# 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?

*Limitations of the analysis*

* 1. Before addressing the question, one must admit that we do not know much about the factors that are ‘external’ to the FMV-branded companies (the “**Group**”) which would allow us to assess the causes of financial distress from Industrial Organization / Organizational Ecology perspective. Indeed, little is known about the performance of the industry as a whole. For instance, it may be possible that the other companies in the same industry faced the same external challenges, such as regulatory pressure or emergence of new, more technologically advanced competitors (say, car sharing companies). Similarly, we only have to guess what the Group’s ecosystem looks like, how dense it is, what it’s life cycle looks like, and so on.
  2. In fact, it is not impossible that other companies in the same industry have performed even more poorly than the Group. In that case, one might argue that the Group has outperformed the market and should be considered ‘lucky’ to strike, what appears to be, a balanced deal with the creditors.
  3. That conclusion, of course, would require making a lot of assumptions for which there is no support in the brief. For this reason, I will seek to try to reach a preliminary conclusion on the basis of what is known to us. To do so, I will discuss the actions of the three groups of key stakeholders, i.e. the management, the shareholders and the creditors.

*Management*

* 1. At first glance, this seems to be a clear case of failure in the Group’s leadership. Indeed, there are many ways in which the management’s performance has not been exactly stellar:
     1. The most obvious example are the numerous failures in financial reporting of the Group’s performance. The management has continuously failed both at (i) accurately recording the results of the previous periods and indeed (ii) predicting the results of the forthcoming ones.
     2. More importantly, none of this was merely a result of poor accounting practices. While the ‘formula error’ in the spreadsheet might be an honest mistake (although, honest or not, it caused a EUR 13.4 discrepancy in the financial results for the year 2013), it is only a symptom of a more fundamental failure on the part of the directors. For instance, we know that the management continuously failed to check the real costs against the results of the cost price calculations, which had led to their failure to increase prices when due.
     3. Further and in any event, it is hard to accept that the problems in the Group’s business only transpired in late 2013, when the group started is discussions with the creditors. One would have thought that the management should have ‘seen it coming’ at least during the year 2012, if not before. It is not impossible that the calculation errors were in fact made on purpose, in order to hide the true position from the creditors and/or the shareholders, although that would be a speculation on my part.
     4. The last observation is particularly relevant when it comes to management bonuses for the year 2012. One could argue that the directors must have had a clear incentive to misreport the Group’s financial performance for their own gain, i.e. in order to be able to receive the bonuses before the Group runs into trouble with the creditors.
  2. All that said, if it were purely a management issue, one would have expected the Group to start doing better when the CEO and CFO were removed and the creditors ‘stepped in’ by way of appointing a CRO of their own choosing. Has it started doing better? Hard to say. The fact pattern does mention the “slight result improvement” under new management as of August 2014 but the actual results for the year 2014 (and then for the year 2015) came out poorer than expected. One should also examine the other key groups involved, i.e. the shareholders and the creditors.

