globe.
   2. Time needed for the process could be lot less since it is within the hands of the debtor to convince the creditors and implement the restructuring plan. In a formal process, a Resolution Plan selected by Committee of Creditors requires an approval by a bankruptcy court and such a process can take more time and many times delayed because of many litigations filed by parties affected by such resolution plans.
   3. Public at large would not come to know about the bankruptcy/insolvency of the debtor since there would not be any public announcement and there would not be any need for the debtor to share any confidential information since this is a private process.
   4. There would not be any legal compulsions in an out-of-court restructuring which allows parties to have a flexible terms in such an agreement.
   5. Out-of-court restructuring signifies huge trust on the debtor and facilitate smooth restructuring since it would have blessings of the creditors and their willingness to work with the debtor to revive the debtor’s business. Most of such processes can result in higher pay-outs to all the stakeholders as compared to a formal process.
   6. An out-of-court restructuring which could be initiated most of the times when a debtor is still running as a going concern would not disrupt the functioning of a debtor. This can also mean reduced losses on account of non-disruption of running as a going concern.
2. **General Disadvantages**
   1. The advantage of ‘stand-still’ period / moratorium / ‘automatic stay’ is not available to the debtor as a result creditors who do not have trust in an ‘out-of-court’ restructuring could initiate their recovery action resulting in failure of such a restructuring process.
   2. Getting any additional finance to run the debtor’s business as a going concern in such circumstances unlike in a court run process where such ‘Interim Finance’ providers get 1st priority in such restructuring processes.
   3. It is quite likely that such restructuring plans may not address all the causes of defaults in an in-depth manner since the information shared by a debtor is very minimal. If the arrangement arrived has not addressed or does not address all the causes of financial distress, it is more likely that such an arrangement may not fix the financial distress in the long run and possibility of failure may be very imminent after some time.
   4. It is quite possible that any asset of the debtor may not be disposed off unless all the creditors agree to for such an arrangement and the debtor may not have any option to change rights of any creditors who have liens on certain assets.
3. **Advantages versus disadvantages in your country**

It may be relevant to understand what kind of out-of-court arrangements(workout) and formal processes happen in India. It is not uncommon in India that out-of-court voluntary arrangements between lending banks (including consortium of banks) and debtor happen based on mutual negotiations between the lenders and the debtor when the debtor starts making defaults in payment of interest or/and instalment payment on term finance. These are called ‘One Time Settlement’ (OTS) and ‘Corporate Debt Restructuring’ (CDR), Strategic Debt Restructuring Scheme (SDR) etc., However, normally these out-of-court arrangements do not consider creditors who are not institutional financiers. Formal Restructuring available only in case of corporate persons could be of two types – one being as per Insolvency and Bankruptcy Code, 2016 **(IBC, 2016**) drawn from global insolvency laws with a focus on revival during the first 180 days(extendable to 270 days if required) and another being as per the Companies Act, 2013 which allows for compromise or arrangement(like in many common law countries – Singapore, Hongkong, UK) when creditors or members of a company or the company itself propose a scheme to the court and court confirms the compromise or arrangement after three-fourth of the creditors in terms of value approve such compromise or arrangement.(Moratorium is not available for compromise or arrangement). For the purpose of listing advantages / disadvantages, Insolvency /Bankruptcy process under IBC, 2016 is only considered here. Advantages versus disadvantages of out-of-court arrangements(workout) could be listed as follows:

* 1. **Advantages**
     1. Time needed for a formal insolvency process ranges from 180 to 270 days as per IBC, 2016. The time taken by a Bankruptcy court – called National Company Law Tribunal (**NCLT**)can also be substantial apart from the time mentioned – which has in some cases gone beyond an year after the Corporate Insolvency Resolution Process (**CIRP**) period of 180 to 270 days because of litigations by the unsatisfied creditors. This much of time would not be required in an out-of-court process and as a result there would be substantial saving of time.
     2. Pronouncement of Initiation of CIRP by NCLT requires that an independent Insolvency Professional be appointed as an Interim Resolution Professional and he or other Insolvency Professional shall be confirmed / appointed as a Resolution Professional for the CIRP after Committee of Creditors take a decision regarding the same. Such a Resolution Professional is required to appoint two set of valuers to get Fair Value and Liquidation Value of all classes of assets – Land and Buildings, Plant & Machinery and all Financial Assets of the Corporate Debtor including inventory. Similarly, Resolution Professional may need to appoint many other professionals including Accountants, advocates, Forensic Auditors etc., if he thinks such appointments are warranted in the context of the CIRP he is administrating. Interim Resolution Professional / Resolution Professional is required to make Public Announcement of the initiation of the CIRP, invite Expression of Interest from Potential Resolution Applicants, need to share information connected with the corporate debtor via Virtual Data Rooms and also fight against lot many petitions which may get filed for rejection of claims, unsatisfied creditors in a Resolution Plan etc., All these entail costs which are as a result of a court process. All such costs can be avoided in an out-of-court arrangement.
     3. Once CIRP is initiated, Interim Resolution Professional needs to make a Public Announcement of commencement of CIRP and Resolution Professional advertises for Expression of Interest from Potential Resolution Applicants. Such publishing would make it known to the general public that there is an insolvency / bankruptcy process going on against the corporate debtor. But, in an out-of-court arrangement in India such information remains within the realm of the creditors and the corporate debtor who are the essential parties to the arrangement.
     4. In a CIRP, a Resolution Applicant needs to necessarily provide for operational creditors of the Corporate Debtor an amount not less than what they would get in a liquidation scenario which would be based on the average of the Liquidation Values arrived by the two sets of valuers, all creditors in the same class to be treated on par and many other conditions as per IBC, 2016. But, in case of out-of-court arrangement, there are no such compulsions and the terms could be flexible as per the voluntary agreement of the parties to the arrangement.
  2. **Disadvantages**

* + 1. In an NCLT run process automatic stay / moratorium is available from the date of commencement of CIRP until an order is passed by the NCLT either approving a Resolution Plan or on passing a Liquidation Order much beyond the 180/270 days of the CIRP period. This advantage would not be available to a voluntary out-of-court arrangement(workout).
    2. All costs incurred by a Corporate Debtor during CIRP including for running it as a going concern which are fully approved by the Committee of Creditors without any hesitation need to be paid by the Successful Resolution Applicant on first priority and it stands first priority for payment even in a Liquidation scenario. In view of this aspect, getting Interim Finance to run a CIRP including that of running the Corporate Debtor as a going concern becomes easier though may be a higher rate of interest. On the other hand, getting any additional finance in a voluntary out-of-court arrangement could be quite hard and sometimes impossible.
    3. In an NCLT run CIRP, the existing management changes in most of the cases which could be the root cause for the failure of the organisation and possibility of getting a more capable management is higher.(the Resolution Plan submitted even by the existing management / promoter directors– which is allowed in case Micro, Small and Medium Enterprises needs be competitive as compared other Resolution Plans submitted). This is not possible in an out-of-court arrangement.
    4. A Resolution Applicant is at liberty to submit a Resolution Plan varying the existing rights of all the stakeholders if that is needed for the long term survival of the Corporate Debtor and nothing specifically restricts him; a Resolution Plan may provide for disposing of certain businesses, certain assets etc., if that is what makes the Corporate Debtor viable. Such options would not be available in case of an voluntary out-of-court arrangement.

