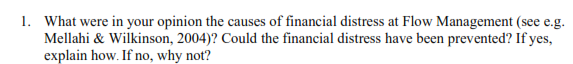
**Tim Prudhoe, 2022/2023**

**Case Study 1 (due 11.4.2023)**

**Question 1**



*Summary of answer: the financial distress could have been prevented, via (i) independent auditing from the time at which (2013-2014) inadequate information management was identified and (ii) improved information management systems themselves*

1. Much academic and research ink has been spilt on the origins for, and of, organisational financial distress.
2. Such studies have identified a variety of causes existing both internally to and externally from the firm. Bankruptcy has been found to arise as a result of varied pressures. Those *internal*, such as related to (i) managerial style, (ii) the specific characteristics of the firm, and (iii) unavailability of resources. In contrast to those, *external* or environmental sources are those which beyond the control of the subject business.
3. A very young / recently operating business is more prone to failure than an older organisation[[1]](#footnote-1). The age of a business plays a significant role as to operable causes of its failure: meaning that many factors which are relevant to the failure of a younger firm appear to be less relevant to the failure of an older business. Academic consensus is that business owners increase their managerial capabilities as they run their businesses and get to know both their real costs and also necessary income better year-on-year[[2]](#footnote-2).
4. With respect to external factors, the impact of environmental factors on an organization such as changes of a technological, regulatory, economic or demographic nature make the demise of some organisations statistically and economically inevitable. Examples of this in the technology and telecoms fields would be Nokia phone and Blackberry / Research In Motion.
5. More directly impactful in an analysis of the Flow Management Holding BV group of companies is Threat Rigidity Effect Theory. Groups, organisations and individuals tend to behave rigidly in threatening situations. Seeking to maintain the present position.
6. On 16.11.2013 the four main creditors of Flow Management Holding BV’s (“Flow”) met with Flow’s Board on the reported pre-tax profit to September 2013 of €8 million actually being a loss of €5.4 million. Further, a misreporting in the annual accounts mean that €3 million must be downgraded by €8 million. That combined event was the first sign of financial distress within the group of companies.
7. Stated causes of the distress:
8. large management bonuses (€ 3 million) paid to the CEO and CFO of Flow;
9. a contingency gain three years hence was recorded in 2012 but was wrongly booked as having been *realised* in 2012;
10. in 2012, in anticipation of a book profit in 2013, a € 2.8 million book profit is made. This book profit was neither realised in 2012 nor in 2013;
11. the 2013 loss is the result of a ‘formula error' in a spreadsheet as the company failed to periodically check the real costs against the results of the cost price calculation (the prices charged were too low, resulting in a loss.)
12. Cause of loss “1.” (which is likely the easiest to identify and “fix”), all the causes are attributable to the competency of Flow’s management information system.
13. Flow’s management needed immediately to take steps in order to ensure that going forward these weaknesses in management information systems were remedied.
14. Exacerbating this, in early December 2013 it is ascertained that the €5.4 million loss is in fact only the loss of Flow Management Work BV itself and that the foreign subsidiaries have also made a loss of €6.3 million.
15. On 20.12.2013 the adjusted result for the years 2011-2013 is worse than anticipated with a total loss for that period of €23.1 million. Not only devastating news in itself, these were obviously were further indictments of Flow’s information management system. Despite this, none of Flow’s December 2013 responses to these many and several economic shockwaves were aimed at preventing / reducing scope for future internal failure. Although a new CFO was retained in January 2014, that did not solve the information management problem.
16. That the situation is largely unchanged as of 2015 is evidenced by the fact that a profit of €9-10 million was forecast in 2014, however, at the end of October 2014 an expected loss for that year of €39 million was announced and the “new” company incurred operational losses of nearly €9 million in 2015 despite prior forecasts of a breakeven result. History, as it were, repeats.
17. Implementation of proper information management systems would have greatly reduced the scope / likelihood for Flow’s economic and financial distress. Related to this is the absence of an independent auditing team since at least discovery of in 2013-2014 of information management weaknesses.