*Shareholders*

* 1. The fact sheet reads that the Group is owned by the Jonson family, notwithstanding that the latter only holds a 30% stake in the business, with the other two shareholders – LLS Private Equity Fund Ltd and Cinderella Investment Ltd (“**Other Shareholders**”) – holding 40% and 30% respectively. What this could mean is that, despite Jonson family being a minority stakeholder, they have operational control over the Group while the Other Shareholders are only hold a stake in the business but take not part in running it on a daily basis. If this were right, then the management failures discussed above might in effect be failures of the various members of the Johnson family who held the respective offices.
  2. Be it as it may, there is a number of ways one could criticise the ultimate shareholders of the Group:
     1. Whether the Johnson family members held the respective offices or not, the shareholders as a class are responsible for appointing the management whose performance was suboptimal. It is not impossible that the shareholders were kept in the dark in the same way the creditors (apparently) were but, as explained, the problems of the business appear to run much deeper than mere failure to conduct proper accounting.
     2. That is not to say that the wrong decisions could have been taken by the management only. Even though the shareholders would not, normally, run the business on a day to day basis, they would be still be taking all of the key decisions. Were there any mistakes in those decisions? Again, not entirely clear. One issue that comes to mind is the fact that the wider business owned by Lease Group Holding United Kingdom Ltd appears to have been involved – aside from short leasing – in truck repairs and *real estate*. One might argue that this wider business is, in fact, too wide and that this may have contributed to the problems that the Group has faced. This is a possibility even though there is no support for this conclusion in the brief (and, in fact, the Group is – from a corporate standpoint – sufficiently separated from the wider business to make sure that there is no knock-on effect).
     3. Further, it would seem that the shareholders were not entirely quick to take measures aimed to preserving the financial stability of the Group, including by way of injecting liquidity into the Group in one way or another. One could say that this was a strategical move in order to force all of the creditors into signing a standstill. On reflection, this could also be the result of there being not one ‘shareholder’ but, in fact, a group of three, each bearing a different level of responsibility for what has happened. In any event, one would expect the shareholders to take a more active role once the financial indicators go south that dramatically.
     4. One could also speculate about that this matter represents a good case study for the *Upper Echelon* or indeed *Threat Rigidity* theories. The latter in particular might explain why the shareholders were slow to react to the Group’s financial troubles. However, we do not have enough insight into the thinking of the shareholders (nor indeed the management) to come to a firm view on this point.
  3. Could the shareholders have done better? The answer is ‘probably yes’. But are they the source of the problem? To that, the answer is ‘probably no’.

*Creditors*

* 1. Finally, the analysis would be incomplete if one were to focus only on the ‘insiders’ and ignore those who had a significant influence on the Group from the outside, i.e. the creditors. At first glance, one might brush off any criticism levelled at the creditors on the basis that they were only made aware of the Group’s financial problems when it was too late. This, however, will overlook the fact that a major creditor (like A, B, C and D) would normally be expected to take more active approach in overseeing the debtors’ performance and making sure that its financial statements reflect the true picture. Even though there is a room for speculating that the management may have acted fraudulently towards the creditors, but – judging from how the Group engaged with the creditors when the financial difficulties transpired – it would seem more likely that Group was run poorly but not necessarily with intent to defraud.
  2. One could also argue that the creditors have not exactly helped the restructuring process when they initially failed to reach a standstill which, in turn, would have allowed the shareholders to increase the Group’s financial stability.
  3. In any event, the creditors did sign off on a number of business restructuring options which we ran throughout the years 2014 and 2015 so it would not be right to completely absolve them from any responsibility for the Group’s distress as from the moment they got involved.

*Conclusion*

* 1. This is likely a case of failure on multiple levels. While the management has been less than perfect, it would seem that so were the other key players.
  2. The bigger question is what happened outside the perimeters of the Group, i.e. in the industry as a whole. This gets us back to where we started. While it is possible that all of the losses for years 2012 to 2015 were attributable *solely* to internal causes, this would not seem to be the most likely scenario. One could speculate that there must have been an industry-wide crisis or disruption which would justify such a significant downturn.
  3. The latter point is what makes it so difficult to assess whether the financial distress could have been prevented. To be more specific:
     1. To the extent the distress was fully (or largely) attributable to the ‘internal’ factors, one may come up with a significant number of proposed improvements to the business. These would include, first and foremost, strengthening corporate governance and financial reporting. This could be achieved in a number of ways, starting from involvement of independent members of the board (who would have a fresh look at the Group’s prospects and strategy) to conducting regular independent inquiries into the Group’s business (be it on behalf of the shareholders or the creditors) and verifying the financial statements. Changes would also need to be made to the substance of how the business is run because proper reporting would only help identify the problem early on but would not prevent it completely. These substantive changes will be addressed in the answer to Question 3.
     2. On the other hand, if the distress had been caused by strong outside factors, such a crisis in the industry as a whole, then it is not impossible that the financial downturn was only a matter of time. Even in that case, however, the measures mentioned previously would have helped mitigate losses that all of the key players have suffered.

