**Case Study I – Peter Madden**

**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?**

*Introduction*

In my opinion, the financial distress at Flow Management Holding BV and its subsidiaries (the “**Flow Management Group**”)was caused by environmental factors, which was then exacerbated by the decisions of the management of the Flow Management Group (the “**FMG Management**”).

Mellahi and Wilkinson[[1]](#footnote-1) state that business literature on the causes of organisational failure is divided into two camps. In one camp, the classical industrial organisation and organisation ecology literature argues that environmental factors are the dominant cause of organisational failure. In the other camp, organisation studies and organisational psychology literature argues that the actions and perceptions of managers are the fundamental cause of organisational failure. Mellahi and Wilkinson then seek to propose an integration of these opposite schools and explain a basis for their linkage.[[2]](#footnote-2)

In this respect, it appears evident from the facts presented in the Case Study that there are elements of both environmental and management issues at the Flow Management Group, which interacted and combined to give rise to the financial distress experienced by the Flow Management Group.

*Environmental factors*

Based on the size of the Flow Management Group and its capital structure, it appears that the Flow Management Group is a well-established group that has been operating in the market for some time. In particular, the shareholding structure suggests that the Flow Management Group may have been founded by the Johnson family and then expanded through the capital investments provided by LLS Private Equity Fund Ltd and Cinderella Investment Ltd.

However, the shareholding structure of the Flow Management Group reveals that there is no dominant investor among the three shareholders (with LLS Private Equity Fund Ltd being the largest shareholder, with 40% of the equity). Accordingly, in order to make decisions and implement strategies, the FMG Management is placed in the difficult position of having to appease multiple non-dominant shareholders, each of which may have different short-term and long-term strategies and incentives. Other areas of complexity include the large workforce (3,000) and international network of offices. Each of these factors add to the organisational complexity[[3]](#footnote-3) of the Flow Management Group. According to industrial organisation scholars[[4]](#footnote-4), there is a positive correlation between environmental complexity and organisational mortality rate.

Additionally, the fact that the Flow Management Group was well-established may have led to an inability to adapt to changing circumstances. In particular, the accounting and financial issues disclosed by the management of Flow Management Group to the Bank A, Bank B, Bank C and Bank D (the “**Working Capital Banks**”) on 16 November 2013 may be seen in the context of an organisation which has failed to adapt to changing circumstances, such as need to continually update its accounting systems. Organisation ecology scholars suggest that, because of structural inertia, organisations tend not to change, and when they do, they respond slowly to environmental threats and opportunities, and they are more likely to disband than adapt.[[5]](#footnote-5)

Finally, in line with the ‘Industry Life Cycle Theory’,[[6]](#footnote-6) the decline of the Flow Management Group may be seen as a “*natural and objective phenomenon*”[[7]](#footnote-7) which is “*inherent to the efficient operation of markets*”[[8]](#footnote-8)

*Management decisions*

The financial distress at the Flow Management Group can also be attributed to the role and actions of the FMG Management.

Based on the large management bonuses awarded to the FMG Management, it appears that the FMG Management may have been in place for some time. Pursuant to the ‘Upper Echelon’ theory’[[9]](#footnote-9), longer-tenured top management are likely to be associated with increased rigidity and commitment to standardised practices. This might explain why the FMG Management failed to update and change the accounting systems which resulted in the failure to identify the accounting irregularities and pricing issues in the Flow Management Group.

The FMG Management may have also become complacent following a previous period of success and high performance. The large bonuses paid to the FMG Management indicate that there was a perception of the FMG Management as being strong performers. However, ‘*success can breed over confidence and arrogance*’[[10]](#footnote-10) leading to a form of ‘*cautious conservatism and perhaps arrogant disdain’.[[11]](#footnote-11)* Accordingly, the need for the Flow Management Group to update its accounting systems and monitor its customer pricing may have been overshadowed by previous periods of success.

*How management decisions were exacerbated by environmental factors*

The complexity of the Flow Management Group’s stakeholder environment, including the lack of dominant shareholder, the large debt capital providers in the form of the Working Capital Banks and the extensive international network of offices, appears to have led to the FMG Management seeking to manage and appease the various stakeholders rather than developing and maintaining the business. This effect has been referred to as the ‘rigidity of aging’.[[12]](#footnote-12) Additionally, the established nature of the Flow Management Group likely created an environment of ‘structural inertia’ in which the FMG Management were encouraged to maintain the status quo rather than develop the business. This laid the seeds for future financial distress as the FMG Management were seemingly focused on their own position (as evidenced by the large bonuses) rather than focusing on the underlying accounting and pricing issues.

In this respect, the situation at Flow Management Group has similarities to Pajunen’s case analysis of a decline and turnaround process in respect of a Finnish pulp and paper firm, Kymi Corporation (the “**Kymi Case Study**”).[[13]](#footnote-13) In the Kymi Case Study, one of the causes of the financial distress of Kymi Corporation was the ‘serious deficiencies’ in the accounting system of the firm. However, when the existing ‘autocratic’ management was replaced by the creditors to the Kymi Corporation (who were more focused on the Kymi Corporation delivering profits and settling debts in the near term, rather than “*megalomaniac investments*”), the new management was able to introduce a new accounting system for the firm.[[14]](#footnote-14)

On the basis of the Kymi Case Study, Pajunen developed the proposition that; “[*i*]*n an existence-threatening crisis, consensus on long-term goals among governing stakeholders will tend to enhance (rather than undermine) the continuing support of those stakeholders and increase (rather than decrease) the probability of organizational survival.*”[[15]](#footnote-15)

Accordingly, I would also argue that the severity of the unfolding financial distress at the Flow Management Group was exacerbated by a misalignment in the incentives and long term goals of the various stakeholders, including the shareholders, the FMG Management and the Working Capital Banks.