**Question 2**

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*Summary of answer: the flexibility outside of a court restructuring reflects the wider scope for bespoke arrangements; however the chilling effect of the absence of protection from court strategies likely inhibits the debtor-in-possession (“DIP”) financing which is often the mainstay of protective bankruptcy. So too the loss of the automatic stay of proceedings in the context of most court restructurings.*

1. The advantages of a formal restructuring (that is, requiring court proceedings), far outweigh any perceived advantages of flexibility in respect of out-of-court alternatives.
2. In the context of informal restructuring everything is open to negotiation and subject to mutual agreement among the debtors and creditors groups.
3. The British Overseas Territory of the Turks and Caicos Islands (where I am a licensed insolvency practitioner, one of very few) insolvency regime lacks this flexibility. The TCI Insolvency Ordinance under Part III thereof (Company Arrangements) only permits of the possibility of a debt restructuring (i) under narrow and specific circumstances and (ii) even then still leaves a creditor able to complain by application to the court[[3]](#footnote-3).
4. An informal restructuring takes place without outside the scrutiny of the outside world. A TCI Company Arrangement, the nearest comparator to an informal restructuring is vulnerable to a dissatisfied creditor taking the process into the court system.
5. An informal restructuring, if remaining that, will leave the debtor’s management in control of the company and which continues to trade.
6. The informal restructuring process has scope, therefore, to quicker than a TCI Company Arrangement which, on top of the structuring of the arrangement itself[[4]](#footnote-4), will involve the multiple formalities, satisfaction of which are required by the Insolvency Ordinance (Part III of the Ordinance). There is also still a requirement to appoint a Supervisor under a Company Arrangement who ultimately has control of the process. The Supervisor for example will have to present, among other things, a summary of the affairs of the company[[5]](#footnote-5), their opinion as to whether the arrangement has a reasonable prospect of being implemented[[6]](#footnote-6) and make proposals as to any necessary modification or alteration of the arrangement that they consider necessary[[7]](#footnote-7).
7. The two main disadvantages of an informal restructuring is that of operating outside the protection of the legislative moratorium (the automatic stay of proceedings) and – in some jurisdictions – the inability to prime DIP financing. Without the automatic stay the debtor will remain exposed to individual collection efforts by creditors which may overwhelm it and prevent constructive efforts to effect a restructuring plan. Such a stay is available in TCI, both in respect of a Liquidation[[8]](#footnote-8) and an Administration[[9]](#footnote-9). Such a stay not available upon effecting a Company Arrangement. DIP financing does not exist as a concept in TCI.

**Question 3**

**Text

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*Summary answer: Flow’s management did integrate both retrenchment and recovery activities to the benefit of the organisation. For example, from the outset in December 2013, Flow’s management’s method of tackling the crisis included measures designed to both cut costs (retrenchment of staff, price increases) together with methods targeted at improving competitiveness.*

