Case Study I — Flow Management Holding

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Below you will find the answers to the questionnaire in connection with the case study of Flow Management Holding's debt restructuring. For clarity purposes, note that Flow Management's general business will be referred to hereinafter as "Flow Management," while the specific business unit in the Netherlands (Flow Management Work BV) will be referred to as "FMW."

Assignment questions

Answer the following questions in detail. Use as much reference material as possible (e.g. the reading material provided by INSOL and/or your own library) to explain and enrich your answers

1. What were in your opinion the causes of financial distress at Flow Management?

Simply put, businesses fail due to the uncertainties and risks which are inherent to their very existence and nature of their commercial activities. In general, causes for business distress can be found either into at least one of the following categories: (i) industry or context-related circumstances, such as a macroeconomic downturn in a country, commodity booms (or busts), regulatory overhauls, etc.; (ii) company or firm-specific, as would be the case of suboptimal capital structures, union strikes, contingent liabilities, etc.; and/or (iii) subpar management.[1]

Often, the root of a distressed business can be found in a sequence of multiple factors, actions, and omissions, and an interplay between industry-wide circumstances, other externalities, structural flaws within a firm (overleverage being a common one), and finally, management blunders. Indeed, myriad factors typically serve to explain why a business goes under. Rather than looking for hidden smoking guns, turnaround work focuses in understanding the complexities of the firm as a system, and identifying those key issues which may represent greater value-unlocking potential.

When looking at the Flow Management situation, which developed over the years 2013 up until 2015, several aspects come at the forefront, as contributing factors of the unfolding liquidity (and solvency) crisis of the firm. Among those factors, we can highlight the following:

Management: Mismanagement of Flow Management's business seems to have been entrenched in the years leading up to the solvency crisis; at least in two significant ways: (i) a flawed decision-making process seems to have been in place, and (ii) misaligned incentives and moral hazard seem to have led to skewed—perhaps even fraudulent—business' management. The narrative detailing Flow Management's travails indeed seem to point out that structural mishandling of the firm's business was pervasive up until, at least, 2013.

Evidence of strategic blunders is somehow clear, specially when looking at the track record for repeatedly falling way short of the expectations, forecasts and projections in the short to mid-term. All this despite the fact that even third-party consultants confirmed that the underlying

[1] See Nesvold, P., Anapolsky, J. and Reed Lajoux, A. *The Art of Distressed M&A*, McGraw Hill (2011), p. 18.

business of the company was viable (meaning that outside factors alone cannot account for the failure of Flow Management).

Furthermore, negligent—or event fraudulent—management at C-suite level cannot be ruled out. On the contrary, despite the degree of seemingly financial, accounting and budgeting mismanagement of Flow Management, the firm still moved to award large management bonuses to both the CFO and the CEO. From an incentives perspective, this may show poor judgment at director's level, setting in place conflicting interests at Flow Management's highest level.

All in all, there seems to be ample evidence of mismanagement at Flow Management. Yet, could such circumstance alone explain the insolvency situation that took place at 2013? Probably not. On the contrary, external contributing factors may have also played a role. Note, that the interaction between faulty management and outside factors is not a 'one-or-the-other' choice, but rather a snowball or downward loop, self-feeding system, where bad business decisions pinball against externalities, back and forth, until a firm finds itself in a hole out of which it becomes increasingly harder to climb out, thus calling for more hail-mary measures, oftentimes resulting in a firm being cornered into takingly increasingly risky decisions. When studying business failure, it is necessary to understand the interactions between external factors and organizational factors.[2]

Thus, other issues which may have played a role in Flow Management's business failure are:

Industrywide crisis: There may have been an industry downturn affecting Flow Management's operating margins, including some structural ones, such as the industry turning a corner into a mature declining stage. Additionally, there could also be contributing cyclical factors at play. Flow Management operates within an industry which is heavily correlated to other industries such as the freight and transport market. Freight is, in turn, a very good proxy to gauge international trade and macroeconomic aspects. For instance, overvalue of a currency or inflation typically affect trade, which in turn weighs down on freight. A downturn in trade, and a lengthy freight downcycle, is bound to make firms operating in Flow Management's business cash strapped and then vulnerable to become insolvent.