*Could the financial distress have been prevented?*

Given the environmental factors and the misalignment of stakeholder incentives that had developed over time at the Flow Management Group, my view is that it would have been difficult by 2013 to avoid financial distress.

An analogy can be drawn with the Kymi Case Study in which the Kymi Corporation went from being “*one of the strongest players on the pulp and paper market of Northern and Eastern Europe*” to having the survival of the firm “*seriously threatened*”.[[16]](#footnote-16) In that case study, it was not any one particular issue which caused the financial distress, but rather it was a complex interplay of various environmental factors and management decisions. Similarly, in the Flow Management Group, the accounting and pricing issues were not the fault of any one stakeholder, but rather it was the result of the collective oversight of the various stakeholders caused by the inability or lack or incentive for any stakeholder to address the critical underlying issues facing the Flow Management Group.

This is not to say that the financial distress at the Flow Management Group was completely unavoidable, but it would have required a collective effort from all stakeholders to identify and address the misalignment and the underlying issues facing the Flow Management Group.

**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*?**

I discuss the advantages and disadvantages of an out-of-court restructuring (a “**Workout**”) compared to a formal bankruptcy procedure (a “**Formal Procedure**”) in the context of flexibility, silence and control.[[17]](#footnote-17)

*Flexibility*

The process of negotiating and implementing a Workout is generally considered less rigid than a Formal Procedure.[[18]](#footnote-18) This is on the basis that Workouts generally do not involve the strict legal processes, such a court hearings or the involvement of court-appointed insolvency officeholders, that are generally required as part of a Formal Procedure.

The benefit of this additional flexibility is that parties to a Workout can save considerable cost, time and resources than would be the case in a Formal Procedure. For example in Singapore, the appointment of insolvency officeholders (such as an interim judicial manager or a judicial manager), as well as their legal counsel, can come at a considerable cost to the debtor. By comparison, the cost savings in a Workout will likely result in a higher returns[[19]](#footnote-19) for creditors and other stakeholders and the saving in time and resource can be used by the management of the debtor to focus on the operational aspects of its business.

However (and critically), the perceived flexibility of a Workout is dependent on the relevant parties acting consensually to agree and implement the terms of a Workout. In this respect, where a party to a Workout (whose consent is required to implement that Workout) does not consent to the Workout, then the Workout route may not be feasible. Furthermore, the ability of a party to block a Workout by withholding its consent, may result in parties seeking to obtain a strategic advantage by acting as a ‘hold-out’. Accordingly, ‘hold-outs’ may exploit one of the key weaknesses of the Workout (the need for consensus) to extract advantages that it might not otherwise have received in a Formal Procedure.

In contrast, a Formal Procedure will generally offer more flexibility to deal with dissenting parties. For example, in Singapore, a scheme of arrangement under section 210(1) of the Companies Act 1967 or section 71(1) of the Insolvency, Restructuring and Dissolution Act (the “**IRDA**”) (a “**Scheme of Arrangement**”) requires the approval of a majority in number and 75% by value of each class of creditors voting in the Scheme of Arrangement. Accordingly, the ability to manage dissenting creditors is far greater in a Scheme of Arrangement and, in relation to ‘hold out’ creditors, ‘holding-out’ is far more difficult, as such creditors must hold a much larger position in the debt in order to block a Scheme of Arrangement.

*Silence*

Workouts can be negotiated and implemented in private between the relevant parties. Further, the privacy of the negotiations in connection with the Workout can be further formalised through the execution of a confidentiality agreement between the relevant parties. Entry into a formal confidentiality agreement by the relevant parties is a recommended course of action under INSOL International’s Seventh Principle.[[20]](#footnote-20)

The advantage of silence in the context of Workouts is that it offers a level of protection to the distressed debtor against a “*race to collect*”[[21]](#footnote-21) by the general body of creditors and can also allow the distressed company to continue dealing with counterparties (such as suppliers and customers) who may otherwise be deterred from dealing with the distressed company.

The disadvantage of silence in the context of Workouts is that it is not a watertight solution and information leakage does occur. In this respect, it may be difficult for a distressed company to keep private the state of its financial distress for long periods, despite the privacy of Workout negotiations (with or without confidentiality agreements). In my experience working in Asia, once a distressed company begins to struggle to pay trade creditors, the chances of the distressed company and its financial creditors keeping the Workout negotiations private are low. Further, studies have shown that employees are aware of the financial distress of an employer, resulting in a steady rise in employee attrition that begins “*on average, a year prior to bankruptcy*”.[[22]](#footnote-22)

Additionally, one of the perceived benefits of silence, being that suppliers and customers may not seek to cancel ongoing contractual relationships with a financially distressed company, has, to an extent, been addressed through the introduction of ‘ipso facto’ laws in certain jurisdiction. In Singapore for example, section 440 of the IRDA restricts a party from, *inter alia*, terminating or claiming an accelerated payment under an agreement with a company by reason only that the company has commenced proceedings for, *inter alia*, judicial management or a scheme of arrangement, or that the company is insolvent. However, it should be noted that such ‘ipso facto’ laws are not a panacea for companies in financial distress given that future suppliers and customers are under no obligation to contract with the financially distressed company.