1. Adriaanse et al argue that for various reasons an “informal reorganisation” is often the more advantageous route through organisational crisis relative to a “formal reorganisation”. By “formal reorganisation” what is meant is “all possibilities of reorgansation laid down by the (insolvency) law or which take place by using legal methods and possibilities”[[10]](#footnote-10). An informal reorganisation, however, is “a reorganisation route which takes place outside the statutory framework with the objective of restoring the health of a company in financial difficulties within the same legal entity”[[11]](#footnote-11).
2. From Flow’s financial crisis it is clear that no formal steps were taken by which to reorganise the group. Instead, the management of the crisis was dealt with informally. Flow’s management likely prioritised the flexibility[[12]](#footnote-12), privacy[[13]](#footnote-13) and the retention of control[[14]](#footnote-14) which an informal reorganisation affords.
3. The Flow Management group performed both a business and a financial restructuring. In November 2013 a plan of action was drawn up identifying the issues causing distress. Subsequently, in December 2013 measures were implemented designed to stabalise[[15]](#footnote-15) and reposition[[16]](#footnote-16) the company. Although recruitment of staff followed in 2014 in an effort to introduce reinforcement processes, it was not really until the restructuring agreement was signed In July 2015 that the group could be said to have been reinforced in tandem with significant financial restructuring.
4. Pajunen et al have developed a stakeholders’ influence identification model using communication archives of the Finnish pulp and paper industry firm, Kymi Corporation, which entered and exit reorganization following financial distress between 1908 and 1912. From that model they extrapolated several propositions regarding the basic function of stakeholder management in organisational survival[[17]](#footnote-17).
5. Proposition 1 is that governing stakeholders should be kept on board throughout the reorganisation process. Looking at the Flow as a whole, the governing stakeholders, identified as the shareholder and the creditors (banks A-D), were reassured during the crisis. That is evidenced by the fact that the shareholder, although forced to replace the CEO of Flow Management Holding BV with its board, was nevertheless willing to contribute significant capital towards effecting the reorganisation. It is true that banks C & D ultimately stuck with the process to the end.
6. Proposition 2 is that frequent and open communication between management and stakeholders will tend to enhance the continuing support of stakeholders and increase prospects of or for survival. Where Flow’s management stand to be faulted be is in the repeated promulgation of inaccurate data and analysis to its shareholder and the banks. That seems an operable cause in the breakdown in confidence between management and the shareholder resulting in the CEO’s replacement in April 2014 and the Banks’ general lack of confidence in the Flow group around that time/
7. Proposition 4 is that when the continued viability of the business is at stake, management’s ability to “broker” as between stakeholder is a supportive (rather than destructive) force.
8. Explicit consensus between management and the governing stakeholders regarding the long-term future of Flow – Proposition 5 - is reflected in the executed July 2015 restructuring agreement. There was consensus that for the rest of the group to survive the holding company, Flow, had to be liquidated. That liquidation and the transfer of the shares of Flow’s subsidiaries was done in the long-term interest of the group of which Flow was itself only a part.
9. Proposition 6 - governing stakeholders actively associating management with good firm performance, which in turn positively related to those stakeholders’ continuing support[[18]](#footnote-18) is less easy to align with the experience of Flow’s restructuring. From the poor information management and the replacement of the CEO and other CFO it is more than a stretch to say that the governing stakeholders would have associated management with “good” firm performance. What maintained the creditors’ confidence is more likely the shareholders’ association with management. Leading creditors to place faith in the company until the restructuring agreement was settled.
10. Sudarsanam et al aim to fill the empirical gap in the effectiveness of particular turnaround strategies by asking whether companies that recover from financial distress adopt different strategies than those that continue into decline, whether the two groups differ in the intensity and timing in the deployment of those strategies and which of them contribute to corporate turnaround[[19]](#footnote-19).
11. The results of the study indicate that both recovery firms (those that eventually recover from distress) and non-recovery firms (those that don’t) start with nearly the same order of importance of strategies with operational restructuring, capital expenditure and acquisition being the most frequent[[20]](#footnote-20). Comparing that to Flow Management, there was some operational restructuring in the form of the price increases, improved loss recovery and the redundancy of 130 staff. But there was no capital expenditure or acquisition.
12. One year after the distress period began, the most frequently adopted strategies in non-recovery firms were still “cutbacks” such as dividend cuts, operational restructuring and asset sales[[21]](#footnote-21). Flow Management adopts the same strategies, as the entire business mix is re-evaluated and they have planned to sell shares. There is still no capital acquisition by Flow Management. Recovery firms similarly employ asset sales but to a greater degree.
13. Continuing on two years following the onset of distress, these trends deepen and it is clear that Flow Management falls squarely into the bracket of having employed the strategies of non-recovery companies. That is, sale of shares, the liquidation of substantial assets and a transformative debt restructuring. There is also no possibility of a dividend issue at this stage and the company is still trying to break even. It is difficult to recommend to Flow’s management the vastly different strategies adopted by recovery companies at this time such as capital expenditure and asset acquisition. Flow could not afford that, their stakeholders would likely be opposed to it (the shareholder and the creditors) and they are simply too consumed with staying in business to make sound strategic decisions of this kind.
14. Whilst corporate turnaround research has described redundancy and recovery as inconsistent forces that should be addressed separately, it has not been tested whether they are in fact interrelated and should instead actually be integrated. Thereby permitting turnaround firms to create benefits that exceed the costs of integration. Schmitt et al performed an empirical study of 107 Central European turnaround initiatives and found evidence of duality between redundancy and recovery.
15. Schmitt et al’s findings indicate that the interaction between redundancy and recovery activities has a positive effect on turnaround performance. Flow’s management did integrate both redundancy and recovery activities to the benefit of the organisation. From the outset in December 2013, Flow’s management’s method of tackling the crisis included measures designed to both cut costs (redundancy of staff, price increases) together with methods targeted at improving competitiveness. A new CFO was retained, evaluations were at least planned regarding how turnover could be increased and the range of products offered were reconsidered.
16. The remainder of the restructuring exercise took a similar approach with financial and operational restructuring taking place together with recovery activities. The restructuring agreement includes aspects of debt restructuring[[22]](#footnote-22) as well as an attempt to separate out the most productive elements of the group[[23]](#footnote-23) to go forward together as a more profitable and, therefore, viable entity looking forward[[24]](#footnote-24).