# **Question – 3:**

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

**Answer:**

1. **Very brief highlights from the papers mentioned**
   1. Adriannse & Kuijil in their paper titled ‘Resolving Financial Distress : Informal Reorganisation in the Netherlands as a Beacon for Policy Makers in the CIS and CEE/SEE Regions?’, published in Review of Central and East European Laws discussed about the primary need for business restructuring and financial restructuring in any informal reorganisation. They also discussed about various stages in which such business restructuring takes place in an informal reorganisation. Such stages could consist of stabilising, analyzing, repositioning and reinforcing. In brief, stabilising stage could focus on how to increase the existing cashflows in the short run predominantly to do with business restructuring since it could be hard to obtain any additional financing until the prospects for a possible recovery can be somewhat felt by such providers of finance– it could involve reducing expenditure, faster recoveries of receivables and better management inventory as well as supply chain management, in which the focus is how to increase the existing cashflows. Analysing stage could consist of deeply understanding causes of the crisis to facilitate finding solutions in the short term as well as long term involving business restructuring and financial restructuring too. A reorganisation plan is drawn possibly with the help of an independent turnaround expert in an informal restructuring at this stage. Repositioning stage could involve implementing key strategies thought out in the analysing stage including some key recruitments with more open sharing of the information among the key stakeholders and it is also called as *value recovery process* which should ideally re-instil confidence and trust among all the key stakeholders of the organisation. In a Repositioning stage, positive cashflows could be seen and there could be a need for taking a decision regarding whether current management has the capability to attune to the mindset required for the turnaround needed in the long run or there is an absolute need for change in the top management, needs to be taken. This would instil confidence in the minds of all the stakeholders. Financial restructuring could involve finance providers - existing and new either in equity or/and debt with lower expected return as well as having patience to accept longer period for their returns. Both business restructuring and financial restructuring are very essential for any formal or informal restructuring. The paper also draws conclusion about the need for existence of very essential elements like active participation of shareholders and management, serious involvement of financiers, transparency in information shared and injection of risk bearing capital, very much needed for a successful reorganisation.
   2. Sudi Sudarshanam and S Lai in their paper on ‘Corporate Financial Distress and Turnaround Strategies: An Empirical Analysis’ published in British Journal of Management, Vol. 12, 183-199(2001) discusses about Financial Distress and Corporate Turnaround Strategies. They discuss about Managerial turnaround, Operational turnaround, Asset Restructuring and Financial Restructuring. Managerial turnaround essentially could include a total revamping of top management which they cite as a precondition for most of the successful turnarounds. Operational restructuring what they describe has the same meaning like what is discussed in the paragraph above; operational restructuring could include sale of certain business unit and closures of unviable business units. Asset restructuring can include both asset divestment and asset investment depending on the context of the crisis. Financial restructuring broadly refers to the restructuring of capital of an organisation which could include infusion of equity, reduction of debt, postponement of repayments, interest waivers and interest reduction which can result in a sustainable level of debt and interest cost. Combination of all these kinds of strategies are needed for revival of an organisation and they state that the time for revival could take upto three years from the year distress is felt by the organisation.

* 1. Kalle Pajunen in his paper titled ‘Stakeholder Influences in Organisational Survival published in Journal of Management Studies 43:6 September, 2006 has made a historical analysis of a decline and turnaround process of a Finnish pulp and paper firm, Kymi Corporation and he has made some propositions based on the case analysis which hold good all the corporate turnarounds. His propositions state that the following aspects improve the probability of the turnaround process when an organisation is experiencing financial distress:
     1. More secured continuing support of the governing stakeholders
     2. More open and frequent communication between managers and governing stakeholders
     3. Continuing support of the stakeholders get enhanced because of the personal relationships between managers and governing stakeholders and brokerage position of managers among governing stakeholders, consensus on long term goals among governing stakeholders and governing stakeholders’ association of management with good performance.
  2. Achim Schmitt and Sebastian Raisch in their paper titled ‘Corporate Turnarounds: The Duality of Retrenchment and Recovery’ published in Journal of Management Studies 50:7 November, 2013 make a remark that retrenchment does help in reducing the operational costs when an organisation is in deep financial distress which can improve cashflows in near term but at the same time it is also true that long term recovery requires recruitment of additional human resources. The authors conclude that turnaround firms in general benefit from integrating retrenchment and recovery rather than from separating contradictory activities.

1. **Application of approaches discussed in the articles mentioned above as applicable to the case study given**