*Control*

Workouts enable the management of a debtor to stay in control and “*continue to fully run the company independently*”.[[23]](#footnote-23) In comparison, in certain types of Formal Procedures (such as judicial management or interim judicial management in Singapore), an independent insolvency officeholder is appointed (the “**External Administrator**”). Depending on the type of External Administrator appointed, it may be an officer of the court and acts in the interests of creditors. Additionally, the authority of the directors of the company will generally be displaced in favour of the External Administrator.

Whether the concept of ‘control’ is an advantage or disadvantage to a Workout depends on the perspective of each relevant stakeholder. For example, from the perspective of a creditor which has lost faith in the management of a debtor, the appointment of an independent insolvency officeholder may be seen positively and may encourage the development of a restructuring plan. Conversely, other stakeholders (such as trade suppliers and long term customers) may view the appointment of External Administrators unfavourably given that their personal relationship exists with management who no longer have the authority to operate the business.[[24]](#footnote-24)

Additionally, a Formal Procedure does not necessarily result in a loss of control for existing management. For example, in Singapore, a Scheme of Arrangement is often referred to a ‘debtor-in-possession’ procedure because the existing management remain in control of the debtor during the Scheme of Arrangement.

*Conclusion*

Workouts and Formal Procedures have differing strengths and weaknesses and, ultimately, whether parties decide to proceed with one or the other will turn on the particular facts of that case. Furthermore, in my experience, Workouts and Formal Procedures are not mutually exclusive events and, rather, both forms will be used to implement the terms of a restructuring agreement negotiated between the relevant parties.

**Question 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.**

The Case Study presents a series of different and (sometimes) conflicting turnaround / reorganisation approaches which were applied by the relevant parties in the Case Study during the restructuring of Flow Management Group (the “**FMG Restructuring**”).

*Business restructuring versus financial restructuring*

Business restructuring has been defined as “*a comprehensive plan the aim of which is to restore the (operational) profitability of a company in financial difficulties.*”[[25]](#footnote-25) In this respect, there is clear evidence that the FMG Management sought to restore the operational profitability of the Flow Management Group through, for example, discussions with clients regarding price increases and the implementation of spending cuts in November 2013. It is noteworthy that, as the FMG Restructuring developed, the business restructuring plans proposed by the FMG Management increased in magnitude, with larger cuts and more extensive evaluation and assessment of the business. This suggests that the business restructuring, by itself, was not sufficient to resolve the financial difficulties facing the Flow Management Group.

Financial restructuring is necessary where the “*losses from the past have — in most cases — disturbed the balance sheet ratios to such an extent that the obligations towards the assets are excessive; as a result, (future) interest and repayment obligations cannot be (or no longer have been) met.*”[[26]](#footnote-26) In this respect, it appears that the approach of the FMG Management was firstly aimed at addressing financial distress through a business restructuring. However, as the financial distress continues, the FMG Management eventually seeks to financially restructure the Flow Management Group through a combination of equity injections from shareholders, small new loans (such as from the Chief Executive Officer of the Flow Management Group in April 2014) and the debt-for-equity swap agreed between the Flow Management Group and the Working Capital Banks in July 2015.

In my opinion, the FMG Management should have focused more initially on engaging with the Working Capital Banks to begin the process of negotiating a financial restructuring of the Flow Management Group. Ultimately, it was the financial restructuring of the Flow Management Group (by way of the debt-for-equity swap agreed in July 2015) which brought about an element of stability to the Flow Management Group and which allowed the FMG Management to focus more on the operational (rather than financial aspects) of the business.

The initial actions of the FMG Management aligns with the findings by Sudarsanam, who notes that “*ineffectiveness of restructuring in early years leads to more intensification of strategies.*”[[27]](#footnote-27) In this respect, I would argue that if the FMG Management had sought earlier engagement with the Working Capital Banks regarding a financial restructuring of the Flow Management Group, then the FMG Restructuring may have been concluded in less time and the shareholders and other investors may have even received a greater return in the final restructuring agreed in July 2015.

Furthermore, the business restructuring initiatives of the FMG Management could also have been pursued at the same time as the financial restructuring of the Flow Management Group. As noted by Schmitt and Raisch, “*turnaround success is a function of the firm’s ability to integrate contradictory, yet interrelated, retrenchment and recovery activities in corporate turnarounds*”.[[28]](#footnote-28) Accordingly, while investing in new strategies to improve turnover and market share and concurrently negotiating a financial restructuring with creditors may appear contradictory, I am of the view that the FMG Management should have pursued both approaches simultaneously given the magnitude of the financial distress at the Flow Management Group in late 2013.