**Question 4**



*Summary answer: from an original position of agreement, the increased and relatively larger exposure of banks C and D, adverse credit data-points / news (the pledge issue), and the related issues of profitability and the information management issues. If advising banks A and B I would have encouraged them to remain cooperative toward and in communication with other creditors.*

1. On the basis of limited information in the Flow Management fact scenario as to banks C and D’s lack of optimism for the restructuring process as a whole, there are some clues as to the basis of reluctance.
2. In January 2014 the stakeholders appeared to be in agreement.. The Banks placed trust in the company which announced that it would appoint a new CFO and the decision was made for the company’s management and the shareholder to constructively work together on a solution. Subsequently, a standstill agreement is proposed by the shareholder consistent with the Statement of Principles for a Global Approach to Multi-Creditor Workouts II (“the Statement of Principles”). A month -and-a-half later, banks C and D stopped cooperating. It is revealed later that generally and even more so for banks C and D, the banks’ lack of confidence stems from the developments of the past six months.
3. Banks C and Ds’ approach reflected their higher levels of lending exposure to the group around the time of the crisis relative to banks A and B’s.
4. In the 6-month period prior to banks C and Ds’ declared reluctance there was the discovery of a problem with the banks’ securities (pledges). That, of course, would suggest that if there were to be a liquidation C and D would wind up in the general body of (unsecured) creditors. Additionally, the other recent revelations regarding the profitability of the company and its systemic information management problems suggest that the company may never return to profitability.
5. Banks C and Ds’ apprehension regarding the standstill agreement is to be understood in that context. Eventually banks C and D executed a standstill agreement.
6. In advising banks A and B, I would encourage them to co-operate with the other relevant creditors.

**Question 5**

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*Summary answer: principles 1, 2, 3, 5, 6, 7, 8*

