**INSOL International**

**Global Insolvency Practice Course 2023/2024**

**Answers to Case Study I**

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***Q1. What were in your opinion the causes of financial distress at Flow Management (see e.g. Mellahi & Wilkinson, 2004)? Could the financial distress have been prevented? If yes, explain how. If no, why not?***

According to the case facts, the major causes of the financial distress at Flow Management are as follows:-

* The management bonuses issued to the CEO and CFO appear to be disproportionate when there was a significant loss experienced in Sept 2013;
* Various incorrect accounting treatments, e.g. recognition of the contingency gain relating to 3 years all in 2012; the unrealised paper gain was recognised as profit in 2013 might well be unrealistic and certain provisions should have been made; and
* The error in the spreadsheet has caused the pricing strategy deviated from the reality, such mistake could have been avoided if the company adopts a four-eyes policy.

The financial distress is unlikely to be due to other macroeconomic reasons. In particular, it is noted from the case facts that:-

* There is market demand for the services that Flow Management provides, i.e. hiring and leasing trucks and private cars; and
* There is no indication that there is competition / rivalry amongst competitors / new entrants in the same market.

According to *Mellahi & Wilkinson 2004*, there are mainly two schools of thought in approaching the question of whether or not organisational failure could have been prevented.

On the one hand, “classical industrial organisation (IO) and organisational ecology (OE) scholars typically assume a deterministic role of the environment and argue that managers are constrained by exogenous industrial and environmental constraints, leaving them with little real strategic choice”. On the other hand, organisation studies (OS) and organisational psychology (OP) literature take a more voluntaristic perspective and argue that “managers are the principal decision makers of the firm, and consequently, their actions and perceptions are the fundamental cause of organisational failure”[[1]](#footnote-1).

Regarding the present case, financial losses are mainly attributable to the managerial errors / internal inadequacies rather than exogenous industrial / environmental constraints. Therefore, they could arguably have been prevented should better organisational management and structure have been implemented.

That said, it is also debatable that better management could not have saved Flow Management from the financial distress, because Flow Management announced on 31 December 2014 in a press release that the expected loss for 2014 would rise to €39 mil and that €10 mil loss for 2015 is forecast despite the following managerial measures were taken place:-

* Price increase and spending cuts;
* In January 2014, new CFO was announced to be appointed soon;
* In the middle of April 2014, CEO of Flow Management Holding BV was replaced;
* In the middle of April 2014, unsecured loan of €10 mil was deposited into Flow Management Holding BV by its shareholders as unsecured loan;
* In the middle of May 2014, shareholder of Flow Management Holding BV even proposed to lend another €27.5 mil to Flow Management Holding BV; and
* Sometime in mid-2014, a Chief Restructuring Officer (“**CRO**”) was appointed.

***Q2. 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?***

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| --- | --- |
| **Advantages of out-of-court restructuring over formal bankruptcy procedure** | **Disadvantage of out-of-court restructuring as comparing with formal bankruptcy procedure** |
| Out-of-court restructuring may have an objective of restoring the health of the company in financial difficulties, thereby allowing a financially viable company to survive instead of being wound up. It enjoys much more flexibility than formal liquidation procedure. Interested parties may tailor their own arrangements with the company with a view to achieving a solution which is mutually acceptable to them. The process which involves concreate strategic, operational and financial plans to restore sound management of the company may improve its profitability, thereby instilling interested parties’ confidence and allowing the company to generate future cash flow to repay its outstanding indebtedness. The company could continue its normal operation as a going concern and its assets could be utilised to generate future income.  The above is in contrast to formal liquidation, whereby the assets of the company in financial difficulties are likely to be subject to fire sale (i.e. at heavily discounted price) (e.g. in the case of Flow Management, it is estimated that liquidation would result in the recovery of only a maximum of 55% of the total in outstanding debts). Indeed, in a formal bankruptcy procedure, it could end up in a situation where the creditors could not get anything out of the process. | Out-of-court restructuring may take an unpredictable amount of time for objectives to be seen since restructuring typically involves various phases (**Adriaanse & Kuijl, 2006**).  It is common to expect a delay in the process of liaising with the creditors, designing the restructuring plan and implementation of the same.  For example, stakeholders (creditors and equity holders) may not be able to agree to a reorganization plan to begin with, especially when there are too many creditors and shareholders in which case the company simply cannot effectively communicate with them and reach a consensus, which would in turn delay the restructuring process. |
| In **Hong Kong**, an out-of-court restructuring is normally welcomed and preferred by companies in financial distress as well as institutional creditors. The major reason is that such restructuring may offer a commercial solution for the parties to resolve the situation and strike a balance between the interest of the debtor company and the creditors.  A full-blown winding up petition could be extremely costly for creditor. Spending extra costs in seeking to wind up the debtor company – while bearing in mind that the debtor company normally does not have any readily-available assets to be realised to repay the creditors – often does not represent a sensible solution for creditors.  Out-of-court restructuring takes place in relative silence - meaning that the procedure is not made public and thus less adverse publicity would be caused. | In **Hong Kong**, without a winding up petition in the first place being filed with the court, the restructuring of the company relies heavily on the management of the company, but this is not always successful because the company’s management may have another agenda which is different from that of the creditors.  Further, without any pressure imposed as a result of a pending winding up petition, the debtor company tends to delay the matter as long as possible, in an attempt to see if there is any change in the market situation, so that a white knight would eventually salvage the company.  Furthermore, without the court’s sanction of a restructuring plan, such plan may not be fair to all creditors and there could be difficulties in terms of enforcement in the future. |