*Stakeholder influence identification*

According to Pajunen, the identification of stakeholders with a strong influence on an organisation’s survival“*becomes an essential function for an organization in crisis.*”[[29]](#footnote-29)

In the Case Study, there is strong evidence that the identification of stakeholder influence (or the failure to do so) impacts how the FMG Restructuring progresses. At the beginning of the FMG Restructuring, the FMG Management appear to be wield extensive influence over the Flow Management Group (as evidenced by large management bonuses which the FMG Management had sought to distribute to themselves). This may be characterised as resource dependence based power, however, in my opinion, the influence of the FMG Management was in fact derived from their central position between the shareholders and the Working Capital Banks, which can be characterised as the FMG Management’s network position based influence.[[30]](#footnote-30)

However, as the FMG Restructuring progresses, the influence of the Working Capital Banks increases as it becomes clear that the Flow Management Group cannot resolve its financial distress without the ‘buy-in’ of the Working Capital Banks. This demonstrates the resource dependence based power[[31]](#footnote-31) of the Working Capital Banks.

In my opinion, the relevant stakeholders in the FMG Restructuring failed to identify early enough that the Working Capital Banks held extensive resource dependence based power. It may be that FMG Management was seeking to use their network position based influence to protect their position by acting as the intermediary between the shareholders and the Working Capital Banks. However, it soon became clear that the FMG Restructuring had fallen into a state of paralysis. This was only resolved once the FMG Management stepped down and the Chief Restructuring Officer was appointed around May 2014. This aligns with the Pajunen’s proposition that “*the* *more secure the continuing support of governing stakeholders in an existence-threatening crisis, the more probable is organizational survival*”.[[32]](#footnote-32)

**Question 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 specific reasons for Banks C and D appearing to frustrate the FMG Restructuring at a certain point are not set out in the Case Study. However, there are several reasons why Banks C and D might have acted this way.

*Information quality*

It appears clear that, in the early stages of the FMG Restructuring, the information provided by the Flow Management Group to the Working Capital Banks was both unreliable and insufficient.

The supply of unreliable or insufficient information from a distressed company to its creditors regarding the financial state of the distressed company is a key cause of the failure of out-of-court workouts.[[33]](#footnote-33) Accordingly, it may that the action of Banks C and D is sourced from a frustration at the quality of information provided by the Flow Management Group. In particular, Banks C and D may not have wished to ‘standstill’ or reserve their rights against a company that, in their opinion, was not being forthcoming with its ‘true’ financial state. From an Asian restructuring perspective, creditors are generally unwilling offer a standstill where the debtor has not shown good faith in providing disclosure.[[34]](#footnote-34)

*Valuation concerns*

Related to the concerns regarding the quality of information received, it may have been that Banks C and D were concerned that the liquidation value of the Flow Management Group was greater than the potential value that they would receive in a restructuring of the Flow Management Group.

In accordance with the INSOL International’s Sixth Principle, “*creditors will need to compare the outcome they could expect from any proposals made to them against the returns they might expect to achieve in a formal insolvency process or from other options available to them.[[35]](#footnote-35)*” Accordingly, Banks C and D may have had a concern that they were unable to make this comparison given the quality of the information provided.

Alternatively, Banks C and D may have held different views regarding the value of the Flow Management Group compared to Banks A and B. Where there is “*ambiguity of information, and the unavailability of and inaccessibility to relevant and objective inputs required for the valuation*”,[[36]](#footnote-36) this can lead to “*fierce debates between stakeholders*”.[[37]](#footnote-37)

*Opportunistic reasons*

Based on the facts of the Case Study, it appears that the consent of Banks C and D was required in order to implement the FMG Restructuring. Accordingly, Banks C and D may have seen an opportunistic reason for withholding their consent.

By withholding their consent, the resource dependence based power of Banks C and D increased.[[38]](#footnote-38) Accordingly, this may have positioned Banks C and D such that they were able to demand better or different treatment from Banks A and B and/or the Flow Management Group.

It is not entirely clear what the motivation was for Banks C and D to do this, but Banks C and D may have been seeking, for example, to (i) obtain a restructuring plan that better suited to the long term goals of Banks C and D, (ii) encourage Banks A and B to buy the debt of Banks C and D (which, from the facts of the Case Study, Banks A and B were considering at one point) or (iii) encourage Banks A and B to sell their debt to Banks C and D.

*What would I have done in that situation in my role as advisor of Banks A and B?*

Given my assessment of the potential rational and opportunistic reasons for Banks C and D to frustrate the FMG Restructuring, I would have adopted ‘Plan A’ and ‘Plan B’ approach.

Pursuant to ‘Plan A’, I would have sought to enter into discussions with Banks C and D to better understand the basis of their concerns. If the concern of Banks C and D was derived from a lack of information or concerns regarding valuation, then I would have sought to bridge the information divide by working with Banks C and D to obtain further information from the Flow Management Group.

I would also have proposed co-ordinating the approach to the FMG Restructuring amongst the Working Capital Banks by appointing professional financial and/or legal advisers to advise the Working Capital Banks with respect to the information received and issues of valuation. This approach would be intended to reduce friction between Banks A and B and Banks C and D and would align with the INSOL International’s Fourth Principle.[[39]](#footnote-39)

In the event that ‘Plan A’ did not appear to be producing results, or it became evident that Banks C and D were frustrating the process for opportunistic reasons, I would develop a ‘Plan B’. Pursuant to ‘Plan B’, I would have explored opportunities to reduce the ability of Banks C and D to block a restructuring process. Such options might include continuing restructuring discussions with the Flow Management Group with a view to ‘cramming down’ Banks C and D through a formal process, such as a scheme of arrangement, or alternatively acquiring the debts of Banks C and D.

