**INSOL GLOBAL INSOLVENCY PRACTICE COURSE 2023**

**CASE STUDY 1 – FLOW MANAGEMENT GROUP**

1. ***What were in your opinion the causes of financial distress at Flow Management (see e.g. Mellahi and Wilkinson, 2004). Could the financial distress have been prevented? If yes, explain how. If no, why not?***

   The causes of financial distress for Flow Management appeared from the facts in the case study to be:

   a. Poor management accounting producing unreliable internal financials – see e.g. cost issues including with the spreadsheet error.

   b. Over-optimistic forecasting of market demand and profit/loss – reality consistently proving worse than expected.

   c. Lack of adequate checks and balances on management remuneration.

   d. High levels of bank financing, from 4 different banks, to and in the context of a loss-making business – see e.g. the difficulties caused by the number of lenders when they ceased co-operating in the manner necessary to avoid a liquidation during the attempted rescue. The 4 banks would be identified as the most influential type of "governing stakeholders" based on the Pajunen matrix analysis. Following the inverse of Pajunen's first proposition - in this case the number of banks gave the potential for the lack of secure ongoing support among Flow's bankers, which decreases the prospect of organizational survival in circumstances of an existence-threatening crisis.

   e. Inadequate attention to achievable pricing, depressing revenues – see e.g. the increased prices that almost all customers were willing to pay.

   f. Inadequate attention to costs control, contributing to losses – see e.g. the staff costs saving that was ultimately possible when the issues facing the business were considered closely.

   g. Lack of oversight and control, by proper corporate governance processes, on all of the above – see e.g. the banks first reaction being to ask an accounting firm to review the procedures within the company, the fact that a new CFO was seen as and implemented as an early part of the proposed solution, and the banks' upset at the "constantly changing information."

   h. Possibility of being spread too thin geographically and across too many industry markets – see e.g. the later proposals to focus geographically on Benelux, and to evaluate and reassess the various lines of business.

i. Possibility of instability at ultimate shareholder level, given different types of shareholder (one family, and two investment houses), with possibly different aims, any one shareholder being able to combine with any other to form a majority, and the difficulty of ensuring acting in concert in response to distress if required – see e.g. during the process the calls from the banks for shareholder funds to be injected, which they ultimately were not (the outgoing CEO personally injecting funds).

So, drawing on the Mellahi and Wilkinson review of the different schools of thought in the academic literature on corporate failure; on the facts as set out, internal management failure appears to be the cause – all of the factors above may be seen as internal factors (whether of the *organizational*, or *psychological* sub-sets referred to by Mellahi and Wilkinson).

However, it is also very likely that *external* market and economic forces (what they call *environmental* and *ecological* factors) in the industries and jurisdictions in which the Group operates, were at least *a* cause of the financial distress.

This reflects Mellahi and Wilkinson's common-sense conclusion that *only in extreme cases* is the cause *only internal* (citing e.g. Enron and WorldCom) or *only external* (one might cite e.g. the effect of radical technological change with the advent of Netflix on Blockbuster's business).

In most cases, the cause of corporate failure is some combination of both types of factor.

To state any position as to how external factors may have combined with the internal factors to cause distress in Flow's case would require a good deal more information e.g. information in the relevant industry markets (truck leasing, private cars, short leasing, truck repair, and real estate) and jurisdictions (Netherlands, Sweden, Spain, France, Australia, South Africa, and USA), as to (i) competition, (ii) population density, (iii) industries life cycles, (iv) relative organization age, and (v) relative organization size.

Based on this analysis, although it seems likely that proper and accurate financial reporting would have avoided:

1. the *initial* distress by predicting it earlier, allowing it to be addressed earlier; and avoided
2. the *ongoing and worsening nature* of that distress, as the information and true position continually worsened relative to predictions, with the attendant uncertainty on how best to address the position with the banks and the shareholder;

it cannot be said that *no distress* would have been suffered by Flow at all, since some of the external factors and issues referred to above may well have meant that, as a business in the markets in which it was operating, it was locked into a consistently loss-making position, due to those issues in any event.

The fact that even the 2016 figures remained loss-making – again despite predictions, and despite all the broadly concerted efforts by stakeholders to improve matters by that time – suggest that such factors were indeed at work – as does the simple inherent unlikelihood of this not being one of the extreme cases where *only internal* factors act as the cause of the corporate failure.

