INSOL International™

CASE STUDY I

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[COMPANY NAME] [Company address]

Dear Insol Team,

As element of context, note that I am based in the United Arabs Emirates, where I have been taking part to a number of restructurings, out-of-court, bankruptcy, and turnaround as CFO, CRO (Chief Restructuring Officer) or Advisor.

- 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?

Considering its size with over 3,000 employees and more than 200,000 cars in its fleet, Flow Management appears to be an installed Group of Companies. Those are usually expected to be less subject to failure. Dun and Bradstreet, Inc. in its research[1] demonstrated that more than 50% of all failures occurred in enterprises "aged" between two to five years. After five years of existence businesses tend to be more stable and experienced. However, the Group, large and established, entered a distress situation resulting into a required restructuring. Are the causes of FM situation external and out of the control of its management?

In the case of FM, various exogenous factors could have been the fundamentals bringing into light its financial weaknesses:

- Industry factors, Market Trend[2] : During the first part of the year 2010, the car rental sector has, like most of the rest of the travel industry, gone through a significant change, to a large degree driven by the internet and e-commerce. Some notable shifts included:
    - Growing importance of online brokers and travel agents/ intermediaries as a distribution channel
    - Emergence and growth of value segment
    - Automation of rental process through new, technology driven solutions

  In this case, new technology can be blamed as the next cause of companies' failure as defined by Norton[3] as an environmental factor that destroys demand for old products and services. Uberisation of the industry increased competition and brought down margins.

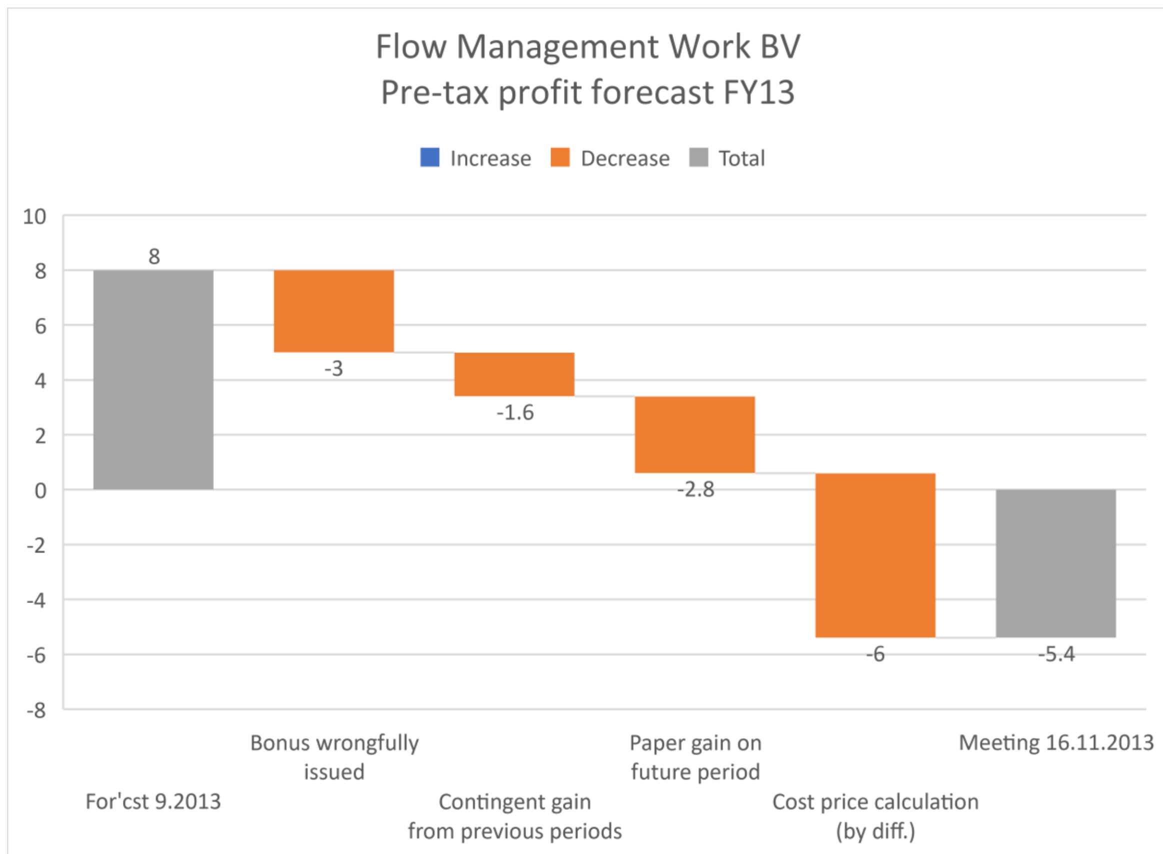
[1] Dun and Bradstreet, inc., Dun & Bradstreet reference book of corporate managements, New York: Dun & Bradstreet, Inc., 1980.

[2] Nedrelid Corporate Advisory, European Car Rental – Market Overview and Structural Perspectives, January 2016

[3] E.C.Norton, "Long-term care," in Handbook of Health Economics, vol. 1, part B, A. J. Culyer and J. P. ewhouse, Eds.Amsterdam: Elsevier, 2000, pp. 955-994.

