**Case Study I**

**Global Insolvency Practice Course 2023**

**FLOW MANAGEMENT**

**Question 1 – What were in your opinion the causes of financial distress at Flow Management? Could the financial distress have been prevented? If yes, explain how. If not, why not?**

In my opinion this is not a straight-forward question to answer, as the problems for Flow Management Holding BV (“**Flow Holdings**”) evolve and vary over time.

It appears to me that, at the outset (on or about 16 November 2013) the main issues identified lie mostly with one of Flow Holdings’ subsidiaries, namely: Flow Management Work BV the Netherlands (“**Flow NL**”). Two of the issues appear to be accounting issues, and (I would suggest) Flow NL will want to take this up with their accounting team. There may also be an issue on the operational level in circumstances where recorded ‘real costs’ have been wrongly recorded (resulting in underpriced products/services). These are all human errors which could have been prevented.

Finally, it is unclear how management bonuses are allocated and approved. This appears to have been an issue at the level of Flow Holdings. It is unclear to me how this may have fed in to the financing and working capital issues experienced at Flow NL. Be that as it may, it is clear that this is also a ‘human error’, possibly with the management of Flow Holdings. One would have to consider the process behind the bonus payment to consider where the issue may lie.

Linking this to Mellahi & Wilkinson, it appears to me that the business’ issues are of an organizational nature of the OS/OP kind. It appears to me that they were preventable, as they were human errors. More competent accounting and quality checking the cost price calculation formula may have prevented this capital / cash flow crisis.

However, the situation then evolves.

Flow Holdings’ approach, to instruct an independent accountant to investigate the company’s procedures, appears to me to be a sensible course of action. It also, clearly, uncovered additional issues with other subsidiaries of Flow Holdings.

An independent accounting team may be able to address some of the structural issues, and resolve the situation in circumstances where there is no significant dependency on outside finance and/or facilities. This does not appear to have been the case here. A significant debt / facility appears to have been outstanding with A, B, C and D bank (the “**Banks**”). As a result, Flow Holdings’ responses are somewhat constrained by the demands and cooperation of the Banks. The Company’s ability to act decisively may be limited when the Banks cannot agree amongst themselves what their terms are or reach an agreement on a standstill agreement.

These are influences of the organizational ecology / environmental (IO/OE) kind, which are less easily controlled (or ‘prevented’) by Flow Holdings, but they can have (and here, appear to have) a significant impact on a company’s ability to turn-around its financial position.

It appears to me that the Banks consider that there may be a failure on the management level, as they clearly wish to appoint (and do appoint) a Chief Restructuring Officer (“**CRO**”) to Flow Holdings’ board of directors.

In addition to the aforementioned issues, throughout the process, there is clearly an issue with profit/loss forecasting, on all occasions in November 2013, December 2013, February 2014, June 2014, and October 2014. In my opinion, inaccurate forecasting can cripple a turn-around and efforts made in order to improve the financial position of a company. A variety of factors can influence this: it could be that management has issues of denial and/or fantasy (as flagged by Mellahi & Wilkinson) or it could be that the market is changing, leading to different results. In my opinion it is most likely a combination of the two.

Upon reading Mellahi & Wilkinson, it is somewhat of a mystery to me why the OS/OP and IO/OE schools of thought were explored separately to the degree that they were. It appears to me evident and logical that they are fundamentally linked and intertwined.

**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*?**

There are quite a few benefits to an out-of-court restructuring, including:

1. The process can be simpler. In Court restructuring process are often prescribed, and procedural rules and timeframes apply, for which reason there is less of an opportunity to tailor the restructuring process to an entity’s specific situation. The out-of-court process may allow for more creative solutions.
2. In addition, because the process does not have to occur within any legislative framework, it also means that the process is more flexible and that a tailor-made situation can be found. The process of the reorganization can also be adapted so as to fit the situation.
3. Existing management may (depending on the control of the shareholder) also be able to remain in place without legislative requirements that control may have to be handed over (in whole or in part) to outside restructuring officers (such as (e.g.) insolvency practitioners).
4. The above may also mean that the process is less disruptive for the on-going operations of the business.
5. The process can also be more cost-effective. Although the company in distress may still like to instruct specialists to assist it in navigating its financial distress, it is more likely to be cheaper than going through court which necessitates the instruction of attorneys (and often many of them), insolvency practitioners and more.
6. However, in my opinion, one of the most important benefits of an out-of-court restructuring is the ability to keep the restructuring (more) private. With an in Court restructuring the Court (as a matter of course) needs to be provided with certain information about the company, the circumstances of its financial distress, its creditors, and the proposal for recovery. This could aggravate matters for the company in distress, as airing its ‘dirty laundry’ may result in negative press which could cause further damage (incl. reputational damage) to a company’s operations.

There are also disadvantages to an out-of-court restructuring, including:

1. The lack of a moratorium means a company is not protected from collection efforts by creditors which could complicate the restructuring negotiations.
2. One may not be able to ‘cram down’ creditors who are unwilling to cooperate resulting in the need for unanimous approval of proposed restructuring plans, which may be difficult to achieve.
3. The foregoing also means that an out-of-court restructuring is therefore more likely to be suitable to simpler (less complex) situations of financial distress and/or in situations where creditors clearly have confidence that management can turn the company around.

I currently practice in the Cayman Islands, although I was a barrister in London the nine years prior to my move to the Cayman Islands.

The Cayman Islands’ restructuring regime has, relatively recently, been expanded.

In court restructuring was previously only possible after the filing of a winding-up petition at Court, and for the company to be placed in provisional liquidation. The company in distress would therefore essentially have to enter an insolvency process. The petition hearing would be used to appoint provisional liquidators (“**PLs**”) with a mandate to explore the company’s restructuring options.

One of the issues with that regime is that it requires a winding-up petition to be filed. However, typically, directors in the Cayman Islands are precluded from issuing a winding-up petition against the company (unless expressly authorised in the company’s articles of association). The company is therefore forced to find a ‘friendly’ creditor to petition on its behalf. Although this system (with PLs in place on a ‘light-touch’ basis) has the advantage of allowing the directors to remain in control of the company’s day-to-day operations, the approach was difficult to access due to the need for a cooperative creditor. Furthermore, the use of the winding-up process leaves the company in a precarious situation where another creditor may be able to gain control of the process by substituting into the position of the petitioner.

The newly introduced restructuring regime enables a company to seek the appointment of a company restructuring officer (“**CRO**”) (rather than PLs). The company can apply to Court for the appointment of a CRO. It does not need to issue a winding-up petition. It is therefore removed from the more traditional liquidation process, which may have reputational advantages. The application for the appointment of the CRO triggers a moratorium to take effect, and the moratorium is intended to have extra-territorial effect.

The test for getting a PL or CRO appointed is substantially the same, namely: whether the company is or is likely to become unable to pay its debts (as they fall due), and intends to present a compromise or arrangement to its creditors.

In summary, it is fair to say that with the introduction of the new restructuring regime in the Cayman Islands, the advantages of an in-court restructuring have increased, in that it does not require the cooperation of a friendly creditor anymore, a moratorium is put in place at the stage of application, and the process has been removed from the liquidation framework (which may have reputational benefits). As such, the process has become more attractive. Nevertheless, the out-of-court restructuring remains less costly and more private. Indeed, an application for the appointment of the CRO must be advertised and must be heard on notice to stakeholders (e.g. creditors). In addition, the Court will still require information about the company, the issues experienced the, and insight into the proposed restructuring plan. As stated previously, the requirement that such information be ‘aired’ publicly could in itself further deteriorate the circumstances of the company in distress. The court process also remains tightly controlled, and as such, it allows less flexibility than an out-of-court arrangement.

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

Adriaanse & Kuijl – Resolving Financial Distress: Informal Reorganization in The Netherlands as a Beacon for Policy Makers in the CIS and CEE/SEE Regions?