**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)?**

*INSOL International’s First Principle:*

In the Case Study, a 120-day standstill agreement was signed in the middle of August 2014 (the “**Standstill Agreement**”), which allowed for information about the Flow Management Group to be obtained and evaluated and for proposals for resolving the Flow Management Group’s financial difficulties to be formulated and assessed.

However, the Standstill Agreement was entered into approximately 10 months after the Working Capital Banks were first notified by the Flow Management Group of its financial distress. It would have been more aligned with the First Principle if the Working Capital Banks had entered into the Standstill Agreement with the Flow Management Group closer to 16 November 2013, when the Working Capital Banks were first notified by the Flow Management Group of its financial distress.

Nonetheless, it is arguable that a ‘de-facto’ standstill was in effect from 16 November 2013 (the “**De-Facto Standstill**”), given that the Working Capital Banks appeared to acquiesce with the Flow Management Group’s restructuring attempts.

*INSOL International’s Second Principle:*

Through the De-Facto Standstill and the Standstill Agreement, the Working Capital Banks complied with the Second Principle by refraining from taking any steps to enforce their claims against, or to reduce their exposure to, the Flow Management Group.

In return, it appears that the Flow Management Group respected the priority of the Working Capital Banks during the period of the De-Facto Standstill and the Standstill Agreement.

*INSOL International’s Third Principle:*

It appears that the Flow Management Group did not take any action which might adversely affect the prospective returns to the Working Capital Banks (either collectively or individually) as compared with the position of the Working Capital Banks at the commencement of the De-Facto Standstill and the Standstill Agreement.

The Flow Management Group did incur financial indebtedness during the period of the De-Facto Standstill and the Standstill Agreement, such as the loan from the Chief Executive Officer of the Flow Management Group in April 2014 and the shareholder deposit at the end of June 2014. However, these loans appear to have been entered into with the consent (or at least the knowledge of the Working Capital Banks). Further these loans were unsecured which aligns with the Second Principle that the Flow Management Group should respect the priority of the Working Capital Banks during the period of the De-Facto Standstill and the Standstill Agreement.

*INSOL International’s Fourth Principle:*

There was no co-ordination committee (“**Co-Com**”) formed amongst the Working Capital Banks. Given that there were only four members of the Working Capital Banks, it may have been the view of the Working Capital Banks that they were small enough in number that they could have liaised efficiently with the Flow Management Group directly.

However, it would have been helpful to have formed a Co-Com for the purposes of engaging professional advisers to advise and assist the Co-Com. Although there are references to an accountancy firm investigating procedures within the Flow Management Group in December 2013 and an independent turnaround consultancy agency reviewing the viability of the Flow Management Group, it does not appear from the Case Study that the Working Capital Banks engaged legal advisers or financial advisers to advise the Working Capital Banks with respect to the restructuring.

If the Working Capital Banks had formed a Co-Com to engage legal advisers and financial advisers it may have assisted the restructuring process and also ensured that each member of the Working Capital Banks received the same information and advice. The failure to receive the same information and advice, may have been the reason that Banks C and D appeared to frustrate the restructuring at one point.

*INSOL International’s Fifth Principle:*

The Flow Management Group did provide some level of information to the Working Capital Banks regarding its financial position. However, it is debatable whether the information provided by the Flow Management Group in relation to its assets, liabilities, business and prospects could be described as ‘reasonable’ and ‘timely’ in accordance with the Fifth Principle.

In contrast it is clear that the Working Capital Group becomes frustrated with the unreliable and constantly changing information provided by the Flow Management Group. This may be one of the reasons why the restructuring took a significant time period in which to complete.

*INSOL International’s Sixth Principle:*

The appears to be little evidence of the production of insolvency models by either the Flow Management Group or the Working Capital Group.

*INSOL International’s Seventh Principle:*

It appears that information disclosed to the Working Capital Group by the Flow Management Group was kept confidential. It may be that confidentiality terms were included in the Standstill Agreement.

*INSOL International’s Eighth Principle:*

As mentioned, the Flow Management Group did incur financial indebtedness during the period of the De-Facto Standstill and the Standstill Agreement, such as the loan from the Chief Executive Officer of the Flow Management Group in April 2014 and the shareholder deposit at the end of June 2014. However, these loans were unsecured and therefore were not accorded priority status in accordance with the debt of the Working Capital Banks, which appears to be unaligned with the Eight Principle. It is not clear from the facts of the Case Study why these lenders agreed to make available these loans on a non-priority basis.

**Question 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?**

*Soft law and standard-setting organisations*

While there is no clear consensus on the definition of ‘soft law’,[[40]](#footnote-40) a suitable description of soft law is that it comprises of non-binding[[41]](#footnote-41) rules or guidelines developed by ‘standard-setting organisations’.