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 and disadvantages in your country?***

Taken from Olivares-Caminall and others (eds) *Debt Restructuring* (2016, 2nd edition, OUP, Oxford), at [3.05] – [3.06], the main advantages and disadvantages of an out of court restructuring or "work-out", as compared with formal court-supervised restructurings (focusing on the options available to debtors and creditors in the US and in England i.e. *in the US:* Chapter 11 plan re-organisations and pre-packaged and pre-arranged plans, and section 363 Sales; and *in the UK:* CVAs, Administration (including pre-packaged administrations), and Schemes of Arrangement in the UK):

*Advantages*

1. Lower administrative costs;
2. Lower professional fees;
3. Increased control and flexibility;
4. Less management distraction;
5. Generally, no loss of management control;
6. Better preservation of going concern value;
7. Less negative publicity; and
8. Creditors not subject to potential subordination of claims or avoidance of pre-petition transfers.

*Disadvantages*

1. Limited ability to bind dissenting creditors or classes of creditors;
2. No automatic stay protection;
3. No ability to unilaterally reject executory contracts (relevant in the US under Chapter 11 but not relevant in England ibid, at [3.24]);
4. No ability to pursue avoidance actions; and
5. No ability to obtain contractually prohibited financing (relevant in the US under Chapter 11 but not relevant in England ibid, at [3.24]).

In my jurisdiction, the Cayman Islands, the options available for a court-supervised process of restructuring are now (1) schemes of arrangement (section 786; Companies Act (2023 Revision) (2) the newly introduced restructuring officer regime (ibid; sections 91A – 91J). The latter regime takes the place of the now-repealed process under the former section 104(3) for the use of a provisional liquidation for a court-supervised restructuring (see the discussion at [1] – [15] in the first decision under the new regime of Re Oriente Group Ltd. (Unreported, FSD, 8 December 2022, Kawaley J). The advantages of an out-of-court work-out over these processes maps the above list, with the same qualifications as in respect of the English court processes i.e. it is not a disadvantage of an out of court work-out in the Cayman Islands that you cannot unilaterally reject executory contracts, or cannot obtain the equivalent of debtor-in-possession financing, as neither forms any

part of the above two Cayman Islands Court supervised processes (unlike the position in Chapter 11 in the US, at sections 364 and 365 of the US Bankruptcy Code, respectively).

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

   I have summarized the turnaround / reorganization approaches as presented in each of the articles below, in broad terms, and then set out my views as to whether, and if so how, they were applied in the case of the company:

   1. Adriannse: this article made the case that (i) informal reorganization is overlooked by policy makers, who instead are focused on formal processes designed to prevent bankruptcies; (ii) there are practical possibilities for reorganization which can be used to avoid formal procedures – and that they involve an informal negotiated plan with two processes – business restructuring and financial restructuring; (iii) the key advantages of such informal processes are flexibility, silence, and control; (iv) that *"practical bottlenecks"* occur which can be decisive as to the failure of an informal process if the company only recognizes the need to restructure when it is too late *"when fewer options remain, and saving the company may be more difficult."* The overall thesis is that when *"prompt action"* is initiated, the informal approach can be a success – such that this largely depends on management being willing and able to take action at an early stage and that *"directly affected parties - particularly important suppliers and financiers – are involved in the reorganization."* Based on this, it seems clear that the approach from this article was applied in the case of Flow Management – an informal process was adopted, and all directly affected parties were involved once management announced the issues initially in November 2013. The only point on which this approach appears not to have been adopted is that although the September 2013 figures were being corrected at the initial meeting (suggesting prompt action as recommended in the article); corrections were also made to the annually audited accounts from 2012. That does not seem to me to have been a prompt flagging of the issues with the company's financial information (albeit most likely as it was an unidentified problem between the signing of those accounts, likely in April 2013, and the first meeting in November 2013).

   2. Pajunen – this article provided a model for stakeholder influence identification – to identify the most influential stakeholders in the company – by using a matrix (figure 1) with two axes: network-based position power, and direct resource dependency power. This was then to be used to identify stakeholders into three levels of (decreasing) influence: "governing"; "potential"; and "minor". The article concludes by saying (at pg 1285) that this model is *"easily adaptable for the use of both stakeholder and turnaround managers. Systematic, integrative analysis of resource dependencies and stakeholders' network positions contributes to decision-making in both crisis and stable situations…..explicit evaluation usually has a positive impact on financial performance in all contexts."* Based on this, and no mention of such a rigorous approach being used by the company, or stakeholders, or the consultancy that was

hired, it does not seem to me that this approach was adopted. However, I wonder whether it is not somewhat optimistic to view what is a relatively complex matrix to be in a form which is, as is claimed, easily adaptable for such use. It would need, to my mind, to be considerably simplified to be used, particularly in the fraught and urgent circumstances in which it would only need to be used.