Capital intensive business: At a company / business level, Flow Management is faced with high requirements of working capital of 'financial' or 'capital' leases (which are probably inherent to the truck-leasing, front-end capital intensive, business). Firms operating in such industries are particularly vulnerable to underwhelming cycles or downturns, as they tend to have overleveraged balance sheets, dependent on reliable revenues (and operating margins), in order to be able to meet its debt obligations.

Could the financial distress have been prevented? If yes, explain how. If no, why not?

Hindsight is 20/20, so it may be easy to trace back Flow Management's steps and come upon certain make-it-or-break-it moments and forks in the road, in which adopting different decisions and laying out different strategies may have led to a more prosper outcome for the firm. My sense is that by the point the company—and its creditors—came to terms with their dire financial situation, it probably was a bit late and beyond a point of no return, so Flow Management's liquidity drying out was more or less a foregone conclusion by 2013. Of course,

[2] Mellahi, K. and Wilkinson, A. *Organizational Failure: A critique of recent research and a proposed integrative framework*, International Journal of Management Reviews, Vol 5/6, issue 1, (2004), p. 32

it is impossible to draw out definitive conclusions, but it seems likely that Flow Management would have rated low at a Z-score,[3] as well as may have seen as somehow vulnerable or week in certain financial performance ratios, even before 2013.

On the other hand, even mismanagement can be masked and remain hidden from the directors and shareholders oversight until telltale of distress become obvious.

Perhaps a lackluster actual-to-budgeted performance from Flow Management should have served as an early warning sign warranting more immediate and robust response from the firm's directors. Failing to properly address such circumstance likely shut down a window of opportunity—without realizing so—for proper turnaround work, thus limiting options further down the road, and throwing the company up on top of a *melting ice cube*.[4]

2. What are in general advantages and disadvantages of an out-of-court restructuring (workout) as compared to a formal bankruptcy procedure?

If debtor and creditors can avoid the strong-arm powers of the bankruptcy court, in order to achieve similar results with significantly less cost, it is wise to take a first shot at an out-of-court restructuring.[5]

Restructuring a firm through an out-of-court workout—as opposed to a bankruptcy-type, court-directed, process—may present numerous benefits. The most obvious one is reduced costs. High overall cost is the primary deterrent to filing a bankruptcy petition, which makes it a last resort for most debtors.[6]

An out-of-court restructuring typically results in lower costs for the debtor, when compared to court restructuring or liquidation proceedings. Indeed, a contentious litigation usually entails a huge financial burden to an already flailing business, affecting not only the debtor's estate itself, but also the creditors rights and claims, which tend to see their expected recovery value pushed further down.

On the other hand, it also reduces indirect costs in connection with reputational costs for the debtor and the opportunity costs of reduced revenues, due to increased vendors and suppliers' awareness to credits risks *vis-à-vis* a struggling counterparty.

The *stigma* of undergoing a chapter 11-type of bankruptcy proceeding may indeed seal the faith of a cash strapped business, which may face reduced operating margins (typically because of a decrease in sales, an increase in its operating costs, a tightening on credit terms, or all of the former) coupled with obstacles to fund its working capital through credit. Because of costs associated with formal bankruptcy—including the disruptions that occur when a firm's

[3] Altaman, E. *Predicting Financial Distress of Companies: Revisiting the Z-Score and ZETA Models*, 2000, NYU.

[4] Financially distressed companies undergo a 'melting ice cube' dynamic, as pointed out by Jacoby, M. and Janger, E. *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 Yale L.J. (2014) p. 865.

[5] Klaus, C. *Out-of-Court Debt Restructuring* in 'Reviving the Financially Distressed Business,' Emporion Press (2019), p. 197.

[6] Nesvold, P. *et al. op. cit.*, p. 56.

customers, suppliers, and employees learn that it is undergoing bankruptcy—it may be preferable to reorganize (or even liquidate) outside of formal bankruptcy proceeding.[7]

Another fundamental benefit of an out-of-court restructuring is that its consensual nature reduces restructuring uncertainties and closing risks. Consensual restructuring terms that have been agreed to by creditors are highly likely to be met.[8]

One important feature of an OCW is that it allows the segregation of different types of claims and credits against the debtor, into different "baskets." This gives a great degree of flexibility on sequencing and addressing specific liabilities—typically financial debt, such as credit facilities in place or lines of credit—between the relevant counterparties involved. Among many other things, this facilitates the coordination effort between the firm and its creditors, while at the same time somehow provides some degree of "damage control."