1. Principle 1, the allowance of a standstill period, was agreed in relation to the Flow Management Group so that information in relation to the group’s position could be obtained, evaluated and for proposals for resolving its financial difficulties formulated and assessed.
2. When banks A-D (likely the relevant creditors given their level of exposure relative to others) learn about the group’s financial difficulties on 16.11.2013, steps are not taken to enforce their debts.
3. There is no evidence that any of the banks took steps to enforce their claims against or take any action which might adversely affect the prospective returns to creditors (Principles 2 and 3). Although banks C and D became “uncooperative” in mid-February 2014, no such steps are noted to have been taken by them. As noted above, they eventually join with banks A and B in entering into the standstill agreement.
4. Although the debtor was very open with the information shared with the banks over the relevant period (Principles 5 and 7), it was usually incorrect information. The banks should have attempted review of the company’s accounts for themselves by way of independent advisers. That would have enabled them properly to assess the financial position of the debtor from the beginning of the crisis. Also to better evaluate management’s proposals.
5. Forbearance of the banks in not progressing to formal measures was largely as a result of their view that dong so was the less desirable outcome relative to the restructuring of the group (Principle 6).
6. Injection of shareholder capital was prevented largely as a result of reluctance on the part of the banks to sign a standstill agreement. Even if the shareholder has injected further capital, then there would have been nothing for the relevant creditors to be wary of by that happening. Their pledges on the company’s assets would have meant that their recoverability would not have been prejudiced (Principle 8).

**Question 6**

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*Summary answer: to the extent possible, remove unwilling recalcitrant creditors.*

1. If creditors are unwilling to adopt the Statement of Principles then the prospects of them adopting any other form of “soft law” seem low.
2. There are soft law insolvency / restructuring approaches developed in the Turks and Caicos Islands.
3. Key to the advice for creditors C-D is that cooperation and coordination amongst them and with management is necessary so as to bring about to an informal reorganization. a Where a creditor still does not want to co-operate, for example, then if they can be removed that would be best: that being the effect of the proposal of banks A-B to buyout the debts of banks C-D. In doing so, Banks C-D could no longer negatively impact the process of formalising a standstill agreement.

**Question 7**

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*Summary answer: a new structure, involving debt-for-equity swap and liquidation of Flow.*

1. The Flow Management group, the shareholder and the group’s creditors entered into a restructuring agreement on 4.7.2015.
2. By the agreement a new company, Flow Management II BV, is incorporated to hold the shares of Flow’s subsidiaries (FMW Spain SL, FMW France SPRL, FMW Australia Ltd., FMW South Africa Ltd. and FMW USA Ltd. (“the Subsidiaries”)). Flow Management II BV, which is incorporated initially as a subsidiary of Lease Group Holding United Kingdom Ltd., “the shareholder”, essentially owns the Subsidiaries. The remaining subsidiary company Flow Management Work BV (The Netherlands) is to be liquidated.
3. The restructuring agreement then contemplates that the shares of Flow Management II BV will be transferred to the consortium of banks (banks A-D), which financed the original working capital of the company (“the Consortium”) and certain Board members of Flow Management Holding BV including the CRO.
4. This transaction appears to have been a “debt-for-equity swap”: in which the banks obtain the shares and in effect the benefit of the new company in exchange for cancelling Flow’s debt as owed to that bank or those banks.
5. The CRO, who was brought onto the Board of Flow Management Holding BV during a period of significant financial distress and the other Board members appear to be owed funds arising from their retainer and the shares transferred to them are in consideration of that. Either that, of some type of “golden handcuffs”.
6. Flow itself is to be liquidated. The liquidation is to take place in an undisclosed manner, all claims against it by the banks and its shareholder (outstanding loans etc.) will be cancelled.
7. Flow and the shareholder will cancel all outstanding claims against Flow Management II BV, thereby ensuring that the Consortium and the board members take the shares in that company free of any indebtedness to the shareholder and Flow arising from past loans etc. to the Subsidiaries.
8. The next phase of the agreement is the various cancellations/waivers of debts owed to the creditors. Banks C and D have agreed to a loss on the loaned amount by €32.5 million, wiping away the debt owed to them by Flow Management Work BV in respect of the additional working capital that they financed. Their agreement to do so is likely partially in consideration of the transfer to them of some of the shares in Flow Management II BV (the “debt-for-equity swap”). So too is the agreement by the Consortium to waive €97.5 million. The €55 million in other loans by sundry creditors to Flow Management Work BV is also cancelled. Likely reflecting underling fact that at least some of that was owed to the Consortium.