- Cost of capital and interest rates: As a result of high interest rates, some businesses will find themselves in a situation where they were no longer able to repay their obligations to the bank, interest, or principal. In the case of FM, the period 2012 to 2013 has been a period of significant drop of European Central Bank refinancing rate[4] and accordingly, it is not likely that it impacted materially the cash-flow required for repayment of the financing obligations.
  Various other Environmental factors or Ecological factors could be reviewed to assess the determinants of the failure of Flow Management Group, however, the review of internal factors driven by the organisational factors and the management perceptions brings stronger arguments to the poor state of affairs achieved by the business.

Looking for cause of distress, some look for bad luck or "act of God"[5]. In the case of Flow Management ("FM"), it appears retrospectively that the key drivers to the distress of the business were closer to earth and even within the organisation itself: The below reconciliation between the initial pre-tax forecast of the main operating entity of the Group, Flow Management Work BV ("FMW") to its last forecast presents that each restatements presented the internal causes, deficiencies of the organisation itself:



[4] European Central Bank Eurosystem https://www.ecb.europa.eu/stats/policy_and_exchange_rates/key_ecb_interest_rates/html/index.en.html

[5] R. Charan and J. Useem, Why companies fail. Fortune, May 27, pp. 36-44, 2002.

A number of evidence[6] brings the conclusion that organisation problems mainly related to poor management.

First of all, the inappropriate payment of a Bonus to Management challenges the integrity and ethics of the incumbent management team. This could effectively be considered as a fraud by the Directors and Officers (CEO and CFO of Flow Management Holding BV). The Management, being beneficiaries of those payments present indeed a doubtful ethics. This transaction appears as a violation of the compliance with the fiduciary duty of the directors toward to Company and its shareholders.

Or was the above the demonstration of a Groupthink, referenced by K. Mellahi and A. Wilkinson[7],: the pool of decision maker for the Company remained a small group (the CEO and the CFO) till late in the process. The shareholders have not been engaged in the process till the position get irreversible and requires the demobilisation of the existing team.

The succession of events from the initial situation of November 2013 till April 2014 (when the CEO is replaced by the Board of shareholder) evidenced the five psychodynamic factors which could contribute to organisational failure listed by Brown and Starley (2020):

- a potential denial of the situation with Management having a complete lack of control of the Company reporting and refusing the requirement for new money injection requested by the banks as soon as early December 2013.
- an attempt to rationalize the events through external conditions by assessing a healthy demand and an optimistic potential to raise prices.
- Idealisation and fantasy through impossible goals and delusional strategy: increased revenue and large cutbacks. The Management presented aggressive but unrealistic outlook considering an expected profit from January 2014, when positive net profit is ultimately reached in 2015, with operating losses however...
- The Symbolisation of the situation resided in the Management looking at addressing financial misstatements and accounting errors by increase in prices

Was the organisation facing narcissist leaders as presented by Macoby[8] with exaggerated price and self-confidence?

More that the Management and the C-Suite, the existence, reliability, and strength of the financial information system plays a key role in the ability to take informed decisions and be accordingly able to drive a business.

Several evidence demonstrate the lack of robustness on the information system of the business:

Under circumstances where the Company would have identified the absence of Governance, it could have engaged into the deployment of internal controls throughout its business

[6] See European Federation of Accountants (FEE), "Avoiding Business Failure. A Guide for SMEs"(2004), 7 ff., available at <htt://www.fee.be>. For more supportive evidence in this respect, see Stuart Slatter and David Lovett, Corporate Turnaround, Managing Companies in Distress (Penguin Books, London, 1999), 21 ff.; Henry A. Davis and William W. Sihler, Financial Turnarounds: Preserving Enterprise Value Prentice Hall PTR, Upper Saddle River, NJ, 2002), 27 ff

[7] Kamel Mellahi and Adrian Wilkinson, Organizational failure: a critique of recent research and a proposed integrative framework, International Jounral of Management Reviews Vol. 5/6 Issue 1 pp. 21-41, March 2004.

[8] Macoby, M. (2000). Narcissistic leaders: the incredible pros, the inevitable cons. Harvard Business Review, January-February, 68-78.

processes such as the COSO[9] Framework covering the overall organization to assures shareholders that the Company meets ethical and security standards.

However, as mentioned broadly in the restructuring literature, the absence of proactive remediation conduct businesses to financial distress bringing the requirement for engaging into a restructuring process, may it be formal or out-of-court.

-	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?

Under a financial distressed situation and when a Company going concern or potential insolvency situation is to be confirmed, the Company Management and its extend group of Company stakeholders[10] need to evaluate the best course of action. They should aim at protecting value individually and generally.

Engaging into a bankruptcy process will appear as the “natural” option in mature jurisdictions.

Indeed, bankruptcy processes offer **legal protection**. It provides a legal framework that offers certain protections to the distressed company, including an automatic stay, which temporarily halts creditor collection actions.

Additionally, a formal reorganisation process is **driven by the court**. In most jurisdictions, a bankruptcy court approval ensures that the restructuring plan is binding on all creditors, creating a more uniform treatment of claims.

Finally, the formal court framework provides a structured process with clear rules and timelines, which can lead to a more **predictable outcome**. However, the timelines of bankruptcy proceedings are too often disconnected from the business pace and requirement for agility.

Even if in alignment and compliant with local laws and regulations, formal reorganisation suffers from series of weaknesses pushing principals and lenders toward alternatives.