***Q3. Were the turnaround/reorganization approaches as presented in the reading material (see e.g., Adriaanse & Kuijl, 2006, Pajunen, 2006, Sudarsanam, S, Lai, J., 2001, Schmitt, A., Raisch, S., 2013) applied in this case? If yes, explain in what way. If no, detail what in your opinion should have been done differently.***

1. **Adriaanse & Kuijl, 2006**

According to *Adriaanse & Kuijl, 2006*, turnaround / reorganisation would ordinarily involve the following stages:-

1. “Stabilising” - increase incoming and reduce outgoing cashflow
2. “Analysing” - draw up a well-reorganisation plan
3. “Repositioning” - initialise reorganisation as outlined in the reorganisation plan
4. “Reinforcing” - regenerate positive cash flows from business operations

The steps of making around 130 staff members redundant (which may yield an annual saving of €3.3 mil) and increasing prices (which may see a result of increase of €7.8 mil (revenues/profits)) fall within the meaning of “Stabilizing”, as they would directly contribute to the increase of incoming cashflow and reduction in cash outflow.

The engagement of an independent accounting firm to investigate the procedures within the company, and the engagement of an independent turnaround consultancy agency could amount to “Analysing”. In order to draw up a well-reorganisation plan, it is necessary to investigate the cause of the financial distress.

In the middle of Apr 2014, the CEO was replaced, and in around mid-2014 the CRO was instilled. These steps could be seen as “Repositioning”. The appointment of the new CEO would be responsible for executing what are supposed to be done as set out in the reorganisation plan.

In respect of the “Reinforcing” principle (ie. the organization tries to regenerate positive cash flows from business operations), the present case does not seem to have applied this step. What could have done is that the company could identify source of new incomes so that it could generate positive cash flows.

1. **Sudarsanam, S, Lai, J., 2001**

According to *Sundarsanam, S, Lai, J., 2001*, turnaround strategies include operational, asset, managerial and financial restructuring.

In the middle of April 2014, CEO was replaced, which seems to suggest that there was a managerial restructuring, as it is apparent that CEO is an important position in the management.

Again, making around 130 staff members redundant and increasing prices which may see a result of increase of €7.8 mil (revenues/profits) appear to have applied the operational restructuring strategy, thereby stabilising operations and restoring profitability by pursuing strict cost and operating-asset reduction.[[2]](#footnote-2)

In respect of asset restructuring, at the end of March 2014, one of the plans drawn up is to evaluate and reassess the “entire business mix (product-range)”. Further, the management also sold off “shares of the companies outside the Benelux-countries… as well as some (non-Benelux) foreign branches (non-legal entities) controlled by Flow Management Work BV”. All these steps involve reorganising the firm into self-contained strategic business units, divestment of lines of businesses not fitting the core businesses, discontinuing unpromising products etc.[[3]](#footnote-3)

Finally, financial restructuring is also involved. For example, in January 2014, new CFO was announced to be appointed soon. Ultimately, the terms of the 2015 Restructuring agreement were also heavily infused with financial restructuring strategy, e.g. all claims by the banks against the company were cancelled; all claims by the shareholders against the company were cancelled; the banks waived the repayment of €97.5 mil which was previously provided as working capital… etc.