3. Sudarsanam: this article concluded that recovery firms and non-recovery firms *"adopt very similar sets of strategies following financial distress but their strategic choices diverge over time, with recovery firms choosing investment and acquisition to lead them out of trouble, where as non-recovery firms are more internally focused on operational and financial restructuring."* i.e. firefighting strategies. It also made the points that (i) non-recovery firms restructure *more intensively* than recover firms; (ii) non-recovery firms are far less effective in *strategy implementation* than their recovery counterparts. Based on this, in light of the case study, it seems to me that the approach taken with Flow Management tends more to the non-recovery firm approaches (internal focus, and fire-fighting – see in particular the distractions created by the financial information issues, which appear to lead to an under-emphasis on the market issues or growth that might be obtained by a better focus on particular business lines and geographical markets). Although those issues are raised, they do seem rather drowned out by the ongoing noise created by the consistently unreliable financial figures.

4. Schmitt: this article showed that successful turnaround firms drive the complementarities between efficiency-oriented and innovation-stimulating activities, seeking to show that *retrenchment* (by cutting costs and asset reductions), and *recovery* (by improving market position through strategic change) are complementary not contradictory forces in a turnaround. Based on this, it is clear that the company did take this approach – i.e. it focused on both cutting costs and strategic change at the same time. So the initial measures in December 2013 involved staff cuts, and other savings; but it can be seen that more strategic proposals were made later in the process: see in particular the plans drawn up in May 2014 which taken together clearly reflect both retrenchment and recovery as is proposed to be most successful.

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

The rational and/or opportunistic reasons for Banks C and D to frustrate the process by not continuing to act together with A and B, could include:

- The fact that as hold-outs they could improve their bargaining position in respect of the other banks and the company, by forcing different or preferable terms or treatment to be given to them; e.g.

- to buy their co-operation in the face of their decision to cease co-operating; or
- to tempt A and B to buy out their debt at a discount (as A and B duly began to investigate, at a c.10-15% discounted level – reflecting the different assessments of the prospects of a successfully rescue as between C and D on the one hand, and A and B on the other).

- To increase further the pressure on the company to raise funds, through its shareholder, in respect of (i) the partial debt repayment of 35m Euro due on 31 December 2013 and (ii) the further equity capital injection of 12.5m to 15m Euros, as had been earlier requested. Time had been dragging on with no apparent progress, and they may have concluded the increased liquidation risk presented by their non-cooperation might increase the urgency for the company to secure the capital injections required and requested from the shareholder.

- The general loss and lower confidence and faith of Banks C and D, as compared with A and B, as to the competence and probity of Flow's management and its shareholder.

- Banks C and D may have adequately addressed the legal issues with the security pledges such that they were less concerned as to their ultimate position in any insolvent liquidation, since (with any defects addressed) they would sweep the pledged assets to repay their lending (or such level of their lending that they were comfortable with, relative to the projected outcomes in the developing restructuring).

If I had been advising the other two banks, I would have (i) ensured any defects in their security documentation / pledges was corrected too, if (and as quickly as) possible; (ii) advised them to obtain a financial analysis comparing liquidation to the rescue plan (i.e. the likely outcome in a liquidation scenario (in light of all banks having valid security, and in light of the range of possible sales proceeds on the secured assets, and the likely outcome on the unsecured portion of their debts) *cf.* the likely outcome in a rescue scenario) (iii) concurrently sought to engage as closely as possible with the best contacts at C and D (i.e. the closest counterpart relationships) to seek to understand their motivations, and to encourage co-operation (using the analysis at (ii) to show the mutual benefit in doing so, if possible).

Each of Pajunen's propositions 1 to 5 are relevant to this approach, and would suggest that these steps ought, if successful, to increase the prospects of organizational survival, through: (i) more secure continuing support (proposition 1); (ii) more frequent and open communication (proposition 2); (iii) leveraging the strongest personal relationships to best effect (proposition 3); (iv) unlocking management's brokerage position between the company and all of the banks as one group (proposition 4); and (v) obtaining consensus on the long-term goal for the group being rescue through agreed measures, rather than liquidation (proposition 5).