Parts of the aspects of an informal reorganization addressed in this article are reflected in the Case Study.

In terms of the business restructuring there is some evidence that an attempt is made to restructure the management of the business through the appointment of a new CFO and ultimately (on demand of the Bank) a Chief Restructuring Officer (“**CRO**”). In respect of the structure of an informal reorganization, there is an aspect of *Stabilization*. Adriaanse & Kuijl mention that cutback on expenditures are part of the Stabilization phase. In the Case Study, management initially propose to negotiate price increases with the main clients and to implement cost cutting measures in terms of labour costs. It is, however, not clear whether a thorough *Analysis* was conducted. It appears to me (from the Case Study) that management repeatedly made inaccurate forecasts. In my opinion, that is an indication that management are not being realistic, or that they have failed to identify significant issues in the business. I do not think it is evident from the Case Study that *Long-Term Profitability is Restored*. The business is ultimately transferred to a new entity, but it does not appear to me that the business operations were fundamentally restructured to ensure profitability. The *Repositioning* aspect is also not evidently present. Had the management of Flow Holdings conducted a thorough analysis, this may have led to better predictions concerning its performance, an easy way to identify how profitability to the business may be restored. Flow Holdings’ informal workout does result in *Reinforcement* in terms of a transfer of the operating companies to a new (apparently shell) entity. The proposal encompasses both a business restructuring and financial restructuring. However, considering that (apparently) no thorough analysis of the business was conducted it is not evident that the transferred operating companies are, in fact, viable or profitable.

Pajunen – Stakeholder Influences in Organizational Survival

There is no indication in the Case Study that the management of Flow Holdings conducted an analysis of the resource dependency and network dependency in respect of the various stakeholders. Nevertheless a few of Pajunen’s propositions in relation to the management of different stakeholders were applied, for example: it is clear that Flow Holdings was aware that it needed the continuing support of the major stakeholders (*Proposition 1*), and in particular the Banks, which is probably why it invited the Banks for a meeting in November 2013. However, it does not appear that Flow Holdings subsequently conducted sufficiently frequent and open communications with the Banks and other stakeholders (*Proposition 2*). Indeed, it appears that the stakeholders and Banks were unhappy about the constantly changing information coming from the Company. It is not surprising that this would lead to a lack of confidence in management (Flow Holdings). It is furthermore not clear whether the restructuring could benefit from personal relationships (*Proposition 3*) or that the parties shared any long-term goal (*Proposition 5*). In relation to the latter, there was uncertainty in respect of the various positions taken by the Banks, as well as management’s long-term intentions, beyond survival. To a certain extent the crisis Flow experienced did unlock brokerage positions as between the major shareholders (the Banks) (*Proposition 4*), but Banks C and D ceased to utilise this, complicating matters unnecessarily. *Proposition 6* was, finally, entirely lacking. The Banks did, expressly, not have confidence in the management of Flow Holdings. Undoubtedly that was not helped by the lack of consistent communication and continuing failure to provide accurate financial forecasts. Summarily it appears that Flow Holdings’ management mismanaged its relationship with its key stakeholders who, in turn, lost confidence in their leadership. As a result, there may not have been the dialogue needed to create a shared goal. Proper engagement by management with its stakeholders could (potentially) have resolved many of these issues.

Sudarsanam & Lai – Corporate Financial Distress and Turnaround Strategies: An Empirical Analysis