* 1. **Application of perspectives from the paper of Adriannse & Kuijil**: We can see the elements of business restructuring and financial restructuring at different stages of stabilising, analysing, repositioning and reinforcing in the turnaround of the case study. We can see the stabilising stage in business restructuring by FMHBV in terms of getting price increases from customers, reduction of employees and independent contractors to the extent of 130 staff, improved loss recovery and savings on car repairs etc., The company appointed a Consulting company (other than their auditors) in the initial part of the crisis. The banks appointing a Chief Restructuring Officer in June, 2014 could be related to the analysing stage of the turnaround – an initiative taken by the banks in view of the possible lower trust on the management since they could not see any visible development for more than six months even after financial distress was noticed by them and CFO not getting changed in spite of their request made in January, 2014. However, this stage appears to have been quite delayed. This could also be on account of a kind of denial of the problem by the existing management or over confidence / hubris about their capability to find a solution to the financial distress. If we consider many aspects of the case study have resemblance of turnaround of LeasePlan and have a look at the revival process of the same by reading through the annual reports of the company, we can distinctly see the stages of repositioning of and reinforcing stages of business restructuring as well as financial restructuring. The need for existence of very essential elements for a successful reorganisation like active participation of shareholders and management, serious involvement of financiers, transparency in information shared and injection of risk bearing capital, can be felt while going through the case study.
  2. **Application of perspectives from the paper of Sudi Sudarshanam and S Lai**: We can see all elements of Managerial turnaround, Operational turnaround, Asset Restructuring and Financial Restructuring. The need for changing CFO is raised by the Banks as early as January, 2014; the CEO is changed by the company in April, 2014. If we were to relate this case to LeasePlan, the CFO also was changed and CEO and CFO both were working at LeasePlan for more than 15 years. Major elements of Operational turnaround have already been discussed in the previous paragraph which holds good even for this. Disposal of vehicles[[10]](#footnote-10) in the fleet is also suggested by the company though the banks do not approve of if it were to avoid infusion of equity by the shareholders. We can see elements of Asset Restructuring and Financial Restructuring proposals in the 4th July, 2015 Restructuring Agreement. From this perspective, the application of the approaches mentioned in the article are very much relevant and are there in the case discussed.
  3. **Application of perspectives from the paper of Kalle Pajunen :** In my view, repeated misleading results, revision of the results announced earlier could have reduced the mutual trust among the stakeholders (between banks, shareholders and the management ) and the reduced credibility about FMHBV. This could also have resulted in the delayed process as such. If there were to be frequent and transparent exchange of reliable information among the stakeholders, it could have fastened the revival process.
  4. 2.1. **Application of perspectives from the paper of Achim Schmitt and Sebastian Raisch :** We could see the initial savings on account of reduction of 130 staff which could have increased the initial cashflows. Author of this submission of assignment of case study analysis also has seen the duality of the ‘Retrenchment and Recovery’ during his stint of eight years at a mid-sized polyester yarn manufacturing company in Indonesia with a capacity to produce 1,200 tonnes of yarns per day. During a crisis in the year 1995 because of vagaries of global oil prices, the company had stopped its total production and during that period it had to lay-off more than 700 workmen for a period of about 6 months and once there was infusion of funds by the shareholders and willingness of the major suppliers to provide credit on a phased manner, it had to retrench about 350 workmen and call back about 350 workmen from the lay-off process. It was possible for the company to run 1,200 tonnes per day of production and market the same within an year of stopping of the production with a workmen strength of only 950 with a reduction of 350 workmen, without any hiccups. After the Southeast Asian Exchange rate crisis in 1998, the company’s production had reduced to about 40% of its capacity by May, 1999 – that too – only doing jobwork for other known brands – reducing own production to almost zero because of the crisis. During this crisis also, the company had to lay-off almost 500 workmen during a period of about six months and the company retrenched almost 200 workmen and about 300 workmen were called back from lay-off and the company was able to run its full production gradually with its own brands within a period of about 12-15 months with just about 750 workmen. Author of this submission(he was working as the Finance Manager during the 1st crisis) has lead the change during 1999-2003 in the 2nd crisis the company has faced. So, he understands the duality of the issues related with the ‘retrenchment and recovery’. He understands that the top management of the company in crisis – in the case study also would have faced the dilemma and passed through the phase of retrenchment of 130 persons and possible need for re-recruitment of some of them as and when business operations needed to be expanded and better service needed to be provided to the customers.

# **Question – 4:**

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

**Answer:**

1. **Rationale and /or opportunistic reasons**: It needs to be noted that the financial distress of the group comes to the knowledge of the banks on 16th November, 2013 and the information shared during the meeting about the estimated losses upto September, 2013 stated at Eur 5.40 Million gets ballooned to an estimated loss of Eur 23.10 Million for the entire year by 1st December, 2013 and further gets increased to Eur 36.40 Million by 20th December, 2013. Banks are not able to see any concrete action by the company and its shareholders to avert the possible further financial distress until mid-February, 2014. This naturally could have caused C and D banks to lose trust on the company and its shareholders. The case study also notes that C and D banks were forced to waive 100% of the additional working capital provided to the tune of Eur 32.5 Million during the when the restructuring agreement is signed. This is an indication that they in fact had lower bargaining power possibly not supported by any security whereas A and B banks had security to some extent but documents possibly having some defects which could be corrected which could have taken some further time. The rationale and/or opportunistic reasons for non-cooperating could only be with an intention to realise whatever the best recovery that could be possible at the earliest in view of their weaker bargaining position once any formal / informal process of restructuring starts. (Normally, the elements of restructuring in a formal law becomes some sort of the basis while drawing restructuring plan even in an informal restructuring process – as far as waiver or interest, loans, priorities of payments to creditors – secured / unsecured, rights of operational creditors, government authorities etc.,). They could have thought that their putting pressure on the other lenders and the company could force the shareholders as well as A and B banks settle with C and D banks facilitating whatever best recovery possible. We could see this happening in some ways when we see a proposal by A and B banks to buy out the loans of C and D banks with 15% to 20% discount(it is mentioned as buying out C and D banks – it must be with reference only to the buying out of the loans connected with the company and not buying out of the entire banks – this is what is assumed while addressing this query).

1. **Advice to C and D Banks:** Knowing the weaker bargaining position of C and D banks and what could happen in a formal liquidation process if it were to become very imminent, selling of their loans to anybody willing to buy at a price much higher than what they would get in a liquidation scenario would be the best approach. If A and B banks were willing to buy out the loans of C and D banks at a discount of 15% to 20%, such a proposal of A and B banks should have been accepted after reasonable bargaining. This could have resulted in much better realisation for them – which is evident from what happened to them when the restructuring plan was drawn. Non-cooperation regarding informal restructuring half the way was never an option since such an act would never have been beneficial to any of the stakeholders. In a nutshell, the advice to C and D banks should have been to cooperate with the process and sell out their loan asset to any party which could have given them better realisation including the option of selling to A and B banks with a discount ranging from 15% to 20%.