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

* 1. The advantages of an out-of-court restructuring could be summarized as follows:
     1. The owners of the business remain in control (even if subject to increased oversight by the creditors);
     2. The restructuring process is normally confidential: this allows the company to avoid the negative effect of any formal procedures (such as decrease of the perceived value of the business in the eyes of potential buyers or the risk of triggering cross-default on its obligations to the lenders);
     3. The restructuring arrangements can be tailored towards the needs of the key stakeholders (subject to the risk of being challenged by other creditors, if they have been left out);
     4. Financial institutions would not be required to allocate additional reserves towards the claims against the debtor (which may be an important factor for banks but less so for non-institutional creditors);
     5. For international businesses, informal procedures may mean that the restructuring process would not require cross-border court assistance which is not always easy to secure in insolvency context.
  2. However, the workouts are not without their own disadvantages:
     1. They are premised on trust among the creditors (until and unless they sign a binding standstill). It only takes one creditor to take enforcement steps and all of them may need to rush to the court in order to preserve their position;
     2. Unless each and every creditor participates, it is not possible to bind all of the creditors as a class. This means that ‘hold outs’ may find themselves in a better position than those creditors who take part in the restructuring process in good faith;
     3. Because there is no formal oversight from a court appointed insolvency practitioner, there is an inherent risk of the shareholders / managers of the debtor to dissipate its assets or otherwise make it judgment-proof;
     4. Similarly, disclosure obligations on the debtor are contract based and do not carry any administrative (or indeed criminal) sanctions.

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

* 1. The short answer to this is that the Group has employed most of the approaches presented in the reading material. It would have been odd for the new management to deviate from established practices of turnaround / restructuring and try to invent something of their own. For ease of reference, I will stick to the classification of approaches used by Sudi Sudarsanam and Jim Lai (that is, division of the restructuring steps into operational, asset, managerial and financial strategies) but will seek to add input offered in the other reading material where relevant.

*Managerial restructuring*

* 1. I start with managerial strategies even though the key stakeholders were not quick to remove the previous management from their offics. I do this on purpose because the whole process started with changes in the communication between the management and the other stakeholders (most notably, the creditors).
  2. Even though I have criticized the management for *what* they communicated to the creditors, I believe that *how* they communicated was also important. It appears to me that the management was quite forthcoming in their communications with the creditors. One might say that they had no other choice since the Group was starting to experience liquidity problems. It could also be said that the hard message should have come earlier to allow all the stakeholders more time to come to the right decision. While all of this may be right, I believe that coming forward and raising concerns about the Group’s financial prospects was one of the first right steps taken by the management.
  3. I tend to agree with *Kalle Pajunen* who attributes significant value to the quality of communications between the management and the governing stakeholders. It appears that, throughout the restructuring process, the management did their best to ensure that the stakeholders were made aware of the ongoing crisis. Interestingly, the management was quick to admit that the management bonuses were issued wrongfully (something you would not hear from the management very often). They were also first to admit the ‘formula error’ even though others in their position could have sought to find other justifications. It is true that the financial predictions coming from the management were often wrong but there is not much basis to suggest that they were wrong on purpose.
  4. None of that prevented key members of the management from being replaced. This was the case for the CEO and (apparently) for the CFO. Changes in the management are indeed commonplace among companies that find themselves in financial distress. One might wonder, though, why the management shake up only concerned the C-level executives and not the middle management, particularly at the level of various foreign subsidiaries of the Group.
  5. Another major feature of the managerial strategies was appointment of (multiple) third party consultants. Those included (i) the accountancy firm which was hired to investigate the procedures within the Group; (ii) the Chief Restructuring Officer whom the creditors appointed to the Board and (iii) a certain turnaround consultancy agency. On the latter, *Jan Adriaanse* and *Hans Kuijl* advocate particularly strongly for appointment of such a consultant.
  6. It is not entirely clear from the brief how much value the said consultants have added, other than that their preliminary report concluded that the Group was viable at the relevant time. We do not know what their substantive advice or indeed final report were but, at the very least, their preliminary position was not disproved by the subsequent events. In any event, appointment of turnaround consultants does appear to be a step in the right direction given that the previous management could well have suffered from the threat rigidity effect.
  7. This concludes the part dealing with managerial strategies. All in all, the stakeholders seem to have adopted the traditional approaches to management change and strengthening of communication which should have helped the turnaround process.