Primarily, cost and complexity of court driven process: Bankruptcy can be expensive due to legal and administrative costs to engage. It is also a complex process that requires compliance with local court rules and procedures. For example, a study in 2008[11] reported that the direct costs to companies entering Chapter 11 proceedings averaged 6.5% of their total assets. Furthermore, same study explains that Chapter 11 proceedings typically last more than 2 years, which further imply indirect costs during that period as well as opportunity loss and forgone revenue. Bankruptcy proceedings can be lengthy and may disrupt business

[9] The Committee of Sponsoring Organizations of the Treadway Commission (COSO) Internal Control—Integrated Framework, originally issued in 1992 and refreshed in 2013 (ICIF-2013 or Framework) https://www.coso.org/guidance-on-ic

[10] Kalle Pajunen, Stakeholders Influences in Organizational Survival, Journal of Management Studies 43:6 September 2006.

[11] Hotchkiss, Edith S., John Kose, Karin S. Thorburn, Robert Mooradian, “Bankruptcy and the Resolution of Financial Distress,” in: Handbook of Corporate Finance: Empirical Corporate Finance, 2008.

operations and relationships. In case of cross-border situation, this would then further increase estimated costs and timing due to additional complexity.

A Court driven process generally implies the appointment of a trustee or a court representative to oversee the operations and the process. This means accordingly the loss of control by the shareholders as well as by the other "governing stakeholders" and creditors.

Finally, the public disclosure of a formal court driven process can potentially damage a company's reputation and its ability to operate under a financially stress situation, where minutes of proceedings are public, and financial information becomes widely available.

Given that formal court proceedings entail significant legal costs and often protracted negotiations, working out an agreement privately between stakeholders would seem to be a preferred solution in complex and international cases.

Out-of-court restructuring typically progress quicker than formal bankruptcy proceedings. This can help preserve the value of the distressed company and reduce legal and administrative costs. Compared to Chapter 11 direct costs expressed as a percentage of the total assets, out-of-court restructuring costs represented approximately half of the direct costs and are usually completed much quicker.[12] This obviously largely depend on cases, industries, and jurisdictions specifics: Banking and Insurance cases out-of-court proceedings can be as short as two months in the USA! Middle Eastern jurisdictions where bankruptcy law have been promulgated only a few years ago still require prolonged investment in time[13]…

During the process, the company and its stakeholders have greater **control** over the restructuring process in an out-of-court setting. They can negotiate and customize agreements to suit their needs. Incidentally, workouts are typically **private** negotiations, which can help maintain the company's reputation and avoid public scrutiny.

Considering an objective to maintain to operating capacity of the Company for future value creation, **preservation of business relationships** is critical. An out-of-court restructurings may be less disruptive to ongoing business operations and allow for the preservation of critical customer, supplier, and employee relationships.

Yet, out of court restructuring contains risk incumbent to its approach. Undeniably, being multilateral and outside of the judicial supervision, there may be no legal mechanism to compel all creditors to agree to the terms of the restructuring. Non-consenting creditors could potentially disrupt the process. Therefore, workouts may not provide the same level of legal protections as bankruptcy, such as the automatic stay, which temporarily prevents creditors from taking collection actions.

The freedom of negotiation given by the informal process can lead to uneven treatment of creditors: There's a risk that some creditors may receive more favourable treatment than others in a workout, potentially leading to disputes and litigation. Similarly, without court

[12] "The Administrative Costs of Debt Restructurings: Some Recent Evidence," Financial Management, 26(4) pp. 56-58, 1997

[13] The Saudi Arabian Bankruptcy Law was introduced in 2018 and the UAE, 2016… a number of currently on-going transactions in this region are still premiere.

oversight, there may be less transparency and accountability in the restructuring process, which could lead to conflicts of interest or abuses.

However, the fact comparing bankruptcy proceedings in the USA (Chapter 11) against out-of-court reorganisation demonstrate the material value preservation of the informal process: between 2017 and 2013, Chapter 11 generated a GDP loss in input of 1 to 2.3% versus 0.3% for out-of-court negotiations. Similarly, 900,000 to 2.2 million jobs have been lost through bankruptcy while out-of-court cases have led to a maximum of 307,000 jobs loss.[14]

In summary, out-of-courts workouts offer speed, control, and confidentiality, while bankruptcy provides legal protections, a binding process, and a structured framework.

Certainly, Stakeholders facing business distress will have to address the risks and weaknesses associated with the Out-of-Court Restructuring process and use best practice as well as recognized framework to navigate the situation. The "Statement of Principles for a Global Approach to Multi-Creditors Workouts II" provides a companion and a toolkit for workouts with granular guidance on the implementation of restructuring protocols protecting value to stakeholders.

From the United Arabs Emirates, the legal framework has been progressed toward bringing a transparent system to address bankruptcy for individuals and businesses: Federal Law n. 7 was initially issued in 2016 and amended till 2021.

However, the UAE Bankruptcy law remains largely untested and has a limited track record. Accordingly, we experiment that informal restructuring remains generally used with the ability to enter a court-driven process may the out-of-court process trigger material conflict and risk for the promoters or the directors. Entering a court driven process brings ipso facto a protective environment for the business and its internal stakeholders, but unfortunately dissipate significant amount of value for the business' stakeholders.

The specific of the UAE being a federation of 7 emirates, with over 47 various jurisdictions between on-shore, free-zone and off-shore environment trigger potential misunderstanding over the process which still requires clarify as the department of justice, local lenders and professional firms navigate the new legislation.

The recent bankruptcy cases of Marka PJCS or KBBO in the UAE[15] still demonstrates the juvenile status of the law and reveal some of the practical issues of the process. This includes for example publications in Arabic language for international stakeholders. This indirectly promotes the engagement into consensual multilateral restructuring under an out of court process.