1. **Schmitt, A., Raisch, S., 2013**

According to *Schmitt, A., Raisch, S., 2013*, corporate turnarounds often involve the interaction between retrenchment and recovery. In gist, the purpose of retrenchment is to reduce assets and/or improve operational efficiency to increase firm profitability and strengthen the firm’s industry position, where recovery refers to strategic changes that transform and reposition the firm for sustained growth and profitability.[[4]](#footnote-4)

In the case study, mixture of retrenchment (e.g. making around 130 staff members redundant, selling off shares of companies outside Benelux countries, etc.) and recovery (e.g. evaluating and reassessing the entire business mix (product-range), strategising on increasing turnover, etc.) were involved.

1. **Pajunen, 2006**

According to *Pajunen, 2006*, the following approaches might be involved in a turnaround:-

1. Rescheduling program for old loans and payments as well as a new credit program to keep the business going
2. New management team should be frugal in their activities
3. New accounting system implanted to replace the old one which suffered from serious deficiencies
4. Renegotiating contracts with sales agents and reorganising the sales districts in order to make the sales system more manageable
5. Introduction of technical improvements to the machines

Rescheduling program for old loans and a new credit program was engaged

After the December 2013 meeting between the banks and management of Flow Management Work BV, the banks decided “not to panic”. Instead of taking legal actions, banks charged a default interest “in order to put healthy pressure on the relation”. On 20 December 2013 when the actual results for 2011-2013 were released, scheduled repayment of €35 mil due on 31 December 2014 were implicitly given permission to be delayed.”

Frugal measures were engaged by the management

In addition, spending cuts were implemented, 130 staff members were made redundant; discussions were held with main clients about possible price increases.

New accounting system might have been implanted

Further, one of the reasons for the losses in 2013 was due to a formula error in the spreadsheet, given that after this error was discovered and the banks were notified about this, and that Flow Management has to report to the banks every month, and that new CFO was appointed, a new formula on the spreadsheet might have been implemented. This indicates that new accounting system might have been implanted to replace the old one which suffered from serious deficiencies.

Also, after the 2013 meeting between the management and the banks, Flow Management Holding “must report based on actual costs and turnover each month”, thereby constantly keeping the banks posted on the financial results throughout the turnover process.

Contracts re-evaluated

Standstill agreement was signed between the banks. Further, repayment plans were constantly evaluated and repayments were delayed as well, e.g. in June 2014, a proposal in respect of working capital financing states that that the €35 mil of additional working capital which should have been due at the end of 2013 would be repaid according to a repayment scheme from 2015.

Technical improvements to machines not found

One of the reasons to this might be due to the nature of business of Flow Management Holding BV. While car leasing involves the cars as machines, there is no indication that the company’s financial distress was linked to the poor quality of cars. Therefore, arguably the case facts do not warrant the cars’ replacements. On the other hand, it could be argued that newer cars might be an attraction to customers. However, given that the company is in financial distress, replacing cars might be too costly of an exercise for the company to undertake when balancing all factors together.

***Q4. 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 case facts suggest Banks C and D “are all of a sudden not cooperating” in mid February 2014, when a standstill agreement was envisioned to be signed by the banks no later than 31 March 2014.

Banks C and D could have hold different views from Banks A and B in relation to their approaches towards Flow Management’s financial difficulties. While Banks A and B seem to be in favour of exploring restructuring measures on Flow Management, Banks C and D may view that liquidation of the company provides more certainty for them to recover their debts.

Further, it should also be noted that different banks would have different internal policies and their own commercial considerations in respect of outstanding debts. The outstanding due to Banks C and D may have already reached the stage where their respective internal policies could not tolerate further. However, this may well be Banks C and D’s strategy to exert pressure on the debtor. Further, Banks C and D may be in a different class of creditor, namely their rights under the outstanding indebtedness due are different from Banks A and B, such as holding securities provided by the debtor or the associates thereof.

Subject to whether the relevant rules and regulations of the four banks in which they were incorporated would allow the banks to enter into dialogue with each other in respect of the same debtor, if I were the advisor of the other two banks (Banks A and B), I would initiate conversations with Banks C and D in order to understand their underlying concerns and rationale, and then suggest the other banks that that the Banks should indeed consider negotiating with the Company on an united basis to enhance our bargaining power. In any case, I would advise Banks A and B that the bank group is unlikely to share the same underlying interests going forward and thus should be prepared for the worst.