From the perspective of the debtor company, an out-of-court restructuring may provide a couple of desirable outcomes for at both management, as well as at a shareholder level; namely: (A) Incumbent management tends to remain in place in an OCW, and plays a significant role in steering the business out of its crisis (notwithstanding the ability of creditors to gain increased leverage in the management's decision-making process, either through the appointment of outside directors to the board, or by nominating a chief restructuring officer—CRO;—as happened with Flow Management. And (B) in an OCW shareholders' claims may survive being completely wiped out, unlike in court-led proceedings, in which equity tends to be completely vanquished *vis-à-vis* creditors' claims and credits. Indeed, the usual shift in control from shareholders to creditors—which may be perhaps the most notable feature of any restructuring legal system—is not embedded into out-of-court workouts, thus providing equityholders with some additional control over the whole process.

Out-of-court restructurings must not be regarded, however, as a one-size-fits-all solution to any insolvency scenario; and they may sometimes be a suboptimal choice, further decreasing the recovery value of claimholders, the recovery prospects for the firm, or both.

For instance, for heavily illiquid firms, facing pressing cash needs, trying an OCW may prove an irrecoverable mistake, yielding the business insolvent for good, as time wasted in a futile OCW typically implies an opportunity cost for the debtor, will at the very least will have likely burned through more cash during that time.

Also, in an out-of-court setting, there may greater incentives for holdout strategies from creditors, which may be able to freeload on other creditors concessions in order to gain enhanced recovery value for themselves. At the same time, such setting may leave a vulnerable debtor liable to be cornered by a creditor in a position of vantage (usually a bank or one of the debtor's main financial creditors) into leonine or lopsided credit lifelines, often in terms which tend to seal the faith of a business failure and/or decrease the expected recovery value of other creditors' claims.

Entering into a chapter 11-type court proceeding may provide an illiquid firm, such as Flow Management, with (a) time to stave off rogue creditors' claims, while (b) the possibility of setting

[7] Ehrhardt, M. and Brigham, E. *Financial Management: Theory and Practice*, South-Western Cengage Learning, 13th edition (2011), p. 872.

[8] Chehi, M., Lopez-Castro, C., Pierce, S. and Kubs, M. *An Out-of-Court Restructuring or a Chapter 11 Case: When and How to Choose*, ABA, p. 1-5.

Debtor-in-Possession financing in place; which for instance in the case of Flow Management, may solve the liquidity, short-term funding issues for its working capital.

More specific, what are the advantages versus disadvantages in your country?

In jurisdictions with either (i) underdeveloped insolvency regimes, and/or (ii) unreliable court systems (both tend to coincide), the implied costs, risks and uncertainties of submitting a sensitive yet complex matter, such as the restructuring and turnaround of a flailing business, before an unspecialized court, adhering to outdated or ill-oriented insolvency regulations, may simply be unconscionable.

Such is the case in Venezuela, where court bankruptcy proceedings are few and far between, the insolvency legal system dates back to mid-nineteenth century (largely untouched since then), while the judiciary is—to put it mildly—an unreliable source of dispute-adjudication, showing signs of imbedded corruption, as well as lacking specialized judges in insolvency matters (bankruptcy proceedings in Venezuela are submitted before commercial courts, which tend to have jurisdiction over a very broad range of matters).

Due to the above, OCW is the usual way in which debtors and creditors alike address debt restructuring negotiations in jurisdictions such as Venezuela. Of course, this also affects the efficiency of out-of-court restructuring dynamics, given that a key component—the notion of negotiations being conducted in the shadow of insolvency law—[9]is largely missing.

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

Broadly speaking, Flow Management clearly underwent restructuring and turnaround processes at multiple levels, including:

First, a *management restructuring* approach, through a reshuffling of the C-suite resulting the replacement of both the Chief Executive Officer and the Chief Financial Officer, as well as appointing a Chief Restructuring Officer, in 2014.