Standard-setting organisations are organisations “*with a good reputation and known for their expertise and/or experience*”.[[42]](#footnote-42) These may include intergovernmental standard-setting organisations such as the United Nations Committee on International Trade Law (UNCITRAL) and the World Bank or non-governmental organisations consisting of practitioners, judges and academics, such as INSOL International.[[43]](#footnote-43)

INSOL International is strongly influential in Singapore as evidenced by the opening of INSOL International's Asia Hub in Singapore in 2019. Other influential standard setting organisations in Singapore include the Singapore Global Restructuring Initiative (SGRI), the Asian Business Law Institute and the Insolvency Practitioners Association of Singapore (IPAS).[[44]](#footnote-44)

*Application of soft law in the Case Study*

In March 2023, the International Insolvency Institute and the Asian Business Law Institute released the ‘Guide on Conducting an Out-of-Court Workout in Asia’ (the “**Asia Workout Guide**”).[[45]](#footnote-45) The Asia Workout Guide sets out nine principles and eleven best practices which have been formulated specifically for out-of-court workouts in Asia.

The principles and best practices outlined in the Asia Workout Guide are, in may ways, similar to INSOL International’s Statement of Principles, but with certain minor modifications for the Asian workout market.

One such modification is that proposition that, “*[i]n Asia, early standstills are not plausible without a debtor first showing good faith by providing disclosure.*”[[46]](#footnote-46) Applying this to the Case Study, it might be possible to encourage the Flow Management Group to improve the quality and amount of information being provided as a means to demonstrating good faith with the uncooperative creditors.

Another soft law approach in an Asian setting arises from the occasional occurrence of “*asymmetry of sophistication and experience between creditor and debtor.*”[[47]](#footnote-47) While it is not clear from the Case Study whether such an asymmetry is present, to the extent such an issue does exist, then Flow Management Group and the cooperating creditors should be encouraged to engage the non-cooperating creditors in a way which demonstrates an understanding of the particular cultural and other concerns of those non-cooperating creditors.

*Informal possibilities*

In the event of an impasse between cooperating and non-cooperating parties, it is often helpful for parties to communicate through pre-existing personal relationships between the parties. This proposition is supported by Pajunen who states that “*[i]n an existence-threatening crisis, personal relationships between managers and governing stakeholders will tend to enhance (rather than undermine) the continuing support of those stakeholders and increase (rather than decrease) the probability of organizational survival.*”[[48]](#footnote-48)

Accordingly, an option for the Flow Management Group and the cooperating creditors might be to reach out the non-cooperating creditors through pre-existing personal relationships between the parties. In my personal experience as a restructuring solicitor, correspondence between principals, without the presence of solicitors, can produce faster results than legal discussions between solicitors.

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

The restructuring agreement 4 July 2015 (the “**Restructuring Agreement**”) has the following key features (i) it is a consensual out-of-court workout (ii) it reflects the priority of the financiers on 16 November 2013 and (iii) it offers the parties the same or a greater return than those parties would have received the immediate liquidation of the Flow Management Group. These features are explained in further detail below:

*Consensual out-of-court workout*

A key feature of the Restructuring Agreement is that it an out-of-court workout consensually agreed between the relevant parties.

In the alternative, the relevant parties (or some of them) may have sought to implement a restructuring through a formal insolvency process. For example, the Working Capital Banks may have sought to appoint an external administrator (such as (in Singapore) a judicial manager or a liquidator) to Flow Management Holding BV in order to implement a restructuring desired by the creditors. However, this may have caused value destruction through the additional costs and publicity involved.[[49]](#footnote-49)

Another alternative might have been for the Flow Management Group and some of the creditors to agree a restructuring plan which ‘crammed down’ dissenting creditors, such as by way of a scheme of arrangement. However, similar to judicial management or liquidation, there are issues of cost and publicity which would need to be taken into account.

Generally a consensual out-of-court workout will result in better returns for stakeholders, as well-summarised in the Bank of England’s foreword to INSOL’s Principles, “*[e]xperience suggests that a collective approach, such as the one advocated, can help preserve value, to the benefit of the creditors as a whole and other stakeholders in the company.*”[[50]](#footnote-50)

*Reflects the priority of the financiers*

As mentioned in the Case Study, the Restructuring Agreement reflects the priority of the financiers involved in the restructuring. In this respect:

* the secured Working Capital Banks receive the shares in Flow Management II BV in return for a write-down of some of the debt owed to the Working Capital Banks; and
* the unsecured creditors and the shareholders receive no returns in the liquidation of Flow Management Holding BV.

By reflecting the priority of the financiers involved at the outset of the restructuring, the Restructuring Plan accords with:

* INSOL International’s Third Principle[[51]](#footnote-51), by way of the debtor not taking any action which might adversely affect the prospective return to the relevant creditors as compared with the position at the commencement of the restructuring; and
* INSOL International’s Sixth Principle[[52]](#footnote-52), by way of the relevant parties resolving the financial difficulties of the debtor in a way which reflects the relative position of creditors at the outset of the restructuring.

The Case Study mentions that some of the shares in Flow Management II BV are transferred to “*a number of board members (including the CRO)*” (the “**Management Shares**”). Accordingly, an argument might be raised that the distribution of the Management Shares to board members represents a breach of INSOL International’s Sixth Principle in that assets, which might have otherwise been distributed to other creditors or shareholders of the Flow Management Group, ended up being distributed to board members.