In the *restructuring process* of Flow Holdings, some managerial restructuring appears to have taken place. There is mention of the CFO being replaced, followed by the CEO. There is, however, no mention of any change in respect of Flow Holdings’ Board of Directors other than that a CRO is appointed on the request of the Banks. It is unclear from the Case Study who, in management, had (most) control over the operation of the Company, as a result of which it is difficult to say whether the replacement of the CFO and CEO would have led to a substantial difference in the management of Flow Holdings. The terms proposed for management post-restructuring are not entirely clear, although it is clear that some of the existing board members (including the CRO) will remain shareholders in NewCo. Some aspect of an *operational restructuring* were adopted in the Case Study; e.g. Flow Holdings negotiates price increases, and costs are cut (in particular, labour costs) in November 2013. In addition, in October 2014, surplus assets are sold. There is also mention of additional measures (in or about March 2014): (i) focussing on increasing turnover; (ii) evaluations of the Company’ product-range; and (iii) selling of subsidiaries outside of the Benelux, it is unclear whether these “*plans*” were executed (in whole or in part). It appears that minimal *asset restructuring* was pursued by Flow Holdings: there is some evidence of asset divestment (in terms of the sale of surplus assets), but no evidence of asset investment. Financial restructuring appears to have been the focus of Flow Holdings’ restructuring efforts. Regular cash injections are made to survive, but the final restructuring proposal is fundamentally concerned with creating a ‘fresh start’, while most of the largest creditors appear to swap their debt for equity.

Schmitt & Raisch – Corporate Turnarounds: The Duality of Retrenchment and Recovery

It appears that the management of Flow Holdings is mostly focused on *retrenchment* efforts in their attempt to turn around the financial fortunes of the Company. Both aspects of *asset retrenchment* (sale of surplus assets) and *cost retrenchment* (reducing labour costs) are present, and there is a definite focus on regaining profitability. Besides the immediate concern with the next financial report (and aiming to achieve a profitable outcome), there does not appear to be any constructive focus on future profitability and how this may be achieved in terms of maintaining a market share, diversifying or effectiveness (which may be emblematic of *recovery*).

**Question 4 – Bank 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?**

Whereas the four banks appear to be in agreement in or around November / December 2023, it is clear that no standstill agreement is likely to be agreed by February 2014.

It seems to me that the only likely (possible) advantage to Banks C and D in behaving in that obstructive manner (by mid-February 2014) is that they may hope for preferential treatment in terms of repayment of their debts / the credit facility, or to gain an advantage in relation to the possible renegotiation of the terms of the outstanding credit facility. Another option may be that Banks C and D are trying to force one of the issues they are most concerned with; their general lack of confidence in Flow Holdings. It is probably, however, a combination of the two. It is likely that Banks C and D are obstructive because of their lack of confidence in Flow Holdings, thereby perhaps preferring to be ‘bought out’ and extracted from the circumstances.

It appears that Banks C and D nearly obtained their aim by their obstructive behaviour, as the case study mentions that Banks A and B investigated the possibility of buying out Banks C and D with a 15-20% discount (in or about March 2014).

It also appears that the shareholders were forced to make substantial contributions / deposits to the company as unsecured loans. Although it is difficult to tell with certainty from the Case Study, it may well be that contributions from the shareholders would have been fewer and/or lower, without the additional threating behaviour of Banks C and D.

I find it fairly difficult to assess what I would have done as advisor to Banks A and B in such a situation, as the Case Study does not clarify the Banks’ respective positions. I would need a lot more information, including: Which of the Banks is the biggest creditor (i.e. what is the Banks’ respective positions of ‘power’ as between them)? What security (if any) do Banks A and B hold? What percentage of the Banks’ business does the facility with Flow NL represent? What is the financial health of Banks A and B otherwise? All these factors (and more) would influence what position those Banks should take in this situation of distress, but also in relation to Banks C and D.

If Banks A and B have a financial (or other) interest in keeping Flow Holdings afloat, then it may be best to try to buy Banks C and D out (as appears to have been suggested in or about March 2014). If, however, that is not a good or viable option for Banks A and B, it may be more appropriate to do the opposite; i.e. to see whether they can be bought out by Banks C and D. In either of these circumstances, I would suggest that it may be helpful for Banks A and B to negotiate with Flow Holdings and Flow NL to investigate a negotiated solution to the crisis (i.e. an out-of-court restructuring) whilst optimizing the Banks’ returns and position. It is not entirely clear to me, from the description of the Case Study, whether this was being pursued in the situation of the Case Study, or whether the various plans proposed there were put forward by the management of Flow Holdings only (and/or with the input of the CRO). In the absence of Banks C and D’s cooperation (i.e. if they remain obstructive), such a negotiated solution would have to take account of their position (and ultimately be to their satisfaction, if restructured out of Court).