# **Question – 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)?

**Answer:**

We could discuss about the application of the eight principles[[11]](#footnote-11) (explicit or implicit)of the ‘Statement of Principles for a Global Approach to Multi-Creditor Workouts II’ considering each of the principle as follows:

1. **Deferment of payment is voluntarily agreed to (‘standstill period’ by creditors):** The discussion regarding ‘standstill agreement’ starts from January, 2014 and finally such an agreement only for 120 days is signed only in August, 2014. It is of relevance that the discussions among the stakeholders about the standstill agreement starts in January, 2014, hesitations to sign the same persists until August, 2014 when it gets signed. There is a substantial delay by the creditors in view of lack of trust about the informal reorganisation because of various reasons as discussed in responses to the earlier questions.
2. **The debtor ensures that the relative positions of the creditors are maintained:** If we consider the Restructuring agreement is signed only on 4th July, 2015, the payment of Eur 25 million to the providers of the additional working capital (though in line with a proposal made in June, 2014 contains this – which has never been accepted and agreed to be acted upon, by the creditors) might have jeopardised the position of other creditors. Whether it has jeopardised or not depends on whether they were secured creditors or not and even if they were secured creditors, whether they had securities which had the realisable value more or less than the value of repayment. If the repayment had affected the going concern business of the company, then also, it would have affected all the creditors because it could have resulted in reduced profit / increased losses and also worsening cashflow affecting any business which happened/happens from the date of repayment.
3. **The debtor refrains from any action that may jeopardize the proceeds for the creditors :** The issue discussed in the previous paragraph may indicate that the repayment of Eur 25 million could have jeopardized the proceeds for the creditors.
4. **Creditor committees are set up, if so required :** It is of relevance that through there is no specific mention of setting up of formal Creditor Committees in the case study. However, the mention of active involvement of the bankers right from October, 2013 indicates that the existence of an implicit Creditor Committee and display of their intention to work towards a resolution of the crisis. An appointment of a Chief Restructuring Officer by the banks is also an indication of such working Creditor Committee.
5. **The debtor provides the creditors with relevant information :** There are all indications about providing of information by the management and the company; but, the quality of information being a question mark in the initial phases of the financial crisis. It could be also partly due to an issue to do with SAP-ERP system implementation. If the quality of information sharing were to be more frequent and reliable, the increased trust could have fastened the process of arriving at a solution. Possibly even the trust level of shareholders on the management could have got affected by the lower quality of information saddled with many revisions regarding estimated performance for 2013 with wide variations from time to time.
6. **Reorganisation proposals are made in light of the applicable law :** The Reorganisation agreement entered into appear to be in line with the applicable laws as existed at the time of entering into the agreement. It is of relevance to mention that *Dutch restructuring legislation (Wet Homologatie Onderhands Akkoord, or "WHOA") that introduces a Dutch debtor-in-possession proceeding (a "Dutch Scheme") combining features of chapter 11 of the U.S. Bankruptcy Code and the English Scheme of Arrangement was finalized at the end of 2020. The WHOA entered into force January 1, 2021 and is thus available to companies in distress from now onwards[[12]](#footnote-12)*. It is of relevance to note that this was not existing when the Restructuring agreement was signed in July, 2015.
7. **The parties treat all information confidentially :** There is nothing in the case study which is contrary to this principle as such.
8. **New financing during the process will be given priority status :** The banks were unwilling to provide any new finance until the shareholders bring sufficient funds to bring to the level of agreed solvency ration and as a result the issue regarding new finance did not get discussed at all in this case study. So, this principle did not become applicable in this case study.

To conclude, many principles in explicit or implicit terms can be found in this case study.

# **Question – 6:**

Suppose it is not possible to convince other creditors to adopt the Statement of Principles in a given situation, are there are any 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?

**Answer:**

1. If it is not possible to convince other creditors to adopt the Statement of Principles in a given situation, as far as India is concerned, there are no possibilities for ‘soft law’ to use in such situations. Out-of-court restructuring (workouts) are essentially voluntary processes conducted at the initiative many times of the organisation in distress or a few lenders whose stakes are substantially higher and as a result such a process could come to a standstill when a few creditors are not getting convinced to adopt the Statement of Principles in a given situation.

1. Let us take a case in point in this case study: we see Banks C and D not willing to cooperate at certain stages essentially to see that whether they can get any preferential treatment because of their non-cooperation or whether adopting such an approach result in fastening the process which is not going forward as per their expectations. If it is absolutely not possible to convince both the banks even after showing scenario that their non-cooperation could lead to liquidation and possibly they may get nothing or negligible if the company goes into liquidation, then the other lenders could think of buying out their stake or consciously allowing the payment of default amount to Banks C and D -without prejudice– if possible- by the organisation under the financial distress which has the potential to be a subject matter of avoidance transaction if the organisation were to go into a bankruptcy or liquidation process. In India, preferential payments made to any of any of the creditors who are not related parties during a period of one year before the date of commencement of Corporate Insolvency Resolution Process could be considered as a preferential transaction which has the potential of getting reversed during a Corporate Insolvency Resolution Process or during liquidation. Considering such a payment is of course against the Statement of Principles. This alternative needs to be considered only when non-cooperation of a very few could scuttle the entire informal restructuring process.

# **Question – 7:**

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

**Answer:**

The details of the essence of the restructuring agreement as signed on the 4th of July, 2015 could be explained as follows:

1. **The ultimate beneficiary shareholder of the group losing all its stake**: Flow Management Holding BV The Netherlands (FMHBV) was the holding company having 6 subsidiaries: in The Netherlands: Flow Management Work BV(FMWBV); in Spain: FMW Spain SL; in France : FMW France SPRL; in Australia: FMW Australia Ltd; in South Africa: FMW South Africa Ltd; and in USA : FMW USA Ltd. The entire shareholding of FMHBV was held by Lease Group Holding United Kingdom Ltd(LGHUKL). A new shell company was incorporated in The Netherland with the name Flow Management **II** BV (**FMIIBV**). All the shares owned by FMHBV in all the 6 operating subsidiaries are transferred to the new shell company FMIIBV initially by issuing shares to FMHBV against these transfers and subsequently FMHBV transfers 100% of its shareholding in FMIIBV to the consortium of banks (A, B, C and D) which had provided original working capital finance, many of the directors of FMWBV and also to the Chief Restructuring Officer. This results in all the shareholdings of all the working companies predominantly held by the consortium of banks and the original holding company – FMHBV and the sole shareholder- LGHUKL **losing all its stake** in FMIIBV.

1. **All claims on FMHBV waived by shareholders and banks and FMHBV liquidated in an undisclosed manner**: Consortium of banks (A, B, C and D) and also the shareholders of FMHBV would write-off all their claims on FMHBV on the formation of FMIIBV as discussed in the previous paragraph. FMHBV bereft of all the working assets of 6 subsidiaries (which got transferred to FMIIBV) and waiver of all the liabilities payable to the banks and the sole UK shareholder would be liquidated in an undisclosed manner.
2. **Reorganisation of FMIIBV and its subsidiaries**: FMHBV and its sole UK shareholder would waive off all theirs claims on FMIIBV and all its subsidiaries which means that all liabilities shown in favour of FMHBV as well as in favour of LGHUKL in the books of FMIIBV (if at all any) and in the books of all the 6 subsidiaries would become zero. Banks – C and D which provided Eur 32.5 million has additional working capital the Netherlands subsidiary FMWBV would waive 100% of their dues payable by the company. Consortium of banks which provided working capital finance to the Netherlands subsidiary – FMWBV would waive its loans to the tune of Eur 97.5 million and continue the balance loan of Eur 240 Million and the same consortium has cancelled other loans payable by FMWBV to the tune of Eur 55 million. Possibly FMHBV could have given securities / guarantees for the working capital loans provided to FMWBV and if there are any such pledges or guarantees, providers or such pledges or guarantees may get part of their dues when FMHBV gets liquidated. It should be noted that there is no restructuring of any liabilities of the subsidiaries other than the Netherland subsidiary by creditors other than the amounts payable by them to the original holding company – FMHBV and the sole shareholder- LGHUKL.