However, I would argue that there is no breach of INSOL International’s Sixth Principle on that basis that the value represented by the Management Shares would have been allocated to the Working Capital Banks in a liquidation of the Flow Management Group (evidenced by the fact that the Working Capital Banks were required to write off a large part of their loan as part of the Restructuring Agreement) and, therefore, it was at the discretion of the Working Capital Banks to re-allocate the value represented by the Management Shares to the board members as part of the Restructuring Plan. In other words, the other creditors would never have received the value represented by the Management Shares in a liquidation of the Flow Management Group and, therefore, the other creditors cannot argue that they ought to have received the value represented by the Management Shares.

*Offers the parties the same or a greater return than those parties would have received in the immediate liquidation of the Flow Management Group*

In accordance with INSOL International’s Sixth Principle, creditors ought to compare the outcome they will receive under a restructuring plan against the returns they would receive in a formal insolvency process.[[53]](#footnote-53)

In this respect, it appears that the parties to the Restructuring Agreement were comfortable that the Restructuring Agreement offered a return to each party which was the same or greater than that party would have received in the immediate liquidation of the Flow Management Group.

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

There are several (potential) legal and/or non-legal cross-border issues which may arise in respect of the Flow Management Group’s restructuring process.

*Centre of main interests (“COMI”)*

In the Case Study, it is stated that Flow Management Holding BV acts as the COMI for the six operating companies of Flow Management Holding BV (the “**Operating Subsidiaries**”).

Accordingly, in the event that an Operating Subsidiary is in a jurisdiction which is subject to either the UNCITRAL Model Law on Cross-Border Insolvency (the “**Model Law**”) or the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the “**Recast Insolvency Regulation**”), then the COMI of that Operating Subsidiary may be relevant in the context of insolvency proceedings.

FMW Australia Ltd, FMW South Africa Ltd., FMW USA Ltd. are each incorporated in jurisdictions which have implemented the Model Law into their domestic legislation. Accordingly, pursuant to the Model Law (as adopted in the domestic legislation of each jurisdiction, respectively), the concept of COMI may be relevant in connection with the recognition of foreign insolvency proceedings.

FMW Spain SL, FMW France SPRL and Flow Management Work BV are each incorporated in jurisdictions which are subject to the Recast Insolvency Regulation. Accordingly, pursuant to the Recast Insolvency Regulation, it appears that each of FMW Spain SL, FMW France SPRL and Flow Management Work BV may be subject to an insolvency procedure under and in accordance with the laws of the Netherlands.

Accordingly, in the event that the Restructuring Agreement dated 4 July 2015 was to be implemented by way of an insolvency procedure, then the above considerations relating to COMI would need to be considered by the relevant parties. Going forward, if the Flow Management II and its subsidiaries enters, or anticipates entering into, an insolvency procedure, then considerations relating to COMI will likewise arise.

*Equitable subordination*

As part of the Restructuring Agreement, the Working Capital Banks become the shareholders of Flow Management II and its subsidiaries (the “**New Group**”). However, the Restructuring Agreement also provides that a €240m claim against Flow Management Work BV will remain (the **“€240m Loan**”). To the extent that the €240m Loan is guaranteed or secured by other entities within the New Group, then the issue of equitable subordination will need to be considered.

In certain jurisdictions, the concept of equitable subordination may be an issue for creditors which are also shareholders. Broadly, the concept of equitable subordination operates such that, in the event of the insolvency of a company, loans from shareholders will be statutorily subordinated to the claims of other creditors. Additionally, in some jurisdictions, loans repaid to shareholders in a set period prior to the insolvency of the company may also be subject to clawback and subordination.

It appears that the concept of equitable subordination exists under Spanish law. Accordingly, to the extent that FMW Spain SL guarantees the €240m Loan, then the Working Capital Banks may be equitably subordinated to other creditors in respect of the guarantee provided by FMW Spain SL. Further investigations in consultation with Spanish-qualified legal advisers will need to be undertaken to understand if there is a way to minimise or structure around the risk of equitable subordination in Spain.

*Foreign takeover laws*

As mentioned above, the Working Capital Banks become the shareholders of the New Group following the implementation of the Restructuring Agreement. Accordingly, given there will be a change of control in respect of the New Group, it will need to be considered whether any entity within the New Group is subject to foreign takeover laws.

By way of example, Australia, pursuant to the Foreign Acquisitions and Takeovers Act 1975 (Cth) and its related regulations (the “**FATA Regime**”), has a foreign investment approval regime, which, broadly, regulates acquisitions by foreign persons of certain Australian companies, businesses and real property assets. Accordingly, the Working Capital Banks should consider, in consultation with Australian-qualified legal advisers, whether the FATA Regime is applicable in respect of FMW Australia Ltd.

Similar takeover laws may also apply in the other jurisdictions in which member of the New Group are incorporated.

*Potential non-legal cross-border issues*

In the Case Study, it is stated that the Flow Management Group employs over 3,000 people. Further, the New Group operates across six different jurisdictions, being the Netherlands, Spain, France, Australia, South Africa and the United States. Accordingly, restructuring the Flow Management Group requires extensive coordination and cooperation among the relevant parties.