[14] Donald Markwardt, Claude Lopez, and Ross DeVol, Milken Institute, The Economic Impact of Chapter 11 Bankruptcy versus Out-of-Court Restructuring, Journal of Applied Corporate Finance – Volume 28-4 Fall 2016

[15] Recent Trends in the United Arab Emirates Bankruptcy Regime, https://www.tamimi.com/law-update-articles/recent-trends-in-the-united-arab-emirates-bankruptcy-regime/

-	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 proposed literature referenced above discuss the informal reorganisation being a consensual restructuring driven by stakeholders and management sharing objective of value preservation compared to a court driven restructuring process or a liquidation: The overall restructuring of Flow Management BV took place outside of a formal statutory framework. On that aspect, the material applies to the case of Flow Management.

The situation of Flow Management BV showcased the stakeholders' dynamics during an information reorganisation. Over the timeline (over 2.5 years), the stakeholders have evolved, and their position changed considering not only the business performance (and the risk associated with debt-holdings) but as well the positioning vis-à-vis an expected long-term alignment of goals:

The misalignment of Banks C,B and A,B Mid-February 2014 significantly reduced the bargaining power of the lenders against the Company and the odds of designed a consensual outcome outside of a court process.

"End of March 2014, mid-April 2014, the general lack of confidence between the group of lenders and the Company triggered the Shareholder to step in with new governance (replacement of the CEO) and injection of new money in the form of a EUR10m unsecured loan."

This specific situation supports several of the propositions from K. Pajunen on *"Stakeholder influences in Organisation survival"*. The injection of additional risk-avoiding capital increases the resources contribution of the shareholder but additionally increased its network position by improving the trust and communication management can leverage with the lenders.

Separately, the informal reorganisation is expecting an execution framework which was not followed through over the FM BV restructuring process.

The research for a strategic plan and operational profitability are presented by the academic literature[16] as a pre-requisite for conducting a financing restructuring: "Distress" and "strategy" may seem as different as night and day, but they form a continuum: getting out of distress requires strategy; conversely, any wise strategy which involve taking calculated risks[17].

However, in the case of FM BV, a conscious strategy might have been superseded by a series of haphazard measures taken to satisfy stakeholder management instead of a focus to value generation.

[16] Adriaanse and Kuijl in the article Resolving Financial Distress from the Review of Central and East European Law 2006, suggest a framework with Business restructuring in 4 phases (Stabilizing, Analysing, Repositioning, Reinforcing) and a Financial restructuring with a panel of options.

[17] H. Peter Nesvold, Jeffrey M. Anapolsky and Alexandra Reed Lajoux (2011). *The Art of Distressed M&A,* 303-304

The case did not present in significant details with regards to the turnaround strategy deployed by the New Management Team including the CRO during the pre-restructuring agreement phase as well as post-restructuring. Generally, initiatives taken including Managerial Restructuring, Operating Restructuring and Asset Restructuring are pre-requisite to Financial Restructuring.

In particular, the initiatives taken by the management team are central ingredients to transform the business and revert to a value generating platform. The integration of retrenchment and recovery activities[18] demonstrate the complexity of the impacts of activities which could be seen as contradictory or conflicting when they jointly contribute to building practical results toward the going-concern value of a business.

Furthermore, the restructuring process could have benefited from an orderly drive of the process.

For instance, the appointment of a Committee and a better steering of the overall process with weekly or monthly meeting could have benefited by:

- Delivering regular, direct information from the Company to the lender: improving the transparency and accordingly the improvement of the trust level between the stakeholders
- Delivering a look ahead with regards to cash-flow forecast and underlying cash-requirements
- Follow-up on demand of each of the parties
- Having Ad Hoc workstreams identified and reported around operational profitability improvement
- Clarifying the overall process timeline
- Ensure representation by the Company Directors to the shareholders and other key stakeholders with regards to their fiduciary duty to the Company with regards to solvency and going concern assessment.

Nevertheless, considering the broken pace of the restructuring, all stakeholders managed to achieve a consensual conclusion through the 2015 Restructuring agreement.

-	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?

Mid-February 2014, Banks C and D are not cooperating. The situation brings a potential deadlock for future support of a out-of-court process at the time when a potential sale of Flow Management Holding BV is envisioned.

The potential rationale from C and D to frustrate the process can be seen as factors directly related to Flow Management BV situation or intrinsic to the bank and bank management itself.

[18] The Duality of Retrenchment and Recovery; A. Schmitt and S. Raisch.

The legal situation with regards to the securities on the assets established at the banks might have generated a reality check for the banks considering a significant erosion of their position, hence banks might have reacted differently with regards to the “dissipation” of this expected security, moving from a secured position to a non-secured position. The disruption of the security package of the 4 banks could push the banks independently to secure their pledge and seek of a “seat in the lifeboat” at the cost of the other lenders.

External Market conditions might have change: increase in interest rates, FX rates (between GBP and EUR) which could trigger a differentiated risk assessment for the bank and accordingly triggering internal policies and procedures. This could result into a requalification of the debt.

The above conditions, inter alia, can impact the consideration and treatment of the debt by the bank:

- Transfer from relationship manager to special asset department: the move might bring department and specialist looking at accelerating the court driven process.
- Requirement for provisioning of the debt to comply with local banking regulations which trigger a more aggressive approach to look at a minimum value scenario

The alteration of the human relationship between the bank and the Company can trigger a significant change in the bank strategy and position vis-à-vis the Company and its co-lenders. This will further crystalize in the case of limited trust with the Company and its financial information as it was the case as of February 2014.