In essence, the new holding company with all the six subsidiaries with all their valuable operating assets after shedding out all the possible unsustainable liabilities is ready to run as a going concern with good prospects in the long run.

# **Question – 8:**

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

**Answer:**

1. We are not aware of the solvency of any of the remaining five subsidiaries which are located in Europe (2 companies), Australia, South Africa and USA. The restructuring agreement is being signed presuming that there is no possibility of commencement of any formal Insolvency / Bankruptcy proceedings in any of these five jurisdictions. If there is any such proceedings commence at any of the locations, it could create problems for the informal restructuring agreement signed at the Netherlands. This is so since any informal restructuring process cannot become any basis for recognition of such process and possibility of moratorium in other jurisdictions even if the other jurisdictions follow the UNICITRAL Model Law on Cross-Border. Commencement of any formal Insolvency Process could affect the implementation of the informal restructuring process. However, it is stated that the contents of the financial restructuring agreement reflect the relative positions of the financiers involved.

1. Considering the above, as well as seeing the consolidated manner in which the restructuring is planned out, it could be assumed that a reasonable due diligence of all the subsidiaries also could have been done and proper care in connection with potential legal / non-legal cross-border issues also could have been thought out.
2. Even if any cross-border issue crops up including commencement of any formal insolvency proceedings, it may not affect the implementation of the signed restructuring agreement.

# **Question – 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 detailed as possible]

**Answer:**

1. The scenario 4 in the case study is reproduced below:

*‘a moratorium [formal suspension of payments procedure] or restart following liquidation, with the company being sold in a ‘controlled’ manner. However, banks must be willing to provide a bridging loan.*

1. The contents of the scenario in the Indian context could be related with declaration of a ‘moratorium’ only when a Corporate Insolvency Resolution Process (CIRP) is ordered by the bankruptcy court – National Company Law Tribunal (**NCLT**) of a relevant jurisdiction of the state in which the company is incorporated, as per The Insolvency and Bankruptcy Code, 2016 (IBC, 2016). IBC, 2016 allows a company to be sold as a ‘going concern’ or sale of any specific business/es to be sold as ‘going concern’; there can be ‘compromise and arrangement’ possible even when the company goes into liquidation or before entering into CIRP as per IBC, 2016. Interim Finance[[13]](#footnote-13) and interest on Interim Finance provided for any company for running as a going concern considered as part of CIRP costs and interest paid on Interim Finance is considered as Liquidation costs as the case may be when it is undergoing CIRP or liquidation as per IBC, 2016 has the highest priority in payment by a successful resolution applicant who takes over the business in a CIRP or when liquidation proceeds are received by a liquidator. In the specific context of the question, a brief discussion - about when moratorium is possible, when it ends, how a resolution happens in a CIRP, possibilities of selling company and business as a going concern in a liquidation scenario and priorities of Interim Finance – could be relevant and the same is given below:

1. **Commencement of CIRP and Moratorium**: IBC, 2016[[14]](#footnote-14) has been implemented only for all the Corporate persons who are registered as company or Limited Liability Partnership registered under the Companies Act, 2013 and Personal Guarantors for the guarantees given to the Corporate persons, as it stands now. If there is any default of payment for not less than Indian Rupees Ten Million (approximate equivalent – as on date - of USD 134,000 or EUR 116,000 or Pound Sterling – 99,000) by any Corporate Debtor to any Financial Creditor or Operational Creditor such a creditor can make an application to NCLT of an appropriate jurisdiction requesting for commencement of CIRP. If the application is considered appropriate by the concerned NCLT, it may pronounce an order for commencement of CIRP for the relevant Corporate Debtor appointing an administrator called ‘Resolution Professional’ and a specific order for ‘Moratorium’ is always included in such order. Normally, there needs to be a Resolution for the debts of the Corporate Debtor during 180 days of the CIRP period or during the extended period of 270 days. The Moratorium would be in place for those 180 days or 270 days or the date of passing of the order by the NCLT for approving any Resolution Plan or for pronouncing an order for Liquidation in the absence of any viable Resolution Plan or based on a decision of the Committee of Creditors to Liquidate the Corporate Debtor for any reasons based on their commercial wisdom.

The contents of Section 14 of IBC, 2016 which deals with Moratorium is attached as Appendix-2 for easy reference. In line with terms of such Moratorium, no creditor including a secured creditor is not allowed to disturb the position of the Corporate Debtor. Corporate Debtor cannon be subject to any coercive action by any of the creditors for any outstanding dues payable upto the date of commencement of CIRP and if a Corporate Debtor incurs any expenditure of whatever nature for running the CIRP and even for running the Corporate Debtor as a going concern would be considered as CIRP cost and such cost has the highest priority for payment both in CIRP process when a successful resolution applicant submits his Resolution Plan and in a Liquidation scenario when recoveries start flowing in. e.g., if the Corporate Debtor is running its operations in a leased premise/s, lessor cannot ask the Corporate Debtor to vacate the premises if rent has not been paid upto the CIRP commencement date; the lessor can only submit its claim for the dues upto such a date and the payment for such dues would be as per the Resolution Plan or as per the priorities in Liquidation as per IBC, 2016. However, lessor needs to be paid for utilising the premises during the CIRP period.