Second, an *operational restructuring* went on, seeking to address multiple issues, stretching from accuracy of financial reporting (and financial data reliability) to price adjustments, costs reduction through layoffs and a drive towards optimized business efficiency. Operational restructuring alone, however, was not enough to turnaround Flow Management's business towards profitability, as the events which unfolded during 2014 through H1, 2015, eventually evidenced.

Finally, *financial restructuring* of the firm took also place, mainly through capital injections, debt rollover and refinancing. And eventually through, distressed M&A strategies upon which the final plan restructuring plan, approved in mid-2015, relied upon.

[9] See, *e.g*., Mnookin, R. and Kornhauser, L. *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. (1979), p. 950; or Adriaanse, J. *Restructuring in the Shadow of the Law: Informal Reorganisation in the Netherlands,* Kluwer (2005).

Most ostensibly, the 2015 plan of restructuring featured some form of debt capitalization in the form of a debt-equity swap, through which outstanding debt obligations owed by Flow Management at its Netherlands business level (FMW, as opposed to the holding company, also incorporated in the same jurisdiction) were exchanged for equity in a newly created debt-purged holdco (see Fig. 1).

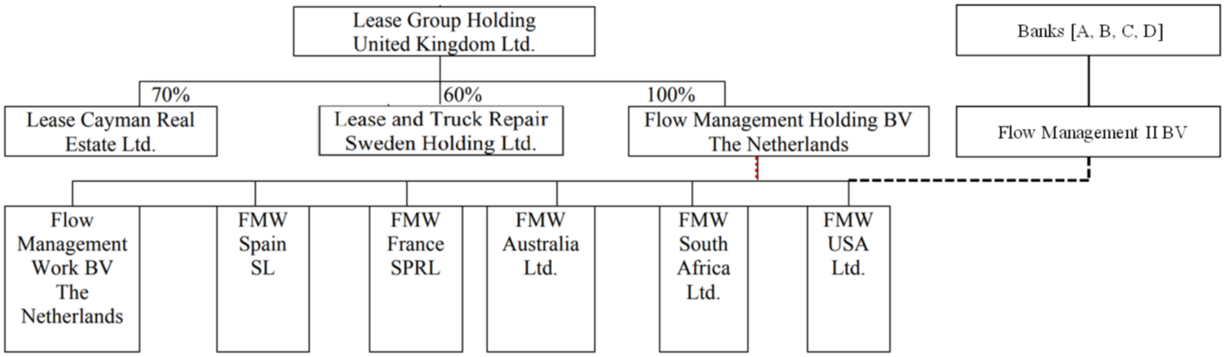

Lease Group Holding United Kingdom Ltd.
Banks [A, B, C, D]
70%
60%
100%
Lease Cayman Real Estate Ltd.
Lease and Truck Repair Sweden Holding Ltd.
Flow Management Holding BV The Netherlands
Flow Management II BV
Flow Management Work BV The Netherlands
FMW Spain SL
FMW France SPRL
FMW Australia Ltd.
FMW South Africa Ltd.
FMW USA Ltd.

Fig. 1

The final restructuring plan, which resulted in debt cancellation in exchange for equity in the newly formed holding company (a stepping-stone towards the probable sale of Flow Management's business as a going concern by the banks syndicate), was preceded by a continued (and hard fought) forbearance on behalf of Flow Management's financial creditors, through repeatedly extended standstill agreements. A forbearance is a temporal agreement by a lender to refrain from exercising certain rights that are available to it under a credit agreement as a result of an event of default. Following the lapsing of the standstill term, the lender is free to exercise any of its rights or enforce any of its contractual remedies. It is typically a short-term solution that allows time for a distressed company and its creditors to assess the company's capital structure in light of its current prospects and business plan and to consider next steps in an out-of-court setting.[10]

Stakeholder management in the context of organization survival seems to have also been factored in throughout debt renegotiations for Flow Management, where key creditors (*i.e.*, banks A, B, C and D, as well as the firm's key clients and customers, who held swath when it came to pricing strategies) were attributed the quality of *governing stakeholders*, whose continued support was proactively sought out and had an open communication with management.[11]

Also prevalent during the process that led to the eventual adoption in 2015 of Flow Management's plan of restructuring was a complementary interaction between two seemingly contradictory approaches: retrenching and recovery.[12]

[10] *Distressed Merger and Acquisitions*, Wachtell, Lipton, Rosen & Katz (2013), pp. 4-5.