1. The Consortium have pledges over Flow Management Work BV’s assets and the restructuring agreement contemplates that they will be able to recoup whatever they can from the liquidation of that company. A €240 million debt is still owed to the Consortium. There are also debts still owed to the shareholder and other unsecured creditors. The assets which are pledged (to the Consortium) are the only secured ones in the company. The other interested parties (the shareholder, other creditors), although able to participate in Flow Management Work BV’s liquidation, will likely receive nothing following the sale of the pledged assets (considering the €240 million debt to the Consortium and unavailability of other assets).

**Question 8**



1. Several potential legal cross-border insolvency law issues arise.
2. Those issues are based on the assumption that a liquidation of Flow Management Holding BV (“Flow”) becomes necessary and a liquidator is appointed. Flow – a Dutch company - holds the shares in several subsidiaries across several foreign jurisdictions including Spain, France, Australia, South Africa and the USA.
3. Having obtained an order for Flow’s liquidation in the liquidator will have to ‘deal’ with those shares which would require orders being made in the foreign jurisdictions recognising the Dutch liquidator’s appointment. Once that is done the liquidator would be free to realise Flow’s assets in those jurisdictions.
4. In respect of Spain and France, both countries are signatories of the European Union’s “European Insolvency Regulation Recast” (“EIR Recast”) which provides a common platform of rules relating to international jurisdiction, the recognition of insolvency judgments, applicable law in insolvency matters and cooperation between insolvency practitioners. The EIR Recast provides for the immediate recognition of judgments/orders concerning the opening, conduct and closure of insolvency proceedings which fall within the scope of the EIR Recast (s. 65). Judgments/orders handed down in direct connection with such insolvency proceedings are similarly recognised immediately and automatically (Article 19).
5. Orders appointing a Dutch liquidator in respect of Flow will therefore be immediately recognised in France and Spain which would permit the direct dealing by the liquidator with the shares of FMW Spain and FMW France.
6. Australia and the United States have both adopted the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvency Law[[25]](#footnote-25). The UNCITRAL Model Law was adopted by the Commission in 1997.
7. The Model Law as enacted in those jurisdictions would permit a foreign representative to apply to the court for recognition of the foreign proceeding in which the foreign representative was appointed (Article 15).
8. Such an application will be recognised if:

(a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2; [*a collective insolvency proceeding, as a Dutch liquidation would be*]

(b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2; [*as a Dutch liquidator would be*]

(c) The application meets the requirements of paragraph 2 of article 15; and

(d) The application has been submitted to the court referred to in article 4 [*the courts with jurisdiction in Australia and the USA to hear such proceedings*].”[[26]](#footnote-26)

1. The effect of recognition would include a stay on the commencement or continuation of individual actions or proceedings concerning the assets, rights, obligations or liabilities of Flow’s subsidiaries in Australia and USA will be stayed[[27]](#footnote-27) and the Dutch liquidator would be entitled to relief. The relief that would be sought in this case is that the Dutch liquidator be entrusted with the administration or realization of the debtor’s assets in Australia and the United States under Article 21(1)(e) of the Model Law.
2. In respect of the subsidiary in South Africa, although that jurisdiction has adopted the Model Law in the Cross-Border Insolvency Act 2000, the provisions thereof continue to be dormant as it was implemented with reciprocity requirements that were so stringent that neither the Netherlands nor any other country would qualify to take advantage of them.
3. It would, however, be open to the Dutch liquidator to rely on South African jurisprudence deciding that there is a general discretion by the South African courts to assist foreign insolvency proceedings either ‘as if’ they were domestic insolvency proceedings or by analogy to them[[28]](#footnote-28).
4. The bonuses were wrongfully paid by Flow leading up to the financial crisis. It was in fact the CEO and the CFO who were paid the bonuses, presided over the woeful information management. Under applicable Dutch law there is the possibility for a liquidator to initiate “claw back” proceedings. Such proceedings would permit the liquidator to make the claim that the payment of the bonuses at the time were prejudicial to the company’s creditors and should be rescinded[[29]](#footnote-29). The liquidator would have to prove in such a claim that Flow deliberately disadvantaged the creditors by the payment of the bonuses and that that was known to the opposite parties in the proceedings[[30]](#footnote-30). Given that the CEO and CFO would have been well informed of the company’s position it appears that the bonuses are in fact liable to be rescinded.