1. **Process of finding a Resolution under CIRP** : Resolution Professional appointed for running a CIRP needs to call for Expression of Interest from the potential resolution applicants, she needs to shortlist the prospective resolution applicants based on the eligibility criteria pre-decided by the committee of creditors at the time of calling expression of interest, issue information memorandum as well as a detailed request for resolution plans including evaluation matrix which would be the basis for selecting the best resolution plans among the ones received, to such prospective resolution applicants and forward all the resolution plans received from the prospective resolution applicants to the committee of creditors after making sure that the resolution plans received are prima-facie not violative of IBC, 2016 and any other laws of India. Once the committee of creditors decides on any resolution plan when it considered to be viable and feasible and based on the evaluation matrix and votes in favour of such a resolution plan with a voting favour at not less than 66%, Resolution Professional connected with the CIRP would submit such a resolution plan for the approval of the concerned NCLT. Once the resolution plan is approved, the successful resolution applicant needs to implement the same as per approved resolution plan. Such resolution plan has the clauses regarding how admitted claims of creditors and amounts infused as share capital by shareholders would be treated.
2. **Selling of business / company as a going concern in liquidation** : The objective of IBC, 2016 has been to get resolutions and not liquidation of the existing corporate debtors. Keeping this in mind the new bankruptcy regime in India has been encouraging sale of business/es and the corporate debtor even when it is in liquidation. Regulation 32 and 32A of The IBBI Liquidation Process Regulations[[15]](#footnote-15) discusses about sale of assets in liquidation including sale of business/es and sale as a going concern. These relevant regulations are reproduced for easy reference in Appendix-3. Liquidator is also allowed to call for expression of interest for Compromises or/and Arrangements from interested parties during Liquidation of a Corporate Debtor under Section 230 of the Companies Act, 2013 ; anybody – shareholder, creditor or any other person is allowed to volunteer to submit a proposal of Compromise under Section 230 of the Companies Act, 2013. All these are relevant when secured creditors have relinquished their rights to sell the relevant secured assets on their own. Extract of the Section 230 of the Companies Act, 2013 is reproduced in Appendix-4. Section 230 allows compromises and arrangements when such proposals are approved by seventy five percent of creditors in value and subsequently NCLT pronounces an order to the effect after following due process of law as per the Companies Act, 2013. Shareholders of a Corporate Debtor have this option of arrangement even before a corporate debtor is drawn to any CIRP process under IBC, 2016.
3. **Waterfall of payment priorities in liquidation and Interim Finance**: Section 53 of IBC, 2016 which discusses about the distribution of assets in liquidation is an important section. The entire contents of the section is reproduced in Appendix-4. A picture[[16]](#footnote-16) depicting the waterfall mechanism in line with the section is shown in below for easy reference.

Picture:1 – Waterfall of distribution of assets in liquidation

Graphical user interface, application

Description automatically generated

In line with discussion made in earlier paragraphs, the entire amount of Interim Finance obtained during CIRP period, interest on such Interim Finance during CIRP period and Interest on such Interim Finance payable/paid for a maximum period of 12 months even during has the first priority even during the Liquidation. Whenever there is a successful resolution in a CIRP, the successful resolution applicant is bound to pay the CIRP costs (which includes Interim Finance and interest on such Interim Finance) much before paying any amount to others.

**To conclude,** in an Indian scenario, going for a formal ‘moratorium’ making use of submitting an application for initiation of CIRP could have been the best option considering there is every possibility to run the company as a going concern even during CIRP, possibility to get Interim Finance from the same lenders or other lenders having the highest priority in payment when there is a resolution or otherwise and there is a possibility for compromise or arrangement or/and possibility to sell business or/and the company as a going concern even in a liquidation.