[11] Pajunen, K. *Stakeholder Influences in Organizational Survival*, Journal of Management Studies (2006), pp. 1279-1280.

[12] Schmitt, A. and Raisch, S. *The Duality of Retrenchment and Recovery*, Journal of Management Studies (2013), p. 1225.

Based on the limited information made available, it is not possible to judge whether something could have been done differently or not. It does seem that both the banks and management did thorough work in trying to salvage the business and went over multiple strategies trying to turn around Flow Management, before throwing the towel and either submitting to a court-directed insolvency proceeding or even liquidating the company.

Perhaps out of personal biases, based on one's own experiences, or personal idiosyncrasies, the only open question mark when going over the events unfolding from 2013 at Flow Management, is whether the company stakeholders were quick and thorough enough when pursuing distress M&A strategies for undertaking an *asset restructuring*. Given the apparent weight suggested to business mismanagement (while at the same time, no mention is made in Flow Management's narrative to any cycle downturn or other industry-wide structural issues), the natural assumption is that at least certain business units within Flow Management should have held greater value as a going concern, if properly managed.

Also seemingly missing from any long-term planning was raising of capital (either through debt or equity) through public offerings in the capital markets. Of course, this probably had do to with lackluster business performance and unimpressive financial data, hindering appetite from prospective investors.

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

The anatomy of debt renegotiations boils down essentially to (a) the identity of the relevant parties, and especially those of the creditors, and (b) the dynamics of the interactions between those creditors.

In cases where a significant part of the debt capital structure is comprised of bank debt, as was the case of Flow Management, determining who will negotiate on behalf of the creditors is fairly straightforward: given the limited number of outstanding loans and small group of lenders, the relevant participants in the company's out-of-court workout are self-evident.[13]

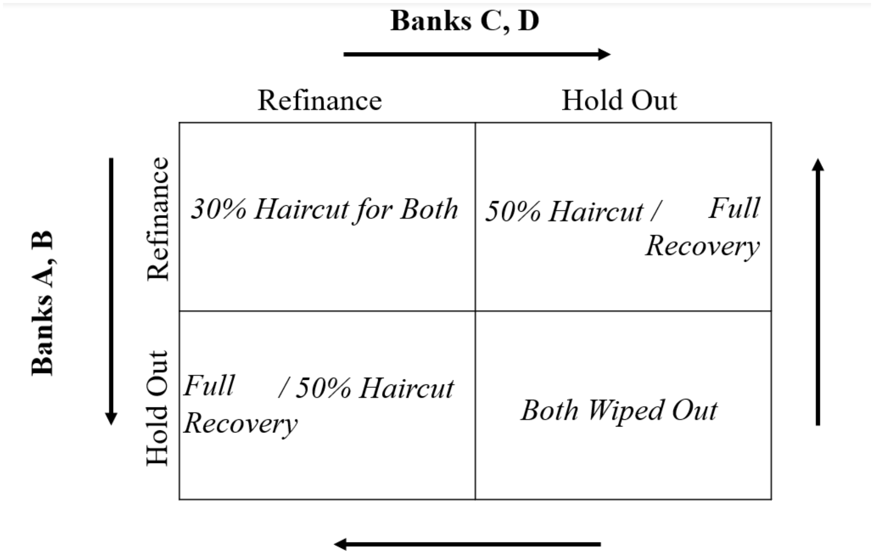
On the other hand, game theory goes a long way in explaining for a significant part of what is the usual intercreditor dynamics in the context of insolvency. In particular, the *prisoner's dilemma* provides insight into the problem of *cooperation*,[14] where selfish behavior leads to outcomes that are worse for each participant, and counterparties imperatively need to coordinate their efforts.[15]

Indeed, restructuring and turnaround work presents a classic prisoner's dilemma. Each creditor, unless assured of some degree of mutual cooperation, has an incentive to take advantage of individual collection remedies available, and to beat other creditors to it. Failure to pursue individualistic remedies may prove costly down the road. Yet this race creates costs for the individual creditors, while also makes the prospect of the debtor's business ultimate failure more