***Q5. 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)?***

**FIRST PRINCIPLE:** “Where a debtor is found to be in financial difficulties, all relevant creditors should be prepared to co-operate with each other to give sufficient (though limited) time (a “Standstill Period”) to the debtor for information about the debtor to be obtained and evaluated and for proposals for resolving the debtor’s financial difficulties to be formulated and assessed, unless such a course is inappropriate in a particular case”.

The above principle is found in the workout process: “On 16 Nov 2013, the four banks (A, B, C, and D) of Flow Management Holding BV are invited by the board for a meeting…” to be notified about its financial situation. Subsequently, even though there were frictions among the banks, they still entered into a standstill agreement.

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

The above principle is again found in the workout process: After the 120-day (i.e. around 4 months) standstill agreement was signed in the middle of August 2014, 4 scenarios were drawn up in October 2014 (though none of the above plans were put in place until after the standstill period). Further, even though on 31 Oct 2014 when a press release was announced about the raise of expected loss for 2014, the banks still did not take any actions during the standstill period.

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

The above principle is engaged: During the standstill period, there is no indication that the debtor took any action that might adversely affect the prospective return to the relevant creditors. However, a note to take here is the banks were fortunate that the debtor did not take any of such action, since there does not appear to be any legal mechanism / security given for the implementation of the standstill period.

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

The above principle is found in the workout process (implicitly). The case facts suggest that when “Banks C and D are all of sudden not cooperating. Banks A and B are worried, since this reduces the negotiating power towards the company”. This implies that the banks are fully aware that their interests would be best served if their response could be unified and coordinated. Indeed, cooperations between the banks were so important that there was even a point in time when banks A and B were considering whether it would be possible to “buy out banks C and D with a 15-20% discount”.

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

The above principle has been applied in the workout process (implicitly): After the December 2013 meeting between the banks and Flow Management Holding, it was decided that the company must report based on actual costs and turnover each month to the banks. Further, it is provided that banks appointed a CRO in the board of directors of Flow Management. Subject to the scope of powers of this CRO, there could be some mandatory reporting provisions in the terms of his/her employment of CRO to report information to the banks.

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

This principle is engaged in the workout process: the contents of the Restructuring Agreement on 4 July 2015 reflect the respective positions of the financiers involved. The Provider of the original working capital possesses pledges on most assets of Flow Management Work BV and will receive part of their claim on liquidation. The other financiers (both banks and shareholder) have no or subordinated security rights and will (most probably) receive nothing from their claims on liquidation”

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

The application of this principle is not apparent from the facts given.

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

The above principle is found in the workout process (implicitly): Under the June 2014 Proposal, it is stated that “the amount of €35 mil of additional working capital which should have been repaid at the end of 2013, will be paid off in accordance with a repayment scheme from 2015.” Then, in Jan 2015, it is provided that “a total of €25 mil is paid back to the providers of the (additional) working capital.”

***Q6. 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?***

Regarding the First and Fifth Principles

* No soft law is available to compel the company to provide information to the creditors when the company is merely in “financial difficulty” but not yet entered into any restructuring / winding-up procedure.
* However, when it has reached a stage where a formal court-driven restructuring is involved, e.g. scheme of arrangement / soft-touch liquidation (more elaborated under Fourth Principle below), then court may take up a supervisory role over the process and make such disclosure orders to facilitate the restructuring. Further, when such processes are triggered, receivers/managers or provisional liquidators may be appointed to investigate the affairs of the company, who would then make an investigation report to the creditors and the court about their findings, thereby providing creditors the information to consider their next steps.

Regarding the Second and Third Principles

* If and when the creditors of the company agree with a scheme of arrangement / soft-touch-liquidation, subject to the terms and conditions of the scheme and the court orders, creditors are normally required to refrain from taking any steps to enforce their claims against the debtor.

Regarding the Fourth Principle

* In Hong Kong, insolvency process often involves the input of opinions of the creditors of the company concerned. For example, when a company is declared to be wound up by the court, creditors’ meeting will be held, whereby creditors will be asked by the Official Receiver to vote on their preferred liquidators and how liquidators are to be remunerated etc. This implicitly requires the creditors to coordinate amongst themselves in furthering their best-served objectives.
* Further, whilst there is no statutory restructuring regime in Hong Kong, similar procedures (i.e. voting in creditors’ meeting) are often put in place when a company has to undergo restructuring, e.g. during a Company’s scheme of arrangement, or soft-touch-liquidation in the case of a foreign-incorporated company (which is the corporate structure of most HK-listed companies).