**Question 9**

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1. A moratorium in the Turks and Caicos Islands in respect of corporate Insolvency proceedings is only available in the very specific circumstances. These are:
2. Upon the filing of an application for an Administration order under section 74 of the Insolvency Ordinance 2017 and which terminates on (a) the dismissal of the application or (b) if an administration order is made, upon the discharge of the order;
3. Upon the appointment of a liquidator under sections 159 or 170 of the Insolvency Ordinance 2017 and a provisional liquidator under section 171. Under those sections, unless the Court otherwise orders, no person may commence or proceed with any action or legal proceedings against the company or its assets or enforce, or continue to exercise or enforce any right or remedy over or against the assets of the company and no share in the company may be transferred[[31]](#footnote-31);
4. In a Company Arrangement under Part III of the Insolvency Ordinance, there is no automatic stay, nor is one provided for by application.
5. As the above provisions set out a moratorium stays all individual claims/enforcement efforts by individual creditors of the debtor.
6. In the case of an Administration order, the moratorium provides an opportunity for the Administrator to assess the situation and plan for the rescue of the company[[32]](#footnote-32), or, if that is not a possibility to consider how to realise the company’s assets in the best interests of the creditors[[33]](#footnote-33). The idea being that this would be in preference to a liquidation where no attempt is made to rehabilitate the company but only to take possession of, protect and realise its assets for the benefit of the creditors[[34]](#footnote-34).
7. While any of the creditors[[35]](#footnote-35) may have sought appointment of a liquidator on the basis that Flow is insolvent[[36]](#footnote-36), a moratorium upon the appointment of a liquidator (so, option “2” above) would not have been a good suggestion. By October 2014, Flow had shown signs of continuing viability – reflected in the slight improvement noticed by the banks in August 2014. Plus, the shareholder was still actively searching for options. There were legal difficulties in respect of the Pledges on the assets as well as the fact that it had already been determined that a liquidation would negatively affect the assets values. A liquidation as considered and rejected by banks A-D in respect of a Netherlands winding up would have been just inadvisable under TCI law.
8. A moratorium pursuant to an Administration Order would have been a somewhat better manner of proceeding. However, the benefit of so doing instead of a standstill agreement in place among the creditors and adopting a wait and see approach for a short while, would have been if there were creditors with proceedings already in existence.
9. In Flow’s case the facts appear that there were no such proceedings
10. If Flow’s management could not be trusted to do that which an Administrator would be tasked with doing upon assuming control (assessing the situation so as to make a plan for the rescue of the company) than an Administration Order would have been better.
11. There is no direct evidence that Flow’s Management was behaving dishonestly. Flawed information management systems obviously do not amount to the same thing. Plus there are alternative means of ascertaining a clear picture of Flow’s financial and operational standing to the appointment of an Administrator.
12. In October 2014 it was open to the creditors, as a group, to negotiate and appoint a coordinating committee to organise the retention of professionals to audit and appraise the company, if even on a preliminary basis[[37]](#footnote-37). The cost and time of so doing would appear likely to been less than have exceeded that of appointing an Administrator.