[13] Moyer, S. *Distressed Debt Analysis*, J. Ross Publishing (2005), p. 59.
[14] See von Neumann, J. and Morgenstern, O. *Theory of Games and Economic Behavior*, Princeton University Press (1947).
[15] McAdams, R. *Beyond the Prisoner's Dilemma: Coordination, Game Theory, and Law*, 82 S. Cal. L. Rev. (2009), p. 218.

likely, as each creditor fails to gauge the disadvantages imposed on them collectively. Thus, each creditor must participate in individualistic (alas, collectively non-optimal) behavior, simply to avoid being taken advantage of by other creditors. Furthermore, the use of individualistic remedies may lead to a piecemeal dismantling of a debtor's business by the untimely removal of operating assets, necessary to the debtor's business. To the extent that a non-piecemeal bankruptcy process (whether in the form of liquidation or reorganization) is likely to increase the aggregate pool of assets, its substitution for individualistic remedies may be advantageous to the creditors as a group.[16]

When looking at the interactions, tensions and fallouts between banks A, B and C, D, game theory does hint to an explanation for the apparent difficulty in making headway in the negotiations. Fig. 2 depicts such situation. The hard truth from the ultra-rational perspective is that uncooperating counterparties have strong opportunistic incentives in holding out (while expecting the other parties—*i.e.*, the other group of banks—to play along with Flow Management to restructure their claims). Having both parties agreeing to refinance is not a *Nash equilibrium* scenario, meaning that—unless coordination mechanisms are incorporated—the rational counterparties would feel compelled to undertake strategies to their collective detriment.



Banks A, B \ Banks C, D	Refinance	Hold Out
Refinance	*30% Haircut for Both*	*50% Haircut / Full Recovery*
Hold Out	*Full Recovery / 50% Haircut*	*Both Wiped Out*

Fig. 2

In addition to deterministic game theory dynamics, another cause for banks C, D reluctance to go along with the plans to buy time and find an optimal solution for Flow Management's turnaround may be explained by the simple and extremely intuitive, yet powerful, aversion to *throw good money after bad*. This would be consistent with a seemingly obvious intent from banks C, D and to be perceived as hard and strict bargainers by the debtor.

[16] Jackson, T. *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. (1982), pp. 862-864.

What would you have done in that situation in your role as advisor of the other two banks?

If retained as restructuring counsel for banks A, B, perhaps the main objective would have been to explicitly flag and spell out the risks and uncertainties facing creditors considering individualistic tactics. One readily available way for doing so would be to perform a valuation of Flow Management's liquidation value, and to make the results of the study available for all four banks. The idea behind it being to provide explicit disincentives for opportunistic behavior from any claimholder.

Keeping fully open and truthful lines for the exchange of information with banks C, D, and their advisors, would be of great significance, in order to foster trust and lay down the building blocks for optimal cooperation and coordination among relatively homogeneous counterparties.

Should the gap result too wide to bridge, then the immediate focus would shift toward proposing acceptable external coordination mechanisms, such as the appointment of mediators or financial advisors, with the tool-kit to procure consensus between the two creditor groups.

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

The following INSOL II principles seem to have been followed in Flow Management's out-of-court workout:

The *first principle* was clearly of paramount importance throughout the course of negotiations, starting as early as January, 2014, up until the final execution of the agreement finally providing forbearance to Flow Management, in mid-August, 2014. Indeed, upon the financial travails of Flow Management becoming obvious, all relevant creditors began a somehow difficult cooperation with each other, aiming to arrive at a standstill which would allow them jointly to gather and analyze information, and draw up proposals moving forward.

The above considerations also apply to the *second principle*, which was also a factor during the negotiations which took place in 2014.

As for the debtor's response, it seems that Flow Management indeed adhered to the *third principle*, refraining from undertaking drastic business actions which could risk leaving the creditor banks worse off. The *fifth principle* was obviously also complied with, as the period of forbearance clearly served the purpose of giving ample time for the creditors to be served with relevant business and financial information, upon which the reorganization plans were then drawn up.

The *sixth principle* may have been somehow relevant, although with some caveats, based on the specifics of the case. Namely, that the relevant creditors of Flow Management seem to have been a rather homogenous and limited in number group. Equitable treatment between those creditors does seem to have been obtained during the forbearance period.