Having been involved in similar cross-border restructurings, I recall that setting up communication structures among all key stakeholders is essential. Such key stakeholders will include (at a minimum) (i) the Chief Restructuring Officer and other management dealing directly with the restructuring (ii) the key contacts from the Working Capital Banks (iii) the key contacts from the shareholder parties (iv) the directors of each subsidiary within the New Group and (v) (if any) the legal and financial advisers of each of the preceding.

In particular, I have observed that it is important to involve the key persons from foreign jurisdictions at any early stage in any restructuring in order to identify and resolve any issues in that jurisdiction in respect of a potential restructuring plan.

**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 as detailed as possible]**

In the Case Study, the moratorium proposed in the October 2014 scenarios (the “**Moratorium**”) was not pursued by the Flow Management Group or the Working Capital Banks due to the circumstances facing the Flow Management Group at the time.

*Moratoriums are generally only available as part of a formal insolvency procedure*

In Singapore, there are (excluding liquidation proceedings for the purposes of this answer) two main procedures for a financially distressed company to obtain a moratorium, being an application (i) for a moratorium under section 64 of the IRDA (a “**s.64 Moratorium**”) or (ii) for judicial management and/or interim judicial management under section 91 and section 94, respectively, of the IRDA (the “**JM/IJM Moratorium**”).

In respect of a s.64 Moratorium, a company will benefit from an automatic moratorium against a broad range of creditor actions upon filing for the s.64 Moratorium. However, it should be noted that a company, when making a s.64 Moratorium, must undertake to the Court to make as soon as possible an application for a scheme of arrangement under section 210(1) of the Company Act or section 71(1) of the IRDA.[[54]](#footnote-54) Accordingly, a s.64 Moratorium will generally only be a viable option for a company if it has a potentially viable restructuring plan to propose to creditors by way of a scheme of arrangement. In other words, the purposes of a s.64 Moratorium is not to simply ‘fend-off’ creditors, rather it is intended to be used in conjunction with a scheme of arrangement.

In the context of the Case Study, it is likely that the Flow Management Group decided against pursuing a moratorium along similar lines to a s.64 Moratorium on the basis that it was seeking to implement a restructuring through an out-of-court workout rather than a formal insolvency procedure.

In respect of a JM/IJM Moratorium, upon entering into judicial management or interim judicial management, the company will obtain a moratorium against a wide range of creditors actions. However, it is relevant to note that a judicial manager or interim judicial manager will be appointed to the company and will displace the authority of the existing directors. Accordingly, a JM/IJM Moratorium may not be desirable for a company that wishes for its existing management to stay in control. There is also the additional costs of the judicial manager and/or interim judicial manager which needs to be taken into account by a company considering a JM/IJM Moratorium.

In the context of the Case Study, it is likely that the Flow Management Group decided against pursuing a moratorium along similar lines to a JM/IJM Moratorium on the basis that the management did not want to be displaced by (and incur the costs of) an external administrator.

*Moratoriums attract publicity*

Upon filing a s.64 Moratorium, a company is required to (i) publish a notice of the s.64 Moratorium in Singapore’s gazette and in at least one English local daily newspaper, and send a copy of the notice published in the Gazette to Singapore’s registrar of companies[[55]](#footnote-55) and (ii) send a notice of the s.64 Moratorium to each creditor meant to be bound by the intended or proposed compromise or arrangement and who is known to the company.[[56]](#footnote-56) Accordingly, making a s.64 Moratorium is a very public process for a company.

Additionally, similar to a s.64 Moratorium, a JM/IJM Moratorium is a public process, with notice of the application for a JM/IJM Moratorium required to be published in Singapore’s gazette and in at least one English local daily newspaper.[[57]](#footnote-57)

In the context of the Case Study, it is likely that the Flow Management Group decided against pursuing a moratorium as it was concerned regarding the potential implications of publicising the financial difficulties facing the Flow Management Group. Such publicity may have resulted in a “*race to collect*”[[58]](#footnote-58) by the general body of creditors and may also have led to counterparties (such as suppliers and customers) becoming unwilling to deal with the Flow Management Group.

*Standstills already in place*

As mentioned in the response to question 5, the Standstill Agreement was in place from August 2014 and, arguably, the De-Facto Standstill had been in place since November 2013.

Accordingly, it appears that the Flow Management Group decided against pursuing a moratorium in October 2014 as it considered that the Standstill Agreement and the De-Facto Standstill offered similar protection for the Flow Management Group without the complications that a formal moratorium would offer (as discussed in relation to the s.64 Moratorium and the JM/IJM Moratorium above).

This approach would align with the commentary to INSOL International’s Second Principle which provides that “*[e]ven in jurisdictions which provide for a statutory pre-insolvency moratorium on creditor claims, there is often still advantage to both creditors and the debtor in adopting an informal or contract-based approach so as to avoid the costs and publicity associated with any formal process.*”[[59]](#footnote-59)

*Conclusion*

Given the situation in October 2014, not calling for a moratorium was the correct approach. This was due to several factors including (i) the desire to implement the restructuring through an out-of-court workout rather than a formal insolvency procedure, (ii) the desire of the management of the Flow Management Group not to be displaced by an external administrator (iii) the benefits of not publicising the restructuring and (iv) the effectiveness of the standstills with the Working Capital Banks at that time.

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