Alternatively, Banks C and D might look at a pain point to maximize their bargaining power either through :

- a kamikaze/bluff strategy: pushing all the other stakeholders including the shareholders to reveal their full intension with regards to financial support of the business
- a back-door strategy: in case Banks C and D are serving other company of the wider group, including the UBO and other Lease Group Holding affiliate, C and D might elect to be difficult not only against Flow Management Holding but as well to other Group entities.

To address the disruption created by the lack of alignment between the lenders, as a banks A and B advisor, I would have suggested:

- Engage into bilateral discussions with bank C and D to rebuild a personal relationship and gain an understand of the position of C and D.
  a. Share documentation and demonstration of the Estimated Outcome under a liquidation process to inform the value destruction by bank B and C in pushing the company toward a potential liquidation. To that effect, I will suggest commissioning an independent accounting firm or Valuation practice to perform a EPM (Entity Priority Model) or EOS (Estimated Outcome Statement) to clarify to all lenders the potential recovery under various scenarios including liquidation and the value destruction to all banks by frustrating the process and entering a court driven restructuring.

b. Suggest their exist through debt trading at a discount (being potentially a premium to the liquidation scenario). This can be a value creation opportunity for bank A and B.

In any case, the situation demonstrates the benefit to all stakeholders to engage in a Restructuring Committee (through the CRO for instance) to serve to the lenders the information and datapoint to support their internal battle and bring them to the table.

In addition, set-up an All-lenders meeting, monthly presentation reporting “per the standards of the bank

-	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)?

From the review of the information provided under the Case of Flow Management, we noted that each of the criteria can be addressed and mapped to the INSOL Principles:

#	Characteristic	Flow Management - Case 1	Takeaways
1	Deferment of payment is voluntarily agreed to (standstill period' by creditors);	Standstill has been signed on June 30th, 2014. The Standstill for a period of 120 days. However, it is to be considered that the lenders have been effecting a de facto standstill since Dec. 2013 when first instalments due were not effected by the Company and the Lenders did not enter into legal proceedings (due to their non-perfected guarantees). This is further expressed when there is an implicit permission from the Bank not to repay the Dec. 2014 instalment	Entering a short-term standstill at the inception of the process (sooner than later) allows the Company to enter into a cool down period and start planning for a long-term restructuring and value protection initiatives instead of remaining into a defensive position.
2	The debtor ensures that the relative positions of the creditors are maintained;	The commercial structuring of the financing facilities provided by Bank A, B, C and D is not described in the case: Syndication, bilateral. However, we understand that all lenders agree to remain pari pasu throughout the process and not try to amend their position or deteriorate the one of other.	We understand as well that the lack of perfection of the guarantees (banks guarantees not foolproof) could impact the collectability of the debt under a liquidation scenario. All parties are better off working on a consensual plan instead of risking a collection substantially lower in the event of liquidation.

3	The debtor refrains from any action that may jeopardize the proceeds for the creditors;	Expected to be part of the terms of the Standstill arrangement, the Lenders have implicitly and jointly agreed to act as a block of financial creditors.	Note that the lack of framework in the restructuring process exposed the Banks to a potential trade creditor which could have called for a bankruptcy, and which could have jeopardized the position of the bank if it was treated as secured under a process.
4	Creditor committees are set up, if so required;	Th appointment of the CRO from April 2014 and the stand of a reporting from June 2014 through the CRO acts as a proxy for a Creditor Committee.	An Ad Hoc Creditor Committee (AHCC) could have been formally set-up from the initial breach of debt instalment to support on-going monitoring of the Companies operation, report to the lenders the use of funds and drive the deployment of a consensual restructuring process out of court.
5	The debtor provides the creditors with relevant information;	Information has been provided by the CFO and then the CRO. Information flow remained erratic	Reporting cadence has been erratic: under presented situation, a monthly reporting pack and performance disclosure session would have been expected
6	Reorganization proposals are made in the light of the applicable law;	The 4th July 2015 Restructuring proposal presents a clear step plan for the actions required to ensure respect of rights and obligation of all parties.	Considering the consensual process, the reorganisation will request a joint approval of all governing stakeholders, which position was previously impaired by the Company either in default of its obligations or requiring an amendment or change of its engagements. A remedial or moratorium period might be requested by the Company from its stakeholders.
7	The parties treat all information confidentially;	Throughout the distress position of the Group vis-à-vis its financial creditors, the Company has been able to continue its operations and operate as a going concern. As such, we can assume that the confidentially of the process was protected or that the information around the process did not impact the relationship of the Company with its trade partners	Note that even under the required confidentiality, the Company and its Directors need to keep a strong focus is respecting their fiduciary duties (including disclosure to the shareholders, prevent insolvent trading)

		(Customers and trade creditors).	
8	New financing during the process will be given priority status.	After the signature of the Standstill agreement between the Company and its lenders, new money has been contributed by the Shareholder. Part of this money was subsequently repay for E25m in Jan 2015, hence priority for repayment was provided for the New Money.	Note that the New Money treatment can be secured: - during the process : throughout the informal reorganisation process (from the initiation of a standstill or joint-agreement to engage into a consensual restructuring) till the restructuring completion date: by remediation in full of the Company breach and default or by the implementation of a restructuring plan. - post restructuring, bringing a new layer of capital to support operations post-restructuring.

- 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?