The same goes for the *seventh principle*, which in all likelihood played its instrumental role during the standstill period, allowing the necessary conditions to yield agreement over the final restructuring plan.

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

To the extent that soft law is—by its own nature—not binding, it is possible to rely upon such rules if not as direct and enforceable rules, at least as general principles and voluntary guidelines. Indeed, *lex mercatoria* has its own place among the sources of law in most legal systems.

The main issue I see arising is in those specific jurisdictions where insolvency regime is either outdated, weak or—in any case—fails to duly incorporate reorganization-friendly approaches, in a manner somehow consistent to what INSOL II proposes and advocates. The question of whether the principles can be incorporated through soft law—as a Trojan horse—ultimately falls to general law principles applicable in each specific jurisdictions, and local case law. Thus, voluntarily following INSOL II—even if absent express submission to such principles by the creditors—is not particularly troublesome. Enforcing the principles upon dissenting creditors, on the other hand, may not be feasible.

The use of soft law may help at sorting out coordination deficiencies and problems that may arise on those topics where precisely most parties would benefit from an aligned and coordinated approach, such as is the case of insolvency and restructuring situations.[17] Hence the value of soft law instruments in setting standards in matters of cross-border cooperation by insolvency practitioners.[18]

Thus, even in jurisdictions where INSOL II may not apply—absent a voluntary, express submission by the relevant counterparties—they may still serve the purpose of providing loose (and unenforceable) guidelines as *lex mercatoria*. In Venezuela, soft law may be invoked as a direct source of law in cross-border legal relationships, pursuant to article 1 of the International Private Law Act (*Ley de Derecho Internacional Privado*).[19]

In the case of Flow Management's out-of-court restructuring, the following soft law instruments may have had limited, residual value, in addition to INSOL II:

The *Guidelines for Coordination of Multinational Enterprise Groups* (2013) adopted by the International Insolvency Institute (III), and in particular its Guideline No. 6, which calls for free and open communications among debtors and insolvency representatives, as well as creditor support, to procure cooperation and coordination in multinational insolvencies.

The *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* (2009), which focuses on practical aspects fostering cooperation and communication in cross-border insolvency cases, an in particular, the use of cross-border insolvency agreements, administration contracts, MoUs, or similar types of contractual instruments.

[17] See answer to question No. 4, *supra*.
[18] Wessels, B. and Boon, G. *Soft law instruments in restructuring and insolvency law: Exploring its rise and impact*, p. 11 (available at: https://ssrn.com/abstract=3397874).
[19] Published in Official Gazette No. 36,511 of August 6, 1998.

And finally, the *European Communication and Cooperation Guidelines for Cross-Border Insolvency* ("CoCo Guidelines"), prepared by INSOL Europe (2007), although—as is the case with most instruments developed to date—it focuses on insolvency curt proceedings.

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

The plan of restructuring passed on 2015 is based essentially on the scenario No. 1, drawn up by the consortium of banks during the standstill period, in October, 2014. The purpose of the plan is to sell the bulk of Flow Management's operations as a going concern, clear of debt.

This is to be achieved by the conveyance of Flow Management's assets from the original holding company to a newly created entity (Flow Management II BV), while the original holdco would remain with all its debt obligations, to be liquidated (and such obligations be finally cancelled). On the other hand, FMW (Flow Management's crown jewel) is to be purged of all debt, allowing it to move forward (under the new holdco's umbrella) with a clean slate.

As consideration for cancelling claims and credits for financing FMW's working capital, the banks consortium received in exchange 100% of shares in the new holding company. This effectively wiped out Lease Group Holding's (the UK holding) investment in Flow Management. Ownership over the company shifted, thus, from the original investors to its debtholders.

The next step for the banks syndicate will be to move forward with appointing an investment bank to come up with a strategy and carry out the optimal plan to find a suitable bidder for Flow Management II BV's stock.

Ostensibly absent from the restructuring plan's description is any representation on the treatment of the successor liability assumed by the banks, as equityholders in the new holdco, and whether the assets are being transferred truly "free and clear." Such circumstance will have material impact in the marketing of the asset and may affect the final pricing in any sale of the new holding's equity.