*Operational restructuring*

* 1. The Group employed a number of steps which *Sudi Sudarsanam* and *Jim Lai* would summarize as the “*efficiency / operating turnaround strategy stage*”. For instance, the following measures aimed at stabilizing operations and restoring profitability took place:
     1. The prices were increased (in some cases, following consultations with clients and in some cases after a mere notice);

Rising prices is intuitively attractive for any business which finds itself in the position of the Group. One could argue that increasing prices could only lead to losing the market share and, consequently, shrinking of the Group’s turnaround and profits. It is hard to say whether this is what lead to the Group’s failure to meet the expectations for the years 2014 and 2015 but it could well be one of the contributing factors. Without knowing the position of the industry as a whole (i.e. how did the Group’s new pricing structure compared to that of its competitors) we can only speculate whether this was the right step.

* + 1. The employee-related costs were reduced (on the basis that 130 staff members were made redundant).

In the short term, this is what one would expect the management to do in order to give the Group a bit of a breathing space. The question is whether – with the reduced staff – the Group remained sufficiently flexible in case it needed to expand its business in the future.

* + 1. Other cost-saving measures included improved loss recovery and savings on car repairs.

It is hard to make a good argument against things like improved loss recovery and other extra savings. The only problem is that these measures by themselves rarely lead to financial recovery.

* 1. All of these steps being helpful to various degrees, one might wonder how much the Group did in order to reshape its business in the long term (or, to use another quote from *Sudi Sudarsanam* and *Jim Lai*, whether it reached the “*entrepreneurial / strategic stage*”). The brief reads that the key stakeholders planned to evaluate and reassess the entire business mix of the Group, so one could argue that the Group made some steps in this direction.
  2. The issue is that we do not know much about the substantive measures which were taken following such reassessment. Did the Group refocus its offering to the clients? Or try to attract new customers (something that clearly worked well for *Kymi Corporation* according to *Kalle Pajunen*)? It is a bit hard to say.
  3. Of course, one needs to know the relevant industry sector well before giving advice to transform or reposition the business. It may well be that in the Group’s specific circumstances, it was impossible or indeed unadvisable.
  4. That being said, if one views the operational strategies adopted by the Group from the perspective of retrenchment / recovery duality (as discussed in detail by *Achim Schmitt* and *Sebastian Raisch* in their article), it would seem that the key stakeholders have preferred to stick with the former approach.

*Asset restructuring*

* 1. Similarly, when it came to asset restricting, the Group appears to have been leaning towards the more conservative approach of asset divestment instead a more forward-looking approach of asset investment:
     1. On the one hand, asset divestment has been on the table from the very outset of the discussions with the creditors. Further, the plan was to sell some of the foreign subsidiaries (although it is unclear whether this was actioned upon since the brief reads that “all” operating companies were ultimately transferred to Flow Management II BV).
     2. On the other hand, there does not appear to have been much of discussion around asset investment steps. Again, this may be for very valid reasons. Someone has to pay for such investments and the creditors may well be slow to ‘*throw good money after bad’*, particularly in circumstances where the shareholders are not quick to lend financial assistance.

*Financial restructuring*

* 1. Here, the stakeholders employed both equity-based and debt-based strategies, with a particular emphasis on the latter. Specifically:
     1. As one would expect, the creditors had to accept a very significant ‘haircut’ of the main debt. It is a bit unclear what happened with the default interest which they sought to charge during the restructuring process but one would normally expect such claims to be waived in the entirety.
     2. The shareholders, on the other hand, had to make a not insignificant cash injection into the Group, even if by way of an unsecured loan. We do not know much about the Group’s dividend strategy during the turnaround process, but one could reasonably assume that no dividends had been paid during that time.