# **Appendix-1 Statement showing development of the case study over a time period from October/2013 to May/2016**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Sl. No.** | **Date** | **Key Events** | **Plan by Management /Expectation by Banks from the Management / Shareholders / Group** | **Perceptions / plan of action by Banks** |
| 1 | 16/11/2013 | 4 banks meet regarding expected default related with Eur 415 million working capital and other loans caused by overstatement of profit by Eur 16 million for the year 2012 and for the year 2013 upto September resulting into losses of about Euro 10.4 million for such period; change due to wrongful bonuses to CEO & CFO: Eur 3 million, wrong pricing and accounting / clerical errors | * Price increases from main customers after discussion * Price increases to be notified to other customers * Spending cuts mostly to do with labour * Profit would be made from Jan, 2014 | Banks A,B,C and D agree to discuss the company’s situation on 1 December 2013 |
| 2 | 01/12/2013 | Total expected losses increase to Eur 23.4 million for 2013 | * Investigation being done by an accountancy firm – including for setting right the procedures * whereas CFO prefers to sell 350 vehicles * Financial Creditors prefer cash only * Price increases broadly accepted – impact Eur 7 million * 130 staff reduction – Eur 3 million * Loss recovery – value addition premium – cost reduction on maintenance – Eur 3 million * Independent Turnaround consulting company concludes that the company is viable in the long run with its market share and other strengths | * Banks shocked – but don’t intend to put panic button * Financial Creditors expect Shareholder to infuse funds to increase Solvency from 3.9% to 5% * Insistence on CFO to raise Eur 35 million to pay debts due in Dec and increase Eur 15 million to improve equity   Default interest rate to be charged – to put pressure on the company |
| 3 | 20/12/2013 | Actual results for 2011-2013 announced – net-loss for 2012-13 far higher than earlier at Eur 42.50 Million instead of Eur 28.50 Million bringing down Equity value virtually to zero.  Expected loss for 2014 – Eur 5.7 million.  Not in a position to fulfil commitments until April, 2014.  Repayment obligations by end 2014 – Eur 35 million.  Infusion of Eur 12-15 million needed to reduce pressure on liquidity | * Efforts to improve the Management Information System | * Credit agreements not terminated since liquidation may yield worse results and issues with pledges(possibility of getting zero in liquidation) * Banks to set right the issues with the pledges |
|  | January, 2014 | Shareholder announces that she will make a decision within short term about the strategy of Flow Management Holding BV.  Continue restructuring the foreign subsidiaries  Strengthening the balance sheet by injecting risk bearing capital.  Trust is put in the company and it is announced that it will appoint a new CFO soon. | * The group unlikely to commit unless banks act as one party and sign standstill agreement | * Gain confidence on shareholder and management working together * Feel the need for standstill agreement to be signed among creditors * an agreement will be signed no later than 31 March 2014 – so that issues with pledges to be corrected by that time |
|  | February 2014 | Standstill agreement not signed  Banks C and D not cooperating | * possible jeopardy on the cooperation from the company | * Banks A & B are worried about the reduced negotiation power with a possibility of liquidation instead of restructuring |
|  | 21/02/2014 | Profit forecast announced for Dutch subsidiary – Eur 9 - 10 million – which is more than what was announced earlier | * Possibility of shareholders not infusing equity / funds considered as a more probable possibility | * Banks gain confidence about selling the company as a going concern to a financially healthy party |
|  | March/2014 | No stand-still agreement signed  No cooperation among banks and the company |  | * Lack of confidence by banks (more so felt by C and D)on the company in view of developments in the last 6 months |
|  | April / 2014 |  | * CEO of Flow Management Holding BV replaced * Infusion of Eur 10 million with interest and interest added to the principal of the loan |  |
|  | Mid May/2014 | A loss of Eur 8.5 million is imminent for 2014 and Eur 30 million profit for3casted for 2015 | * Proposal to lend another € 27.5 million to Flow Management Holding BV under the same conditions * Plans drawn to develop strategy for enhancing turnover and major cutbacks; reassessment of product portfolio; sale of shares of the holding company in countries other than Belgium Netherland, Luxemburg in Europe and in other continents; | * Banks A & B intending to buy-out C and D with discount of 15% to 20% since there is no standstill agreement * At the insistence of Bank A, a Chief Restructuring Officer(**CRO**) is inducted into the Board of the holding company – who can be valuable in the restructuring process |
|  | June/ 2014 | Proposal by shareholder of the Holding company in Netherlands:  Working capital finance:   * Deferment of repayment of Eur 35 million from end 2015 and onwards * Refinancing of Eur 360 million to be repaid until 2019 instead of 2016   Other Loans   * Refinancing postponed to 2020 instead of 2017 * Repayments scheduled for 2014 postponed to 2017   Default interest no longer charged for all the loans  A waiver granted for all other non-fulfilled obligations for all other kinds of obligations. | * Shareholder contributes at lest Eur 27.5 million whereas Banks expect infusion of Eur 35 million | * Banks A & B are open to negotiations since going concern sale is ruled out and realisation not more than 55% in liquidation |
|  | End Jun/ 2014 | CRO announces Euro loss of 27.5 million for 2014 and liquidity shortage are imminent due to delay in reorganisation (price increases and cut backs)carried out | * Shareholder willing to deposit Eur 10 million in short term and balance Eur 25 million in September / October, 2014 subject to signing of standstill agreement | * Banks C & D threaten to cancel the credit |
|  | August/2014 | Banks not happy with constant changing information provided during 6 months; however content with  slight improvement in the performance on account of reorganisation and appointment of CRO |  | * Intend to draw sale and liquidation scenarios by September/October, 2014 * Willing to sign standstill agreement and sign 120 days standstill agreement in middle of August, 2014 |
|  | October, 2014 | Four plans are drawn up:   1. Going concern option with standstill agreement for 180 days subject to infusion of Eur 30 million by the shareholder 2. Selling Flow Management Holding BV to an outsider if viability is not sufficiently proven 3. Debt-equity swap with or without cooperation by the shareholder 4. A moratorium or re-start following liquidation with the company being sold in a controlled manner – banks to finance bridging loan |  |  |
|  | 31/10/2014 | Press release of expected loss for 2014 rise to Eur 39 million and forecast of loss of Eur 10 million for 2015 followed by a slight profit in 2016 | * Provision of information has informed * Company to provide tax refunds of Eur 10 million as additional security * Additional deposits by shareholders seem unnecessary in view of sale of surplus assets and incoming cash flows | * Banks disappointed at the performance and progress of reorganisation * Banks conclude going concern is the best and are also exploring debt-equity swap and deliberating on the role of the current shareholder in that case |
|  | January/2015 | Repayment of Eur 25 million to providers of the additional working capital |  | Jeopardising the status of all creditors!? |
|  | 04/07/2015 | Restructuring agreement is finally signed. | Outlines are as follows:   * All operating companies to be part of a shell company called Flow Management II BV * The shares in the shell company to the consortium of banks and board members including CRO * Flow Management Holding BV to be liquidated in an undisclosed manner – all claims of banks and the shareholder would be cancelled * Flow Management Holding BV and all shareholders would cancel all claims against the new shell company * Banks C and D would take a haircut of the entire additional working capital of Eur 32.50 million * Consortium would take a haircut of Eur 97.50 million and the balance loans of Eur 240 million remains – loans were provider to Flow Management Work BV * Eur 55 million in Flow Management Work BV is cancelled in full | * Banks which provided original working capital posses pledges on most assets of Flow Management Work BV will receive part of their claim on liquidation. * Other financiers have no or subordinated security rights – most probably – receive nothing from their claims on liquidation * Banks intend to sell this new company Flow Management II in a going concern |
|  | May/2016 | New company’s operational losses for 2015 – Eur 9 million  Net profit positive in view of debt reduction  Solvency higher at 5%  Break-even result expected for 2016 |  | * Take over candidates prefer to buy company in liquidation * Working capital financed based on transfer of shares needs refinancing in 2016 – refinancing postponed to July, 2017 to prevent liquidation |

# **Appendix-2 – Structure of Flow Management Group**

![Diagram

Description automatically generated]()

# **Appendix-3 - Section 14 of IBC, 2016: Moratorium.**

14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.]

(3) The provisions of sub-section (1) shall not apply to —

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.

# **Appendix-4 – Sale of Assets and Sales as a Going Concern in Liquidation**

**32. Sale of Assets, etc.**

32. The liquidator may sell-

(a) an asset on a standalone basis;

(b) the assets in a slump sale;

(c) a set of assets collectively;

(d) the assets in parcels;

**(e) the corporate debtor as a going concern; or**

**(f) the business(s) of the corporate debtor as a going concern:**

Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate.

32A. Sale as a going concern.

(1) Where the committee of creditors has recommended sale under clause (e) or (f) of regulation 32 or where the liquidator is of the opinion that sale under clause (e) or (f) of regulation 32 shall maximise the value of the corporate debtor, he shall endeavour to first sell under the said clauses.

(2) For the purpose of sale under sub-regulation (1), the group of assets and liabilities of the corporate debtor, as identified by the committee of creditors under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 shall be sold as a going concern.

(3) Where the committee of creditors has not identified the assets and liabilities under sub-regulation (2) of regulation 39C of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, the liquidator shall identify and group the assets and liabilities to be sold as a going concern, in consultation with the consultation committee.

(4) If the liquidator is unable to sell the corporate debtor or its business under clause (e) or (f) of regulation 32 within ninety days from the liquidation commencement date, he shall proceed to sell the assets of the corporate debtor under clauses (a) to (d) of regulation 32.

# **Appendix-5 -Section 230 of : Power to Compromise or Make Arrangements with Creditors and Members[[17]](#footnote-17).**

230. (1) Where a compromise or arrangement is proposed—

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them,

the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator,1["appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be,"] order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation.—For the purposes of this sub-section, arrangement includes a reorganisation of the company’s share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.