In the realm of distressed organizations, it is often said that 'the pursuit of perfection can hinder progress.' Given the multifaceted array of factors and stakeholders demanding attention, organizations facing financial distress may opt for an informal approach. While this approach may not shield them from potential escalation into a court-driven proceeding, it is undertaken with a clear intent—to safeguard the inherent value of the business, foremost for its creditors.

In the event of unfruitful attempts to secure a Statements of Principles agreement with creditors, the company should undoubtedly explore alternative avenues:

- **Implementation of a De Facto Standstill:** The company may consider operating under a de facto standstill and unilaterally notifying its lenders of the necessity to defer their obligations, with the aim of fulfilling them as soon as financially feasible. This approach, known as 'clause de retour à meilleure fortune' in jurisdictions like France and Switzerland, can be pursued effectively through the following proactive measures:

  a. Providing transparent and comprehensive financial and operational reports to lenders.
  b. Demonstrating tangible operational improvements.
  c. Establishing a robust legal defence framework to address lender objections.

By engaging lenders in this manner, the company can navigate its short-term distress and convey the advantages of maintaining the status quo over resorting to active execution or attachment. It is crucial for the company's directors to secure shareholder approval for this

approach and to maintain vigilant oversight of Directors' and Officers' responsibilities to prevent potential legal or criminal repercussions related to insolvent trading.

- **Formation of a Joint Governance Scheme in Collaboration with Creditors**: Another viable strategy involves establishing a coordinated governance structure in collaboration with creditors. This includes:
  a. Creation of a coordination committee comprising representatives from both the company and its creditors.
  b. Appointment of professional advisors, including a Chief Restructuring Officer (CRO) who may assume a fiduciary duty to the lenders.

  Alternatively, the involvement of financial supervisors[19] or independent mediators can help create an environment conducive to negotiations among all parties involved

Under the UAE Bankruptcy Law (Federal Law No. 9/2016), there are three distinct types of proceedings available:

- **Preventive Composition:** This debtor-initiated process serves as a crucial tool for businesses facing financial challenges. It empowers the company to proactively address its indebtedness, providing a protective shield against immediate creditor actions.

- **Formal Restructuring under Bankruptcy:** While offering a structured framework, formal restructuring under bankruptcy can be more complex. In cases where creditors exert pressure for preferential treatment of certain debts, this process provides a degree of protection to the company. However, it may also introduce a level of complexity that, if mishandled, can exacerbate the company's financial distress.

- **Insolvent Liquidation under Bankruptcy:** This option is typically the last resort, resulting in the dissolution of the company. It is invoked when the financial situation has deteriorated to an irreversible point, necessitating the sale of assets to satisfy outstanding obligations.

In the situations of FM BV, the preventive composition process, as an initiative from the debtor, serves as a crucial tool for safeguarding the business against immediate financial challenges. However, formal restructuring under bankruptcy, although offering protection, should be approached cautiously, as it can potentially trigger a chain reaction, moving the company from distress to liquidation.

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

The impact of the July 2015 restructuring agreement should be explained by first understanding the Governance and Financial restructuring enacted by the agreement. Secondly, highlight the requirements to engage into this option in term of optionality for a

[19] Jose M. Garrido, Out-of-Court Det Restructuring, A World Bank Study, 2012

restructuring versus a liquidation and the requirement to reach a secured going concern position.

The essence and the result of the restructuring agreement should factor the impacts as well for the incumbent and new shareholders of the business. Finally, a look at the success factors of the plan and the drivers to complete the recovery of the business post the signed restructuring should highlight the remaining path and journey for the Flow Management II.

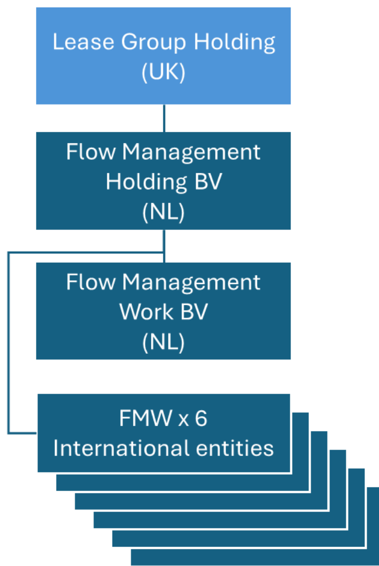
Overall, the restructuring plan achieves the following:

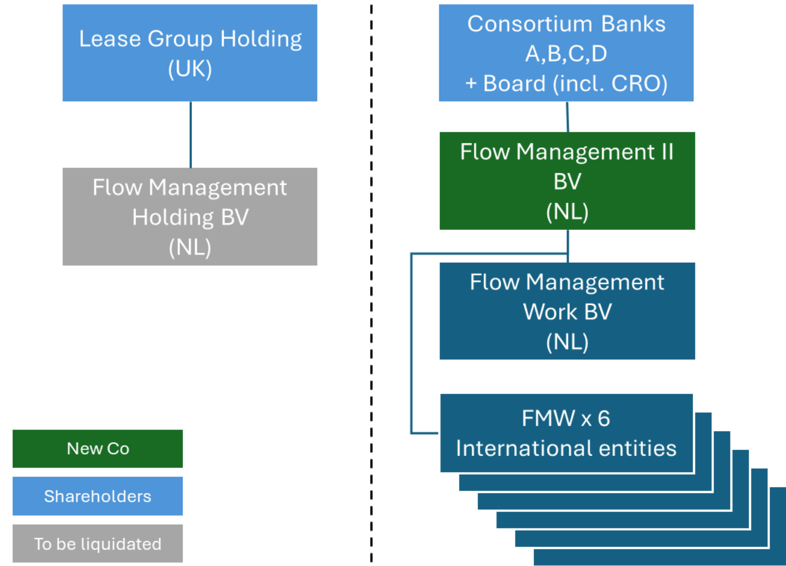
- **Governance restructuring:**
  a. 100% of the Group is transferred to the banks and selected New Directors
  b. Clean break and separation of the previous holdings and shareholders
  c. A new Holding structure, free of legacy and contingent liabilities owns and control the Group to ease potential future M&A transaction,
- **Financial restructuring:**
  a. Waiving any advances and loans provided at the Holding level
  b. Resizing the operating Company (Flow Management Work BV) debt to a sustainable level by writing off and waiving a total of EUR185m
  c. The remaining financial debt for Flow Management Work BV amounts to EUR240m under consortium claim having pledges on most assets. The claim is crystalized as repayable on liquidation, and accordingly does not impact the Business operating Free Cash-flow.