Regarding the Sixth Principle

* The outcome of a scheme of arrangement / soft-touch liquidation might prejudice the interest of different creditors in the sense that their priority of claims might be varied.

Regarding the Seventh Principle

* Information disclosed during scheme of arrangement / soft-touch liquidation is generally subject to confidentiality.

Regarding the Eighth Principle

* Whether the additional funding provided during the workout process is accorded with priority is up to commercial bargain, there is no soft law involved in Hong Kong. However, any preferred payment made within a stipulated period before the presentation of the winding up petition may call for investigation under the principle of unfair preference.

***Q7. Explain in detail the essence and result of the restructuring agreement as signed on the 4th of July 2015.***

According to the case facts, the major terms of the 4 July 2015 Restructuring Agreement are outlined as follows:-

1. All operating companies of Flow Management Holding BV are to be accommodated in a shell subsidiary, called Flow Management II BV
2. The shares in Flow Management II BV are transferred to the consortium of banks (A, B, C, D) which has financed the original working capital of Flow Management Work BV, as well as to a number of board members (including the CRO)
3. Flow Management Holding BV will be liquidated in an undisclosed manner. All claims against this entity will be cancelled by the banks and the shareholder of Flow Management Holding BV
4. Flow Management Holding BV and its shareholder will cancel all claims against Flow Management II BV and its subsidiaries
5. Banks C and D which in the past provided Flow Management Work BV with additional working capital will waive an amount of €32.5 million. In fact, the entire debt is written off
6. The consortium who in the past provided Flow Management Work BV with working capital will waive an amount of €97.5 million. A €240 million claim against Flow Management Work BV remains
7. The € 55 million loan in Flow Management Work BV is cancelled in full

According to the case facts, the contents of the 4 July 2015 Restructuring Agreement reflect the relative positions of the financiers involved. The providers of the original working capital possess pledges in respect of most assets of Flow Management Work BV (the main partner in the group) and will receive part of their claim on liquidation. The other financiers (both banks and shareholder) have no or subordinated security rights and will (most probably) receive nothing from their claims on liquidation. As a result of this restructuring, the foundation is laid for selling the company (now being ‘Flow Management II’) in a going concern situation.

The above produces an array of significant results:-

First, all previous liabilities incurred will rest with the old company, Flow Management Holding BV, which would be liquidated eventually according to the above arrangements; whereas the new entity, Flow Management II BV will be a liability-free entity.

Second, the consortium of banks (via Flow Management II BV) would be the new holder of the operating companies, whereby the banks could enter into an arrangement with that entity to see how the profits generated from the operating companies could be distributed to Flow Management II BV (presumably by way of dividends), and thereafter further distributed to the banks through another round of dividend payment at the level of Flow Management II BV. Given that the CRO would be appointed as one of the board members of Flow Management II BV, presumably the banks would have the access to information in respect of that entity, and thus would be in a position to indirectly monitor the financial performance of the operating subsidiaries.

Third, from the case facts, it appears that the business run by the operating entities under Flow Management BV is still valuable and thus those entities were packed and transferred to Flow Management II BV. Since Flow Management BV would be liquidated in an undisclosed manner, it appears that the said transfer arrangement was to avoid any potential adverse impact on the reputation of the business.

Fourth, while a significant portion of claim against Flow Management BV was cancelled / waived, this does not mean that the banks’ interest would be significantly prejudiced as a result of this. The reason why the banks would have agreed to the above arrangement is likely because the return to the banks under such arrangement is still higher than leaving the operating companies under the original structure, which would only lead to a total collapse of the business and render the value of the entire group diminished.