(2) The company or any other person, by whom an application is made under subsection (1), shall disclose to the Tribunal by affidavit—

(a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor’s report on the accounts of the company and the pendency of any investigation or proceedings against the company;

(b)reduction of share capital of the company, if any, included in the compromise or arrangement;

(c) any scheme of corporate debt restructuring consented to by not less than seventy-five per cent. of the secured creditors in value, including—

(i) a creditor’s responsibility statement in the prescribed form;

(ii)safeguards for the protection of other secured and unsecured creditors;

(iii)report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;

(iv)where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and

(v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

(3)Where a meeting is proposed to be called in pursuance of an order of the Tribunal under sub-section (1), a notice of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by a statement disclosing the details of the compromise or arrangement, a copy of the valuation report, if any, and explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and such other matters as may be prescribed:

Provided that such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as may be prescribed:

Provided further that where the notice for the meeting is also issued by way of an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned persons free of charge from the registered office of the company.

(4) A notice under sub-section (3)shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice:

Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent. of the shareholding or having outstanding debt amounting to not less than five per cent. of the total outstanding debt as per the latest audited financial statement.

(5) A notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

(6) Where, at a meeting held in pursuance of sub-section (1), majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator, 2["appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be,"] and the contributories of the company.

(7) An order made by the Tribunal under sub-section (6)shall provide for all or any of the following matters, namely:—

(a) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;

(b) the protection of any class of creditors;

(c)if the compromise or arrangement results in the variation of the shareholders’ rights, it shall be given effect to under the provisions of section 48;

(d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate;

(e)such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement:

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

(8)The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

(9) The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent. value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

(10) No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.

\*(11) Any compromise or arrangement may include takeover offer made in such manner as may be prescribed:

Provided that in case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

\*(12) An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit.

Explanation.—For the removal of doubts, it is hereby declared that the provisions of section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section.]

Note:

\* Sub-sections (11) and (12) have been notified on 03.02.2020

Amendments

1. (a) Inserted by Insolvency and Bankruptcy Code, 2016, Dated 15th November, 2016..

(b) The MCA Notification No. F.O. 3453(E) Dated 15th November, 2016 enforcing the related sections of Insolvency and Bankruptcy Code, 2016

2. (a) Inserted by Insolvency and Bankruptcy Code, 2016, Dated 15th November, 2016.

(b) The MCA Notification No. F.O. 3453(E) Dated 15th November, 2016 enforcing the related sections of Insolvency and Bankruptcy Code, 2016

Exception\Modification\Adaptation

3. In case of Government Company - In Section 230 for the word "Tribunal" the words "Central Government" shall be substituted.- Notification Dated 13th June, 2017

# **Appendix-6 - Section 53 of IBC, 2016: Distribution of assets.**

53. (1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely :—

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following :—

(i) workmen’s dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:—

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.—For the purpose of this section—

(i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and

(ii) the term “workmen’s dues” shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013.

1. Even The Hertz Corporation - a global car rental company having significant operations in Europe also went through tough period between 2012 to 2015. [↑](#footnote-ref-1)
2. <https://sec.report/lux/doc/2768798> - Press Release with the subject line: CONSORTIUM OF LONG-TERM INVESTORS COMPLETES ACQUISITION OF LEASEPLAN [↑](#footnote-ref-2)
3. <https://www.youtube.com/watch?v=O0FLwUinlX0> - Lessons From LeasePlan's SAP Failure | S/4HANA Case Study | S/4HANA Implementations - Eric Kimberling - Digital Transformation, CEO and Founder of Third Stage Consulting Group [↑](#footnote-ref-3)
4. Organizational failure: a critique of recent research and a proposed integrative framework - Kamel Mellahi and Adrian Wilkinson, March 2014 issue of International Journal of Management Reviews – Volume 5/6 Issue -I, pp 21-41 [↑](#footnote-ref-4)
5. Based on the downloaded data of World Development Indicators from the website - <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD?end=2020&locations=EU&start=1971&view=chart> and analysis of the data for the European Union. [↑](#footnote-ref-5)
6. A study by Deloitte on “Fleet management in Europe – Growing importance in a world of changing mobility’: <https://www2.deloitte.com/content/dam/Deloitte/cz/Documents/consumer-and-industrial/cz-fleet-management-in-europe.pdf> [↑](#footnote-ref-6)
7. Source: *Miller, 1990 notes* that ‘success can breed over confidence and arrogance’. [↑](#footnote-ref-7)
8. Source: Organizational failure: a critique of recent research and a proposed integrative framework - Kamel Mellahi and Adrian Wilkinson, March 2014 issue of International Journal of Management Reviews – Volume 5/6 Issue -I, pp 21-41

   , [↑](#footnote-ref-8)
9. Organizational failure: a critique of recent research and a proposed integrative framework - Kamel Mellahi and Adrian Wilkinson, March 2014 issue of International Journal of Management Reviews – Volume 5/6 Issue -I, pp 21-41 [↑](#footnote-ref-9)
10. Hertz Corporation had made profits by selling vehicles during their crisis period during 2012 to 2015. [↑](#footnote-ref-10)
11. The short sentences for each of the Principles is taken from the paper of Adriannse & Kuijil details of the paper given in the answer for the question number 3 – since the wordings were considered concise, very apt and easy to understand. [↑](#footnote-ref-11)
12. <https://www.jonesday.com/en/insights/2021/01/the-dutch-scheme-has> -arrived?utm\_source=Mondaq&utm\_medium=syndication&utm\_campaign=LinkedIn-integration [↑](#footnote-ref-12)
13. Interim Finance during Liquidation is not considered as Liquidation cost; though there was a thinking of allowing Liquidator to borrow Interim Finance, the expert committee setup connected with the Interim Finance did not favour the same in view of such a proposal affecting the interests of the existing financial creditors on the date of the liquidation. [↑](#footnote-ref-13)
14. The entire IBC, 2016 could be found on webpage: <https://ibbi.gov.in//uploads/legalframwork/af0143991dbbd963f47def187e86517f.pdf> and the relevant IBBI CIRP Regulations can be found in <https://ibbi.gov.in//uploads/legalframwork/9156df1cc76be7c2eb221b357b6aab17.pdf> [↑](#footnote-ref-14)
15. The entire regulations can be found on the webpage: https://ibbi.gov.in//uploads/legalframwork/bb9c4eeb9ade9b573f5b0aac7b06a875.pdf [↑](#footnote-ref-15)
16. Source: <https://samajho.com/upsc/waterfall-mechanism-for-liquidation/> [↑](#footnote-ref-16)
17. Source: <http://ebook.mca.gov.in/Actpagedisplay.aspx?PAGENAME=17640> – Companies Act, 2013 [↑](#footnote-ref-17)