Finally, subject to Dutch laws there may be an in-court restructuring option open to Flow NL and/or Flow Holdings which could be viable, depending on the procedure and circumstances. Despite having Dutch law degrees, I do not currently have any knowledge of the Dutch restructuring options (if any).

Ultimately, of course, a possible winding-up process (faillissement) may be an option. However, the Case Study has already established that such a procedure would negatively impact the proceeds of the assets. Consequently, this appears to be the option of last resort.

**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)?**

The **First Principle** (*cooperation between creditors*) appears to have been applied in part –

It is clear from the narrative that the Banks were (at the very least) attempting to coordinate their approach. Although not entirely clear, it appears that the Banks, in this scenario, represented the major financial creditors of Flow NL. Initially, the Banks appeared to cooperate and they agreed to “*discuss*” the situation, and gave the company time to provide them with information. However, they did not formally enter into a standstill agreement until August 2014, roughly nine months after the initial financial turmoil was identified. In the meantime there appeared to have been a period of non-cooperation (around mid-February 2014) when, therefore, Banks C and D appeared to disregard the First Principle.

The process was, furthermore, not remotely as organized as that described by the First Principle which suggests that the various classes of affected creditors should be identified and that it should be subsequently decided which creditors ought to be included in a standstill agreement (p. 6 of the Statement of Principles for a Global Approach to Multi-Creditor Workouts II (the “**Principles**”)).

The **Second Principle** (*refrain from enforcement during a standstill period*) was also applied in the process of Flow NL and Flow Holdings.

Regardless of Banks C and D’s lack of cooperation between mid-February 2014 and August 2014, they did (prior to that time) appear to be in agreement that terminating the credit agreements would not be beneficial due to its negative effect on the value of the assets. Although it is unclear whether Banks C and D took steps adverse to the recovery efforts and/or whether the mere lack of cooperation on their part had financial consequences, it appears to have principally been agreed that no significant legal steps should be taken which may have a (detrimental) financial impact.

A standstill agreement was also eventually entered into. However, quite a significant amount of time passed between the start of the financial difficulties and the standstill agreement being signed. As time is of the essence in many recoveries, this could arguably have had serious consequences (although it is unclear whether it did in this scenario).

The **Third Principle** (*no adverse actions by the debtor*) also appears to have been applied in the Case Study. I have not found any immediate evidence that Flow Holdings (or Flow NL) took steps which were adverse to the interest of creditors.

As with the other three principles, the **Fourth Principle** (*creditors should coordinate their responses*) appears to have been applied in part (or loosely). Banks A, B, C and D clearly started out by coordinating their efforts, subsequently fell out, and thereafter did manage to agree a standstill agreement. Depending on the terms of the standstill agreement, that agreement may subsequently have included arrangements for the parties’ / creditors’ coordinated response. No information has been provided in relation to, for example, representative committees, etc.

It is unclear whether the **Fifth Principle** (*access to relevant information*), **Sixth Principle** (*proposals and arrangements should be equitable*), and **Seventh Principles** (*information should be available to relevant creditors and kept confidential*) were applied. In relation to the provision of timely access to all the relevant information, Flow Holdings clearly made proposals to the creditors and appeared to also provide the creditors with financial forecasts. However, it is unclear what additional information the creditors received and whether this would have included the necessary information for them to assess the viability of the proposals and conduct a proper evaluation (Fifth Principle). It is clear that the Banks were unhappy about the “*constantly changing information*” (p. 5) provided by Flow Holdings. The information in the Case Study does, furthermore, not disclose whether: (i) the proposals put forward; (ii) the relationships between the creditors; and (iii) the arrangement under the standstill agreement, reflected the applicable law and the relative position of the creditors (Sixth Principle). Finally, as previously stated, it is not clear whether Flow Holdings had provided all the necessary information to the creditors and (in addition) whether appropriate confidentiality agreements applied in respect of such information (Seventh Principle). I would expect so, as a lack of confidentiality would defeat a large benefit of pursuing an out-of-court recovery.