5. ***Which of the eight principles of the 'Statement of Principles for a Global Approach to Multi-Creditor Workouts II' [April 2017] can be found in the workout process of Flow Management (explicit or implicit)?***

In my view, all but the Third and Fourth Principles of the Statement of Principles can be found, or are reflected to a significant degree, explicitly or implicitly, in the workout process of Flow Management. As to the principles which are reflected explicitly or implicity:

**FIRST PRINCIPLE:** All relevant creditors were prepared to co-operate with each other (at least initially) to give sufficient albeit limited time to the debtor for information to obtained and evaluated, and for proposals to be formed.

**SECOND PRINCIPLE:** Although there was no explicit standstill agreement to refrain from taking steps to enforce their claims in place until August 2014 (with November 2013 the date of the first meeting), there was an implicit restraint in place initially between the creditors while they sought to investigate the company's procedures. When the independent turnaround consultancy was hired, there was then an agreement between the banks not to take legal action, pending the consultancy's final report.

**FIFTH PRINCIPLE:** The company did, in broad terms, provide and allow reasonable access to all relevant information relating to its assets, liabilities, business and prospects, to allow evaluation and proposals during the effective Standstill Period. Again, the hiring of the accounting firm and consultancy support that; as does the appointment of a CRO on bank A's instigation. There was also ongoing communications from the company to the creditors e.g. in respect of (i) revision to the reported accounting figures at the outset; (ii) expected costs savings by the initial measures proposed; and (iii) the continuing communications of actual results and predicted forecasts. Although the final type of communications appeared consistently over-optimistic and obviously affected the creditors' trust and confidence in the figures – and appear not to have been supported at each juncture by provision of the relevant underlying information (as required by the Fifth Principle) – the appointment of the consultancy and the CRO, presumably with the powers in each case to access such information – tend to support the argument that the company broadly did provide and allow reasonable access to information, consistently with the spirit of the Fifth Principle.

**SIXTH PRINCIPLE**: The contents of the July 2015 Restructuring Proposal *"reflect the relative positions of the financiers involved,"* so again subject to one point, the Sixth Principle does appear explicitly to have been followed. That one point is that the statement quoted suggest the positions reflected were those at the time of the agreement, rather than at the Standstill Commencement Date. Based on the definition at pg 9 of the Commentary, that would have been at the very outset when the initial "temporary breathing space" was given to the company, and at that time there appear to have been issue with the banks' security/pledges which they addressed during the Standstill Period. However, the point that this does not follow the Sixth Principle appears to make no practical difference in this case, since the sentence goes on to say: *"the providers of the original working capital possess pledges on most assets of Flow Management Work BV…the other partners (both banks and shareholder) have no or subordinated security rights…"* Accordingly, albeit the validity of the security interests has been improved during the Standstill Period – therefore strictly the Sixth Principle

has not been followed here – it makes no practical difference given the priority of claims to assets as between the banks and other secured creditors.

**SEVENTH PRINCIPLE**: There is no suggestion that information obtained for the purposes of the process – including in particular by the consultancy, and CRO as mentioned above in respect of the Fifth Principle – was not made available to all relevant creditors, or would not have been treated as confidential. The Seventh Principle does not require a formal agreement to reflect these obligations – if in fact its terms have been complied with. Clearly, however, best practice is to have such an agreement in place, since in the commentary it is mentioned that it is *"in all cases…recommended that a formal confidentiality agreement should be entered into by each relevant creditor."*

**EIGHTH PRINCIPLE:** The requirement of this principle to accord priority status to additional funding provided during the Standstill Period has been implicitly respected by the 25m Euros January 2015 repayment (with a haircut, in advance of the July 2015 restructuring agreement) of the CEO's additional working capital of 10m Euros and 27.5m Euros provided in April and May 2014 respectively.

As stated above, in my view, principles 3 and 4 appear not to have been followed because: in respect of the *Third Principle*: addressing the security validity defects likely required further documents to be signed by the company, meaning the debtor would have taken steps which *"might adversely affect"* the prospective return to individual creditors; and as to the *Fourth Principle:* the banks in particular did not facilitate co-ordination through a representative co-ordination committee as recommended by this principle, which led to issues later in the process.

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 or region)? If yes, explain in what way. If not, do you see any alternative (informal) possibilities?***

I am not aware of any other specifically Cayman Islands "soft law" alternatives to the Statement of Principles, but as to other possibilities more widely, the Statement of Principles themselves refer to the UNCITRAL Legislative Guide on Insolvency, and the World Bank Principles for Effective Insolvency and Creditor/Debtor Rights.