***Q8. Which (potential) legal and/or non-legal cross-border issues – if any – do you recognize in the Flow Management restructuring process?***

Legal cross-border issues

* Item 1 of the 4 July 2015 Restructuring Agreement provides that “all operating companies of Flow Management Holding BV are to be accommodated in a shell subsidiary, called Flow Management II BV”.
* It is unclear what is the structure of ownership of Flow Management Holding BV’s assets — whether corporate vehicles are permitted to be the holder of cars, or whether individuals are the only permissible holders of cars; if corporate vehicles were permitted to hold cars, whether the cars are owned by Flow Management Holding BV, or through its subsidiaries incorporated across multiple jurisdictions.
* If the cars are only permitted to be held by individuals, additional agreements will have to be entered into between Flow Management Holding BV II and these individuals, which give de facto control to Flow Management Holding BV II over the cars.
* If subsidiaries of Flow Management Holding BV are the holder of the cars, there might be some tax issues with regards to cross-border transfer of shares in the Company.
* If Flow Management Holding BV itself is the holder of the cars, as it is unclear where Flow Management II Holding BV would be incorporated, assuming that it is going to be incorporated outside of Netherlands (i.e. a different jurisdiction from Flow Mangamenet Holding BV), cross-border tax issues may arise.
* Further, in Hong Kong, transfer of assets from a company that is insolvent (whether balance sheet or cash-flow insolvent) or about to become insolvent as a result of such transfer could be subject to statutory claw-back provisions. Whilst in the current case, the Restructuring Agreement was agreed upon by a “consortium of banks (A, B, C, D)”, thereby decreasing the chance of potential creditors relying on such claw-back provisions, it is unclear from the case facts whether Banks A, B, C, D are the only creditors of Flow Management Holding BV. If they are not, this issue might be triggered.

Non-legal cross-border issues

* A reason why the operating companies of Flow Management Holding BV are incorporated in various countries may be due to Flow Management Holding BV’s objective in establishing its business presence across the globe and also to correspond to its business demands across such countries. It might come as a problem for the management level of Flow Management II BV to monitor business activities in light of the different geo-graphical locations of the operating businesses, which entails different geo-political and economical developments.

***Q9. In October 2014 four scenarios have been drawn up. Why was or wasn’t calling for a moratorium (see scenario 4) a good option given the situation at that time? [you are allowed to give your opinion based on your own countries’ Bankruptcy Act; be as detailed as possible]***

While certain jurisdictions provide for a statutory moratorium which allows “breathing space” to a debtor before the onset of formal insolvency; in many jurisdictions a statutory moratorium on creditors’ claims is available only as part of a formal insolvency process[[5]](#footnote-5).

If it is the former situation (i.e. moratorium could be called before the onset of formal insolvency), it would have been a good option since Flow Management continued to expect loss of €39 mil in 2014 and €10 mil for 2015, meaning that it would not have cash to repay its creditors.

However, if it belongs to the latter situation (i.e. moratorium is only part of the formal insolvency process), it would not be an ideal option for the banks, since none of the banks seem to be inclined to proceed with a formal insolvency process.

There is no statutory moratorium in Hong Kong. However, even if there was, it would not be a necessary option for the banks for three main reasons.

* First, the purpose of a moratorium is that it provides a legal basis for the debtor to temporarily suspend its payment obligation to creditors and the creditors could not rely on any outstanding debt to commence or proceed with any legal action against the debtor. There is no indication from the case facts that any of the creditors were eager to enforce its outstanding indebtedness due thereto against the Flow Management Holding BV, thereby disrupting its process of restructuring. Therefore, there is no urgency in applying for a moratorium.
* Second, in fact, the creditors were willing to cancel part of their claims against Flow Management Holding BV (see points 3, 5, 6 of the Restructuring Agreement). Therefore, there is simply no commercial reason to apply for a moratorium.
* Third, it seems that management of Flow Management Holding BV has been rather cooperative with its creditors all along. As seen in the Restructuring agreement, the banks’ €240 mil claim against the company remains. Assuming that such agreement was also signed by the company, there is no indication that the company is unwilling to repay its debts and had to apply for a moratorium to give such effect.

1. Mellahi & Wilkinson 2004, Organizational Failure: a critique of recent research and a proposed integrative framework, p. 21 [↑](#footnote-ref-1)
2. Sundarsanam, S.Lai, J. 2001, Corporate Financial Distress and Turnaround Strategies: An Empirical Analysis p.185 [↑](#footnote-ref-2)
3. Ibid, p.186 [↑](#footnote-ref-3)
4. A. Schmitt and S. Raisch, Corporate Turnarounds: The Duality of Retrenchment and Recovery, p.1218 [↑](#footnote-ref-4)
5. INSOL International, Statement of Principles For A Global Approach to Multi-creditor Workouts II, p.12 [↑](#footnote-ref-5)