In relation to the **Eighth Principle** (*priority of additional funding*), not much information has been provided, but it appears to have been applied (e.g. the repayment of additional funding being repaid as a priority) on the basis of the following statement: “*a total of € 25 million is paid back to the providers of the (additional) working capital*” (on p. 6 of Case Study).

**Question 6 – Suppose it is not possible to convince other creditors to adopt the Statement of Principles in a given situation, are there 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?**

The Cayman Islands does not (that I am aware of) have a version of ‘soft law’ which would be equivalent or comparable to the Statement of Principles for a Global Approach to Multi-Creditor Workouts (the “**Principles**”).

However, internally, there are many similar frameworks which could be used. There are for example:

1. The World Bank’s “*A Toolkit For Out-of-Court Workouts*”, published in 2016 (the “**Toolkit**”), which discusses all the major points in relation to out-of-court workouts, including the position of relevant stakeholders, standstill agreements and restructuring plans. It also, in terms, makes references to the Principles; describing each of the eight Principles. This publication also includes a case study to assist in the understanding.
2. More recently, in January 2022, the World Bank published “*A Toolkit for Corporate Workouts*”. Needless to say, it focusses on corporate distress. It covers practically the same ground as the Principles, but also includes country-specific commentary, and distinguishes between “*out-of-court*”, “*enhanced*”, “*hybrid*” and “*preventative*” workouts. As with the Toolkit, this publication too, includes a case study by way of illustration.

These are by way of example. Undoubtedly there is more ‘soft-law’ guidance available. In addition to these more practically focused publications, there are also publications which cover very similar ground but are directed more towards the legislative framework which could support the application of workout principles. These include, *inter alia*:

1. The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes. These principles were published in 2021. It focusses on the “systems” which should be in place in order to ensure effective workouts. The “systems” it refers to are, in my opinion, the body of policies, legislation and regulations which supports the economy, credit and transactions and insolvency. The essential elements which it identifies are reflected in just four principles listed at the end of the document, namely: (A) Creditor/Debtor Rights; (B) Risk Management and Corporate Workouts; (C) Legal Framework for Insolvency; and (D) Implementation: Institutional & Regulatory Frameworks.
2. The UNCITRAL Legislative Guide on Insolvency (the “**Legislative Guide**”). With its Model Law on Cross-Border Insolvency and Model Law on Recognition and Enforcement of Insolvency-Related Judgments, it is perhaps no surprise that one can also turn to UNCITRAL for guidance in that regard. The Legislative Guide focusses on ‘designing’ an effective and efficient insolvency law. In doing so it focusses on the liquidation process, rather than out-of-court workouts. Nevertheless, many of the same principles can be gleaned from it, including (for example) (i) transparency; (ii) maximization of assets; and (iii) ensuring equitable treatment between similarly situated creditors.

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

In essence the restructuring agreement of 4 July 2015 (the “**Agreement**”) is as follows:

* The language of “*to be accommodated in a shell subsidiary*” is not entirely clear, but I expect that what is meant is that the shares of the various subsidiary operating entities of Flow Holdings are transferred to the new company, Flow Management II BV (“**Flow II**”), which is initially a subsidiary of Flow Holdings.
* However, the shares in Flow II are then to be transferred from Flow Holdings to Banks A, B, C, and D (and a few board members).
* Going forward it will therefore be the Banks (and a few board members) who will have an interest in Flow II, thereby leaving Flow Holdings essentially as an empty shell, particularly as it has agreed to cancel any claims it may have against Flow II. As a result, it should be relatively straight-forward to liquidate Flow Holdings.
* In return for the shares in an essentially still valuable assets (namely, Flow II), the Banks receive a significantly reduced repayment of the facilities they previously provided to Flow NL, otherwise known as a debt for equity swap.

Summarily, the result is that the operating companies of Flow Holdings can continue in business, but that Flow Holdings no longer has an interest in them and that instead of a repayment of their facilities, the Banks obtain an interest in the operating companies.