*Conclusion*

* 1. Ultimately, it looks like all of the key stakeholders preferred to err on the side of caution: the majority of turnaround steps were aimed at preserving the business of the Group and maintain the status quo until there is a better plan. In the end, the ‘better plan’ appears to be a transfer of the Group’s key operating assets to a new company with a view to sell it to a third party buyer. One might say that this – in and of itself – is a significant transformation of the business, although I would probably argue that the business itself remained largely unchanged, even if the corporate structure was now different.

# 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?

* 1. There is a number of ways to explain the position of C and D:
     1. The most likely explanation is that they wanted to keep the pressure on the debtor so that the latter does not get the comfort of a binding standstill agreement too easily. As discussed above, such an approach is not without its own downside (e.g. the shareholders would be slow to provide any liquidity injections until a formal standstill has been reached with all creditors).
     2. Another possibility is that they sought to be as difficult as possible in order to force one of the key stakeholders (be it the shareholders of the Group or banks A and B) to buy them out in order to streamline the restructuring process. Indeed, the buy-out of C and D was contemplated by the other major creditors.
     3. Further, it may be that creditors C and D could be more affected by the deficiencies of the pledges over the Group assets. It is not impossible that they were trying to buy more time to rectify the pledge before they enter into agreement which might require them to refrain from such steps going forward.
     4. Finally, one should not discount the psychological side of things. We know from the brief that creditors C and D had a particular distrust towards the management of the Group (and perhaps its shareholders). One would be slow to enter into a binding standstill against this background.
  2. As an advisor to banks A and B, I would say that buying C and D out is one of the options (as long as the discount on their claims is attractive enough). Another potential strategy is to beat them at their own game and be the first to initiate formal procedures once they start cease settlement discussions.

# 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)?

* 1. In summary, most of the Principles have been followed in one way or the other, either explicitly or, at least, implicitly. Because the information provided in the brief is limited, it is difficult to assess application of every single Principle.
     1. **FIRST PRINCIPLE:** *Where a debtor is found to be in financial difficulties, all relevant creditors should be prepared to co-operate with each other to give sufficient (though limited) time (a “Standstill Period”) to the debtor for information about the debtor to be obtained and evaluated and for proposals for resolving the debtor’s financial difficulties to be formulated and assessed, unless such a course is inappropriate in a particular case.*

Comment: I would have thought that the creditors have been patient in order to allow the Group sufficient time in order to come up with proposals on the way forward. While the whole process was not without tensions between various creditor groups (A&B versus C&D), it can hardly be said that the creditors have failed to cooperate with one another. This is evidenced, among other things, by the fact that the creditors managed to reach an agreement covering all of them (or, at least, all of A, B, C and D).

* + 1. **SECOND PRINCIPLE:** *During the Standstill Period, all relevant creditors should agree to refrain from taking any steps to enforce their claims against or (otherwise than by disposal of their debt to a third party) to reduce their exposure to the debtor but are entitled to expect that during the Standstill Period their position relative to other creditors and each other will not be prejudiced. Conflicts of interest in the creditor group should be identified early and dealt with appropriately.*

Comment: The creditors have clearly refrained from taking any enforcement actions of their own (or, at least, the brief is silent about such actions). Nor is there any evidence that there was any change in the creditors’ respective individual positions as between each other during the Standstill Period (and, notably, before the Standstill Period was put in place). While the resulting restructuring treats various kind of debt (original working capital v. additional working capital) in different ways, I do not suppose that this would evidence a conflict of interest between the creditors.

* + 1. **THIRD PRINCIPLE**: *During the Standstill Period, the debtor should not take any action which might adversely affect the prospective return to relevant creditors (either collectively or individually) as compared with the position at the Standstill Commencement Date.*

Comment: Similarly, we are not aware of any steps that the Group took which would result in undermining the returns to the creditors. One could of course say that the way the restructuring process was implemented meant that the creditors would ultimately receive less than they would have otherwise received had the process been run more successfully. However, given that the creditors were essentially signing off on all of the restructuring steps (and, from a certain point of time, appear to have led the restructuring), it would be hard to put the blame on the debtor.