The latter are more high-level than the Statement of Principles, and therefore likely less useful in respect of obtaining specific creditor buy-in in a particular case. They are expressly *"focused on helping policymakers build and improve the insolvency and bankruptcy systems that support micro, small and medium enterprises (MSMEs)"* (Foreword; pg ii). To see just how much more high-level these principles are, this is the statement of relevant principle at B4.1 on pg 20: *"An informal workout process may work better if it enables creditors and debtors to use informal techniques, such as voluntary negotiation or mediation or informal dispute resolution. While a reliable method for timely resolution of inter-creditor differences is important, the financial supervisor should play*

*a facilitating role consistent with its regulatory duties as opposed to actively participating in the resolution of inter-creditor differences."*

The UNCITRAL Legislative Guide is far more likely to be helpful, setting out as it does at section II "Mechanisms for resolving a debtor's financial difficulties" and at paragraphs 2 – 16 giving considerable detail on the development of "voluntary restructuring negotiations": their necessary pre-conditions; the main processes that form part of such negotiations – (i) commencing the negotiations (ii) coordinating participants – appointing a lead creditor and steering committee (iii) agreeing to a "standstill" (iii) engaging advisers (iv) ensuring adequate cash flow and liquidity (v) access to information on the debtor and (vi) dealing with creditors.

In the two final paragraphs of this section of the Guide, the INSOL Statement of Principles are referred to expressly at paragraph 18, and one additional "soft law" set of guidelines: the Bank of England's "London Approach." This is summarized at paragraph 17 of the Guide as: *"an informal framework introduced with the support of the Bank of England for dealing with temporary support operations mounted by banks and other lenders to a company or group in financial difficulties, pending a possible restructuring. The approach urges commercial banks to take a supportive attitude toward their debtors that are in financial difficulties. Decisions about the debtor's longer-term future should be made only on the basis of comprehensive information, which is shared between all the banks and other parties that would be involved in any agreement as to the future of the debtor. Interim financing is facilitated by a standstill and subordination agreement and banks work together with other creditors to reach a collective view on whether and on what terms a debtor entity should be given a financial lifeline. Similar approaches, and in some cases guidelines, have been developed by the central banks of other countries."*

There is some interesting commentary in Olivares-Caminall and others (eds) *Debt Restructuring* (2016, 2nd edition, OUP, Oxford), at [3.23], based on an article of Paterson *"Bargaining in Financial Restructuring: Market Norms, Legal Rights and Regulatory Standards"* (2014) 14(2) Journal of Corporate Law Studies 333. This suggests that (with change in the UK finance market away from a relatively homogenous group of lenders who could be kept in check by the threat of being excluded from deals with healthy companies, relying on the explanation of Armour and Deakin (2001)), it is now far less effective as a code steering behavior between creditors. The key feature of the London Approach was that *all stakeholders* (creditors and shareholders) were to receive *some allocation of consideration* in the restructuring. That often involved creditors 'leaving on the table' what they would otherwise receive in a court supervised restructuring. Hence the conclusion in the text that out of court restructurings using this approach are *"far from the ubiquitous affair which they once were in the UK and increasingly resort is needed to legal procedures in order to deliver a debt restructuring."*

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

The essence and result of the 4 July 2015 Restructuring Agreement is two-fold:

(1) a *debt for equity swap* by which

(i) the creditors are issued shares in the NewCo, Flow Management II BV, with NewCo being a subsidiary of the company;

(ii) the assets of the company (the shares in its 6 subsidiary operating companies, and therefore the equity in those businesses) are transferred from the company to NewCo and

(iii) the creditor claims (of the banks and the shareholder) against NewCo are cancelled; and

(2) *creditor haircuts and waivers* of the lending to the main operating subsidiary, Flow Management BV by which:

(i) the two banks C and D write off their working capital financing entirely; and

(ii) the other consortium previously providing working capital, waives 97.5m Euros but retains a claim of 240m Euros – reflecting the fact that, unlike banks C and D, this consortium appears to have obtained no equity in NewCo, so retains its (reduced) debt interest in, and claim against, the main operating business of the Group.