Tim Prudhoe

1. Mellahi K, Wilkinson A (2004) Organizational failure: a critique of recent research and a proposed integrative framework. Int J Manag Rev 5(1):21–41. [↑](#footnote-ref-1)
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3. TCI Insolvency Ordinance 2017; s. 52 [↑](#footnote-ref-3)
4. TCI Insolvency Ordinance 2017; s. 25(1)(c) [↑](#footnote-ref-4)
5. TCI Insolvency Ordinance 2017; s. 13(1)(b) [↑](#footnote-ref-5)
6. TCI Insolvency Ordinance 2017; s. 13(1)(c) [↑](#footnote-ref-6)
7. TCI Insolvency Ordinance 2017; s. 45 [↑](#footnote-ref-7)
8. TCI Insolvency Ordinance 2017; s. 175 [↑](#footnote-ref-8)
9. TCI Insolvency Ordinance 2017; s. 74 [↑](#footnote-ref-9)
10. Adriaanse, J.A.A., & Kuijl, J.G. (2006). Resolving Financial Distress: Informal Reorganization in The Netherlands as a Beacon for Policy Makers in the CIS and CEE/SEE Regions?, *Review of Central and East European Law, 31(2), 135-154 at 135.* [↑](#footnote-ref-10)
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14. Adriaanse, J.A.A., & Kuijl, J.G. (2006). Resolving Financial Distress: Informal Reorganization in The Netherlands as a Beacon for Policy Makers in the CIS and CEE/SEE Regions?, *Review of Central and East European Law, 31(2), 135-154 at 141.* [↑](#footnote-ref-14)
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20. Sudarsanam, S, Lai, J., (2001), ‘Corporate Financial Distress and Turnaround Strategies: An Empirical Analysis’, British Journal of Management, Vol. 12, 183-199 at 193 [↑](#footnote-ref-20)
21. Sudarsanam, S, Lai, J., (2001), ‘Corporate Financial Distress and Turnaround Strategies: An Empirical Analysis’, British Journal of Management, Vol. 12, 183-199 at 194 [↑](#footnote-ref-21)
22. Paragraph 2-7 of the outline to the restructuring agreement [↑](#footnote-ref-22)
23. It is noted that Flow Management BV is the main partner in the group at the bottom of page 6 of the fact scenario. [↑](#footnote-ref-23)
24. Paragraph 1 of the outline to the restructuring agreement [↑](#footnote-ref-24)
25. In Australia this was effected by the Cross‑Border Insolvency Act 2008 No. 24, 2008 and in the USA by Chapter 15 of the Bankruptcy Code [↑](#footnote-ref-25)
26. UNCITRAL Model Law; Article 17(1)(a)-(d) [↑](#footnote-ref-26)
27. UNCITRAL Model Law; Article 20(1)(a) [↑](#footnote-ref-27)
28. Obiter; “Assisting foreign insolvency practitioners in cross-border insolvency : some foreign insights into South African law Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda) [2014] UKPC 36 (10 November 2014), [2015] 2 WLR 971 : cases”, Vol. 37, No. 1, pp 167-186; 01 January 2016. [↑](#footnote-ref-28)
29. Netherlands Bankruptcy Act; article 31 [↑](#footnote-ref-29)
30. Netherlands Bankruptcy Act; article 31 [↑](#footnote-ref-30)
31. TCI Insolvency Ordinance 2017; s. 175(1)(f) [↑](#footnote-ref-31)
32. TCI Insolvency Ordinance 2017; s. 57(1)(a) and (b) [↑](#footnote-ref-32)
33. TCI Insolvency Ordinance 2017; s. 57(1)(c) [↑](#footnote-ref-33)
34. TCI Insolvency Ordinance 2017; s. 186 [↑](#footnote-ref-34)
35. TCI Insolvency Ordinance 2017; s. 162(1)(b) [↑](#footnote-ref-35)
36. TCI Insolvency Ordinance 2017; s. 5: “Insolvent” is defined, on the so-called cashflow basis, as an inability to pay debts as they become due [↑](#footnote-ref-36)
37. Fourth Principle of the Statement of Principles [↑](#footnote-ref-37)