The reshaped indebtedness of the Group should bring the focus on operational performance and Enterprise value for a potential sale.

In essence, the restructuring agreement represents a Debt-to-equity swap which will ensure alignment of the interest of the debt holders and the shareholders being the same institutions with the support of an incentivized Board of Directors (including CRO) to ensure enterprise value optimisation.

Pre-Restructuring vs. Post-Restructuring Flow Management Holding BV Structure





The condition to effect the restructuring includes the assessment of the upside of the restructuring scenario compared with the liquidation ("No Worse Off Test"), the ability to continue to operate as a Going Concern, i.e.. the Company can continue to trade

No Worse Off Test

The Restructuring Agreement presents an analysis (page 6, last paragraph) and produce a comparison of the recoveries for the key stakeholders under the restructuring plan versus in case of a liquidation scenario.

The purpose of this exercise is to confirm that the creditors who are affected by the restructuring plan shall not receive less pursuant to the terms of the restructuring agreement than they would have received if FMW had been placed into liquidation (the "No Worse Off Test"). Even if outside of a court led process, it is relevant to satisfy the No Worse Off Test to protect the restructuring from potential claw back or the agreement to be see as a voidable transaction in a subsequent potential court process.

Going Concern position

Through the impact of the restructuring implementation, Flow Management II Group significantly reduced its indebtedness and strengthened its equity position supporting a going concern position, meaning "the entity is viewed as continuing in business for the foreseeable future"[20] per the Internal Standards of Auditing (ISA 570, Going Concern). This required the Company being financially stage enough to continue operating, which the Restructuring Agreement provides.

[20] The term 'foreseeable future' is not defined within ISA 570, but IAS 1, Presentation of Financial Statements deems the foreseeable future to be a period of at lease 12 months from the end of the reporting period.

For the Stakeholders

The key impact of the restructuring is for the banks A, B, C and D is the on the one side, the resizing of their debt through a material reduction of the face value of its debt stack against Flow Management Work BV by €152.5m, might means a de facto write off the debt value in the books of the banks by 63%[21]. On the other side, A, B, C and D become shareholders of Flow Management Work BV and other International entities through its SPV (Flow Management II BV). It brings elements of **control and financial benefit** against the value of the assets.

First with regards to Control, the Lenders have the voting rights to take decisions for the business: there is no more independence of the management or misalignment of interest between the Company the Lenders.

Secondly, the New Board of Directors controlled by the Lenders will ensure value generation toward through protection of the restructured debt and enterprise value build-up for potential realisation through a M&A. The economic interest attached to the shared of the Company will flow to the shareholders in the case of organic upstream (dividends) or exit in a sale of the Flow Management II BV.

Separately, the Shareholders are deprived from the ownership of their operating assets (FMW BV and the international subsidiaries) but are released from their obligations toward the business and its creditors. A “clean break” between the business and its Shareholders will still require the performance of an orderly wind-down of the remaining legal structure of Flow Management Holding BV. Nevertheless, this is expected to be an out of court process without risk of contagion to the rest of the Group, Lease Group Holding and its subsidiaries.

FMH restructuring epilogue: From Restructuring to Recovery

A year after the sign-off and execution of the restructuring agreement, business conditions of Flow Management II remain uncertain: the business operations generated loses but net profit came out positive. This presume that assets monetization, potentially though divestment of subsidiaries, selected business lines or tangible or intangible assets.

This emphasize that Company management needs to demonstrate its ability to generate profit from operations. It will be critical to support a valuation and deter potential investor that there is more value into a liquidation than in a going concern transaction for acquirers.

The convalescence period is required for businesses to recover from a financial distress.

As concluded by S. Sudarsanam and J. Lai in their research paper *Corporate Financial Distress and Turnaround Strategies: An Empirical Analysis*, “The analysis of the time pattern of restructuring activities by distressed firms suggests that they should be examined over time”. In the case of FMW, even if the period covered includes from the inception phase of the restructuring in November 2013 to the signature of a Restructuring agreement in January

[21] Working Capital of €360m + other Loans of €55m, against a waiver of €97.5m on the Working Capital facility and cancellation of the full €55m, hence 63% write-off or reduction at 37 cents per Euro.

2015, a span of 15 months, it does not contemplate the full recovery progress and aftermath of the restructuring initiatives engaged. Indeed, the consensual restructuring process reached the completion of a financial restructuring by a material reduction of the debt against the business, and a managerial restructuring by a change in Management (CRO and New Board of Directors) as well as a change in shareholding (transfer of the business to a lenders-controlled vehicle). However, several costs cutting initiatives and divestments were presented throughout the process, but a new operating model and strategical plan needs to be proposed and implemented toward value creation for the business.