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

Cross-border issues may arise where either the debtor's assets, its creditors, or both, are located in more than one country. Given the state of globalization and easing of international trade, it has increasingly become the norm to find multinational companies, operating within territories extending beyond a single country's frontiers, with a complex and interconnected web of suppliers, vendors, customers, clients and logistic chains, spanning different countries, as well as a broad access to tapping credit beyond the confines of the credit markets in a single country.

This is indeed the case of Flow Management. A company with an ownership structure that goes across the Atlantic, from the U.S. to the United Kingdom, incorporated as a Dutch holding, headquartered in the Netherlands, and operating in parallel in four continents (Europe, North America, Oceania and Africa) and six countries (Holland, Spain, France, U.S., South Africa and Australia).

Such complex corporate structure poses a challenge, from the perspective of private international law, in the context of reorganization and insolvency. Failure of multinational enterprises tends to segregate its business and operations into a series of disconnected and standalone units, each confined within the boundaries—and jurisdiction—of multiple countries and often conflicting restructuring systems. Thus, the seamless and streamlined process in which multinational companies tend to carry out their globalized business usually comes to a grinding halt and is fundamentally disrupted when insolvency and restructuring law comes into play.

In a standard cross-border restructuring, different sets of creditors assert different kinds of claims to different assets under different rules in different countries. The business is broken up and split, while unconnected remnants of the organization attempt to continue until they either starve or implode. It may be affirmed that cross-border insolvency actually promotes disjointed failures and liquidations.[20]

However, from a purely pragmatic approach, Flow Management's situation seems to be relatively straightforward, without raising too much legal uncertainties or potential conflicts of international law, as it seems safe to assert that its *center of main interests* (COMI)—usually a heavily debatable issue—was located in the Netherlands. Indeed, both Flow Managament's holding company as well as its main operation were located in the Netherlands. Even the holdco which resulted from the plan of restructuring also sits in the same country, further smoothing out any potential debate on Flow Management's COMI.

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

The October, 2014 turnaround plans were the result of the forbearance and creditors' willing efforts in cooperating and coordinating with each other, to find viable restructuring alternatives for Flow Management. These plans could also be called 'post D-Day plans,' as they were the result of the shock produced by the 'day of reckoning' for Flow Management, back in June, 2014, when the company's Chief Restructuring Officer publicly acknowledged their imminent liquidity woes. A moratorium was a quickly dismissed alternative raised within these plans. The passing over of such alternative was probably justified by the following considerations:

- One of the key tactical gains of a moratorium—the temporal *stay* and deferral of payments and credit collection efforts—was already effectively achieved by consensual agreement between Flow Management's creditors, which had already provided the debtor with breathing room through a standstill agreement executed a couple of months before. A moratorium proceeding would have then been of little strategic value for all stakeholders involved.

- Based upon the information provided, there may be limited upside to staving off litigation and contingent claims against the estate. Perhaps at a future date, the benefits of a court mandated liquidation proceeding would have provided strategic advantages (for instance by staying off creditors' claims).

[20] Leonard, B. *Co-ordinating Cross-Border Insolvency Cases*, International Insolvency Institute (III) (2001), p. 5.

- Submitting the matter before a court would have Opened the pandora box to court's intervention, which usually pushes down liquidation value, while narrowing the range of available reorganization and turnaround options for the stakeholders.

- Additionally, it would have further restricted the flexibility in the management of Flow Management's day-to-day operations, which would have been under the judiciary's oversight, through a court-appointed trustee.

- On the other hand, court-led sale proceedings are notably suboptimal when compared to asset sales carried out privately through investment banks and other standard market procedures. If the final intent by the banks syndicate was to undertake a sale of Flow Management as a going concern, then definitely they were better off keeping the transaction outside the courthouse.

- In a moratorium debtor-in-possession is the general rule, meaning that management would remain in place, handling day-to-day matters (with the oversight of a court appointed trustee). While a moratorium points towards the business turnaround as a going concern (which is key aspect of the underlying strategy behind Flow Management's 2015 plan of restructuring), on the other hand, leaving the control, direction and management in hand of its current shareholders risks further destruction on value.

- In jurisdictions with rough-around-the-edges insolvency systems, such as Venezuela, there may also be weariness of including a bankruptcy or commercial judge into the decision making process, as this could open a myriad other issues.[21]

[21] See answer to question No. 2, *supra*, p. 5.