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

There are likely to be cross-border issues with the proposed restructuring plan, as it anticipates a transfer of shares in respect of Spanish, French, Australian, South African and US subsidiaries. It is likely that the Articles of Association and Memoranda of Association of each of indiviaul subsidiary will have to be consulted, and it will have to be ensured that there is no legislation (in each of the relevant countries) in relation to the sale of share in a distressed situation. However, as the shares in each of the foreign subsidiaries are already held by a Dutch entity, this may make the transfer to another Dutch entity (Flow II) slightly less complex than it could be (on an international transfer).

Non-legal issues are likely to include (but may not be limited to) ‘people management’. It will be important to brief management of each of the foreign subsidiaries so as to reassure them of the logic and purpose of the restructuring plan. Local management may then pass that information on to its employees. Reassurance on the local level and clear avenues of communication can ensure that unease about the restructuring plan is kept at a minimum, so as to ensure that normal production chains and operations can continue without disruption.

**Question 9 – In October 2014 four scenarios have been drawn up. Why was or wasn’t calling for a moratorium (…) a good option given the situation at that time?**

The proposal is as follows: “*a moratorium … or restart following liquidation, with the company being sold in a ‘controlled’ manner. However, banks must be willing to provide a bridging loan*.”

It is not entirely clear to me why Banks would need to provide a bridging loan to enable a liquidation to take place, unless the loan would be necessary to finance the liquidation (so as to allow assets to be sold in a ‘controlled’ manner). The ratio is not entirely clear to me from the Case Study.

There are several reasons why seeking a moratorium as part of a liquidation process may not be a “*good option*”:

1. Firstly, it is not entirely clear from what perspective the question is being asked. Whether a liquidation (which in the Case Study, appears to be necessary in order to obtain the moratorium) is a “*good option*” is a subjective question and dependent on the circumstances of the liquidation. For example, on the basis of Cayman Islands law (the Companies Act (2023 Revision)) the Case Study must be referring either to a compulsory liquidation or a liquidation pursuant to a supervision order (as there is generally no protection from creditors in a voluntary liquidation). In those circumstances, the official liquidator will have to determine whether the liquidation is on a solvent or insolvent basis. Depending on the answer to that question a liquidation committee (“**LC**”) will be formed (unless dispensed with on the approval of the Court). The members of the LC will either be contributories of a company (if deemed solvent) or creditors of the company (if deemed insolvent). At least three members must sit on the LC. Because the Banks are creditors of Flow Holdings, their degree of influence in the liquidation, both as to the choice of insolvency practitioner as well as subsequent control and input, will be dependent on whether or not Flow Holdings continues to be solvent. On the basis that Flow Holdings’ management still considers that the Company has value as a going concern it is likely that an appointed insolvency practitioner may conclude that the Company is solvent, which would mean that the Banks would lose some control over the process, and that they would (involuntarily; as opposed to through the standstill agreement which is voluntary) also lose the right to commence proceedings against the Company (in respect of their respective debts).
2. Secondly, and similarly, in circumstances where the Banks have just entered into a standstill agreement, going through a liquidation in order to obtain a moratorium (in relation to which the Banks would maintain less control) would be highly inefficient and a waste of asset in circumstances where Flow Holdings’ assets are likely to decline in value in a liquidation.
3. Finally, it appears that a liquidation is only proposed as an option on the basis that the Banks extend a bridging loan. In that regard, the proposal may not be a viable option, on the basis that:
4. Banks C and D have been threatening to cancel the credit. Extending credit appears contradictory to that threat; and
5. the Banks may not be likely to recover 100% on each € in a liquidation scenario. Of course, the Bank’s likelihood of recovery (of any bridging loan) may depend on the ‘waterfall’ of payments in liquidations in the Netherlands; i.e. where the Bank’s debt in respect of the bridging loans would rank in terms of repayment priority.

---------------------------------------- End of Responses to Case Study I----------------------------------------

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