The latest insight regarding performance as of May 2016 highlight that the journey is not yet completed and still need attention to protect the continuity of Flow Management II going forward.

However, research demonstrate that Company which went through a restructuring process are better equipped than other. A 2014 research paper[22] for example compares PE-Buyouts and other listed PLCs in the UK after the 2007 Crisis. This is to be considered as a proxy for entities which went through a out-of-court restructuring. The article finds out that Companies which went through a PE Buyouts:

- Presents a greater adjusted working capital structure over time
- has a mobilized and equity incentivized management team
- are led by experienced management as well as shareholders are driving a focus toward value protection and generation
- embrace stronger governance mechanisms

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

Based on the information collected with regards to Flow Management restructuring and with reference to the shareholding organisational chart for the Group, a restructuring transaction involving cross-border operations can be complex and often give rise to various legal issues and non-legal issues:

Considering the company has operations or assets in multiple countries, determining which jurisdiction's laws apply to the restructuring can be challenging. Conflict of laws and choice of law issues may need to be addressed by legal advisors.

In addition, the cross-border aspect of the restructuring covering legal entities in various jurisdictions would materially impact the structuring, documentation and satisfaction of the security interests or liens constructed under the restructuring terms. It will be further on those assets can be complicated when assets are spread across borders. Similarly, ensuring that contracts with international parties are properly addressed in the restructuring, including their enforceability and any applicable jurisdictional issues, is essential.

[22] Mike Wright, Robert Cressy, Nick Wilson & Hisham Farag (2014) **Financial restructuring and recovery in private equity buyouts: the UK evidence**, Venture Capital, 16:2, 109-129

Last not but least, the cultural and language differences can play a significant impact and friction during the implementation of the Flow Management Restructuring process.

From personal experience, deployment of restructuring in the Netherlands requires translation of the documentation in Dutch to ensure enforceability. This requires mobilisation of resources and impacts the timeline. More than translation, effective communication and understanding of cultural and language differences among stakeholders in various jurisdictions are essential to successful cross-border restructurings.

Legal and Tax with regards to the Shareholder related transactions (Netherlands - UK)

The parent, direct shareholder of Flow Management Holding BV is Lease Group Holdings UK. Hence the treatment of the advances of the shareholder could attract legal and fiscal risks to the transactions. For example, the taxation with regards to the treatment of funding and any write-off of debt or shareholder advances to the various entities of the Group: a write-off of shareholder advance might be considered as a taxable income resulting in taxation at the legal entity level.

The applicable law with regards to the financing documents for FMW is to be considered as part of the process and in any case as part of the April 2015 restructuring plan.

Regulatory requirements: Lender's provisioning requirements:

The jurisdiction of the Banks A, B, C and D has not been identified, however, the required provisioning of the Non-Performing Loans on the books of the banks could require assessment and to be addressed by each of the financial institutions. Depending on the jurisdictions, regulatory approvals may be required for certain aspects of the restructuring of the bank debts and the same might apply to regulatory ratios applicable.

Recognition of Foreign Proceedings:

If the restructuring involves insolvency proceedings, ensuring that the proceedings in one jurisdiction are recognized and enforced in another can be a significant challenge. This often requires compliance with international treaties or agreements, such as the UNCITRAL Model Law on Cross-Border Insolvency.

- 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]

As of October 2014, the Company is still under the 120 days standstill agreement which protect the Company from legal proceedings from its creditors and protect the relative position of each creditor. This will bring the Company to Dec 2014 when the Company is expected to settle EUR35m to its Lenders.

Entering a moratorium in October 2014 could provide some breathing room for the Company to address its current situation by deferring the December payment. However, it should be envisioned with a going concern of the Company and the ability to resume payment of its debt in the foresee future.

The actual suggested term *"The proposed moratorium envisions resuming payments at liquidation or those sale of the Company"* conflict the principle of a moratorium.

From a shareholder's perspective, this proposition makes sense for the Shareholders to have the opportunity to preserve their position and potentially prepare for an orderly liquidation.

From a lender perspective, a moratorium without protection could potentially result in dissipation of the assets and lack of control on the Company's operation.

From a potential acquirer perspective, there is limited interest in entering in a transaction on a verge of liquidation when it could be expected to purchase the business at liquidation value instead of going concern value.

There is no alignment of interests between the parties: between the shareholder (considering that de facto his investment is at a loss and having no prospect of recovery) and the lender leaving the control of the company and prospective asset sales with the Company when having to provide additional deferral.

In this situation, the lenders will have all interest to take control of the holding to drive and look at maximizing the value generation for the orderly sale of the business. Hence, this appears to materialize through the effective "debt to equity swap" under the 4 July 2015 restructuring plan.

Based on the above, the Moratorium approach makes limited sense for the stakeholders.

Secondly, the proposed option encompasses a liquidation process, if no sale, which means entering the premises and security provided by a court driven assessment and liquidation. As previously detailed, a court driven bankruptcy will provide :

Legal protection for the Directors and potentially the Shareholders of FMH. In addition, the Bankruptcy process will provide a stay on existing obligations of the Company which can ipso facto defer any of its payment to the Lenders A,B,C,D.

Considering the recent misalignment between C, B and A,B, the court driven bankruptcy will ensure uniform treatment of all parties and their claim.

Accordingly, the Moratorium option results in accelerating the start of a bankruptcy process where the court will provide additional security and comfort to all stakeholders.