* + 1. **FOURTH PRINCIPLE:** *The interests of relevant creditors are best served by co-ordinating their response to a debtor in financial difficulty. Such co-ordination will be facilitated by the selection of one or more representative co-ordination committees and by the appointment of professional advisers to advise and assist such committees and, where appropriate, the relevant creditors participating in the process as a whole.*

Comment: I have already elaborated on the extensive use of third party advisors in the restructuring process which, in my view, was the right step. As far as the co-ordination committee is concerned, given that there were only four creditors involved (either because there were no other creditors or because the claims of the non-financial creditors were less pressing), the co-ordination committee was not that necessary and the whole process was (apparently) run by individual representatives of each of the creditor.

* + 1. **FIFTH PRINCIPLE:** *During the Standstill Period, the debtor should provide, and allow relevant creditors and/or their professional advisers reasonable and timely access to, all relevant information relating to its assets, liabilities, business and prospects, in order to enable proper evaluation to be made of its financial position and any proposals to be made to relevant creditors.*

Comment: Likewise, I have touched upon the fact that the Group’s management appeared to have been forthcoming in providing information to the creditors, even if such information should have been given earlier (or, indeed, notwithstanding the fact that many of the business projects proved to be overly-optimistic). In any event, the brief does not mention any instances where the creditors have had to chase the debtor for relevant information.

* + 1. **SIXTH PRINCIPLE**: *Proposals for resolving the financial difficulties of the debtor and, so far as practicable, arrangements between relevant creditors relating to any standstill should reflect applicable law and the relative positions of relevant creditors at the Standstill Commencement Date.*

Comment: Here, the applicable law is likely to be Dutch law (as the law that is likely to govern any insolvency procedure of the Group’s Dutch entities). It is not impossible that the laws of the countries in which other FMW-branded subsidiaries could be applicable or, at least, relevant. While the brief does not detail on any Dutch law issues which the key stakeholders sought to address, from the perspective of a non-Dutch lawyer, the restructuring agreement does not seem to be particularly troubling.

* + 1. **SEVENTH PRINCIPLE:** *Information obtained for the purposes of the process concerning the assets, liabilities and business of the debtor and any proposals for resolving its difficulties should be made available to all relevant creditors and should, unless already publicly available, be treated as confidential.*

Comment: The brief is silent on any confidentiality arrangements between the key stakeholders. However, given that the process was run by sophisticated parties represented by professional third-party consultants, lack of any complaints about disclosure of confidential data speaks for itself.

* + 1. **EIGHTH PRINCIPLE:** *If additional funding is provided during the Standstill Period or under any rescue or restructuring proposals, the repayment of such additional funding should, so far as practicable, be accorded priority status as compared to other indebtedness or claims of relevant creditors.*

Comment: Again, there is not sufficient data to address this Principle. The briefing does mention ‘additional working capital’ provided by banks C and D, but the way it was treated (write off) suggests that this additional funding preceded the start of the restructuring process. Further, while the additional funding was forthcoming from a shareholder. It is unclear whether it were to be treated in priority towards the claims of the other creditors. On balance, I would be surprised if it were to be treated this way.

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

* 1. While there are some aspects of the restructuring process which I would have liked to clarify, the essence of the restructuring agreements seems to be three-fold:
     1. The creditors get the key operating assets of the Group.

This is achieved when “all” the operating companies of Flow Management Holding BV are transferred to Flow Management II BV which, in turn, is held by the consortium of banks. In this way, the asset is cleared from claims attributable to the (previous) shareholders of the Group and the creditors will be able to effectively sell the business of the Group (save for Flow Management Work BV – see below) to a third party and receive compensation for, at least, part of their claims.

* + 1. In consideration for (a), the creditors have to waive their claims against the entities that remain in control of the (previous) shareholders, i.e. Flow Management Holding BV.

The net result would seem to be that the (previous) shareholders will be relieved from the need to repay the debt to A, B, C and D and will be able to continue with the sister-businesses of the Group, *Lease Cayman Real Estate* and *Lease and Truck Repair Sweden Holding Ltd*.