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

The main potential cross-border issues I recognize in the company's restructuring process are (i) the need for close and better management than was the case hitherto, of the subsidiaries' businesses across multiple jurisdictions to ensure results are more closely aligned with expectations and issues are identified earlier, which in turn requires better information and internal processes (ii) the cross-border legal issues which would arise if the restructuring is not ultimately successful (and this remains a live issue based on how the case study ends – i.e. inconclusively). Those issues will include:

1. The inevitability of Courts in different jurisdictions having parallel insolvency processes – of the six relevant jurisdictions – the Netherlands, Spain, France, Australia, South Africa and the US – only two have enacted the UNCITRAL Model Law on Insolvency (Australia and the US), so such matters would be approached and coordinated cross-border in those jurisdictions on the basis of the concept of centre of main interests (COMI), with proceedings being categorized as main (where COMI is located) and non-main (where there is a mere establishment not amounting to COMI). In the other jurisdictions, other private international

law principles relevant to insolvency jurisdiction developed by local law would be applicable and this may lead to difficulties of co-ordination (in particular if the law of the place of incorporation is given primacy, rather than some equivalent of the Model Law's concept of COMI). The UNCITRAL website sets out the four elements identified in the Model Law as *"key to the conduct of cross-border insolvency cases:*

i. *access,*
ii. *recognition,*
iii. *relief (assistance) and*
iv. *cooperation."*

How successful any such cross-border co-ordination would be in these areas, depends upon the comity between the national courts applying their own national laws, while respecting the obvious need to conduct an efficient international cross-border process. History shows that this is not always plain-sailing, and can lead to difficulties; and is best ameliorated (as in the Cayman Islands by practice directions or the like dealing with the principles of court to court communication: PD 1 of 2018). Whether recent innovations would be adopted is unclear. These can include joint hearings by video link (in Nortel as between Canada and the US), and contemporaneous judgments based on the same evidence and submissions (in Halifax as between Australia and New Zealand): see Milne, Hau and Johns, Conyers: Cayman Islands Restructuring: Court to Court Communication and Co-operation in Cross-Border Matters (October 2022).

2. The potential in those insolvency processes for anti-avoidance provisions to provide a basis for attacking the terms of the agreed proposal and for payments made pursuant to it to be reversed, where the applicable provisions (e.g. preferences, transactions at an undervalue etc.) apply.

This latter point is highlighted in Olivares-Caminall and others (eds) *Debt Restructuring* (2016, 2nd edition, OUP, Oxford) at [3.22]: *"most notably the creditors who agree to a work out agreement should be wary of provisions in the bankruptcy code which allow the debtor to assume or reject executory contracts [talking of the US context] and the provisions…that empower the debtor with a number of avoidance powers which may be used to void prior transfers or obligations. In the event of a bankruptcy proceeding, these statutory provisions could be used to undermine agreed upon terms of a workout or restructuring agreement and possibly require the creditor to forfeit payments or liens previously received. Therefore, each creditor in workout negotiations should carefully analyse the potential bankruptcy ramifications of an out of court transaction."*

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

At [3.08] of Olivares-Caminall and others (eds) *Debt Restructuring* (2016, 2nd edition, OUP, Oxford) they state that moratoria are a fundamental consideration to an out of court restructuring. They involve the company seeking a temporary period during which it can seek to delay obligations to

make payment on its debts as they fall due. They say the moratorium is sought early in the process once the situation has been explained initially to key creditors, and that it allows a ‘time out’ for the company to seek to negotiate restructuring agreements. They continue (at [3.09]) that: *“it is important for the company to provide periodic progress reports on its financial dealings during a moratorium. Disclosure helps foster a relationship of trust with creditors and encourages continued cooperation. Such cooperation will be needed in the potential negotiations which lie ahead.”*

Based on this analysis of the standard practice around moratoria, calling for one in October 2014 seems to me not to have been a good option at that time, for these reasons:

1. At that time, the initial disclosure of the position to creditors was the best part of a year prior, contrary to the above suggested usual timing – the creditors had in practice been forbearing since that time in any event.

2. In the period from the initial disclosure of the position, to October 2014, and contrary to the best practice approach suggested above, the company had not provided reliable information and had therefore not used the practical or effective moratorium granted by the creditors’ forbearance to increase trust; but had rather decreased trust and confidence in the company through that period. This can be seen from the comment in reference to the months leading up to October 2014 that: *“the banks as a group are not happy with the constantly changing information.”*

3. Given the real risk that existed at that time that the company would enter a formal liquidation, under Cayman insolvency law, an agreement to delay obligations to make payment on its debts as they fall due would be at risk of leading to (i) the reversal or avoidance of payments made by the company to other creditors on the footing of that agreement, or (ii) the reversal or avoidance of the subsequent restructuring agreement designed to improve the position of those creditors compared with their position in a winding up, if either (i) or (ii) were determined by the Court to be:

    a. voidable preferences under section 145 of the Companies Act, or to be
    b. dispositions made at an undervalue under section 146.

**Sebastian Said**