* + 1. Lastly, given that Flow Management Work BV remains encumbered by the claims from banks A, B, C and D (subject to the ‘haircut’), it would be liquidated so that the secured creditors will receive part of their debt from proceeds of sale of the pledged assets.

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

* 1. As far as Russia is concerned, even though there have been attempts to conceptualize the ‘ground rules’ for informal corporate workouts, in practice, the creditors would rarely agree to adopt any sort of pre-set provisions. This is partly due to the overriding atmosphere of distrust among the major players in the restructuring field and partly due to the (perceived) disadvantage of being ‘locked down’ by any specific rules.
  2. What is the alternative? I would say that the lawyers representing the key stakeholders would normally play it by ear and reach specific, tailor-made arrangements on a case-by-case basis. In some way, this resembles the position of the legal counsel in arbitration proceedings where the relevant institutional rules only contain the bare minimum procedural regulations, hence the tribunal and the counsel having to devise the same on the go.
  3. Of course, another alternative is to start the formal insolvency process but continue the informal discussions behind the scene. In this way, the creditors can benefit from the well-established statutory regime while at same time being able to reach a settlement if it proves possible. The downside, of course, is that all the disadvantages of the formal insolvency process (including the negative publicity and the need for court sanction for any restructuring) will kick in as well.

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

* 1. Overall, given this was a largely private contract arrangement (as opposed to formal insolvency settlement), then it would seem that many of the traditional difficulties associated with cross-border insolvency (such as recognition of the foreign insolvency court orders and/or the powers of the foreign liquidator) would unlikely apply.
  2. One potential are of difficulty is the liquidation of Flow Management Holding BV. Under the restructuring scheme, the company lost its key asset – the six operating subsidiaries – even if this was done in exchange for waiver of the claims from A, B, C and/or D. To the extent the company has other creditors, there could be a scope for attacking the restructuring agreement as preference (or indeed on other grounds). To the extent the other creditors are foreign, the respective issues could be said to be cross-border.
  3. On a separate note, given that the operating subsidiaries are located outside of The Netherlands, one may need to consult with the local laws to ensure that the transfer of shares to Flow Management II BV is conducted in a valid manner. As far as the creditors of the operating entities are concerned, their position is unlikely to be affected (unless, of course, they had claims against the other Group companies, such as Flow Management Holding BV). Rather, they would probably benefit from waiver of the claims against the subsidiaries by the (previous) shareholders and, indeed, the haircutting of the claims by A, B, C and D against Flow Management Work BV.
  4. The key non-legal issue would likely be connected with the creditors’ ability to sell the Flow business a single enterprise, given that its operating entities are scattered across four continents. One would assume that the business is most valuable when sold as a whole (presumably on the basis of economy of scale effect). But finding a buyer who would be prepared to operate in a number of sophisticated markets might not be an entirely easy task.

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

* 1. The answer largely depends on what exactly is meant by the ‘moratorium’ in this specific setting. Under Russian law, moratorium (as a formal suspension of payments) is not a separate procedure in its own right. Rather, it is a legal consequence of the court initiating insolvency proceedings against the company.
  2. Given that no formal proceedings are mentioned in the brief, I would assume that a ‘moratorium’ would mean an informal arrangement pursuant to which neither of A, B, C or D would be receiving any repayments towards their respective debts for a certain period of time. Indeed, pursuant to this arrangement, the banks would be required to provide ongoing financial support (‘bridging loan’) to the Group.
  3. That said, the idea behind this procedure is not entirely clear. The brief reads that the Group would sold ‘in a controlled manner’, until when any payments to the banks would be suspended. If that is indeed the arrangement, then it is not clear how it is different from Option 2.
  4. On the other hand, Option 4 also involves a ‘restart following liquidation’. Given the use of “or”, this route is apparently in the alternative to the ‘moratorium’ and not a supplement to it. If that is right, it is unclear how the Group would be sold following its liquidation (when all of the assets would presumably be sold to various third parties), let alone in a ‘controlled’ manner.
  5. In any event, Option 4 clearly involves a sale to a third (perhaps, more financially strong) party. This is a common way out of financial distress and could hardly be described as an impractical option.