Questions

1. ***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?***

Flow Management faced the following financial distress around November 2013:

1. The pre-tax loss of €5.4 million up to September 2013; and
2. The down grade of €3 million results for 2012 by €8 million.

The causes of the losses and negative corrections (as communicated by company management) are stated below:

1. large management bonuses (€ 3 million) have been wrongfully issued (concerning salaries of the CEO and CFO of Flow Management Holding BV);
2. a contingency gain relating to three years has been received in 2012 and has been wrongfully booked as a result in 2012. A negative correction of € 1.6 million must be made;
3. in 2012, in anticipation of book profit (‘paper gain’) to be realised in 2013, a € 2.8 million book profit is made. This book profit was neither realised in 2012 nor in 2013; and
4. the 2013 loss is the result of the basic principles used in the cost price calculation deviating from reality (because of a ‘formula error' in a spreadsheet, it emerges later). Since they 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.

These causes of financial distress were the result of management error and hence avoidable.

In December 2013, Flow Management Works faced a loss of € 5.4 million. On top of that, the foreign subsidiaries have made a loss of € 6.3 million as a result of which total losses of 2013, including a loss of Flow Management of € 11.4 million, amount to € 23.1 million.

On 20 December 2013 the (adjusted) actual results for 2011-2013 were:

|  |  |
| --- | --- |
| In € million | **Net profit** |
| 2011 | 9.4 |
| 2012 | -/- 6.1 |
| 2013 | -/- 36.4 |

The total loss turned out to be even higher than stated on 1 December 2013.

As mentioned in Mellahi and Wilkinson 2004, several studies have demon­strated that performance of a company is determined by its strategy more than the industry. *Mellahi and Wilkinson 2004* also mentioned that the study of *Marks and Spencer* showed that early turnaround attempts were inef­fective because managers failed successfully to diagnose the causes of failure.

In this case study, management of Flow Management may have failed to properly identify the causes of the financial distress in November 2013. Hence, management’s initial plans to address the causes of the financial distress (in November and December 2013), which were to increase prices and implement spending cuts (with regards to labour costs in particular) did not address the causes of business failure. The assumptions adopted by the management initially that the existing business structure continued to operate properly and the existence of market demand and the forecast for so-called “hiring and leasing days” with a view that a profit will be made from January 2014 may also have been inappropriate or may not have been supported by actual performance. Although an independent turnaround consultancy agency was engaged in December 2013 which concluded that the company was viable, the view was based on a view to market share and achieving the estimated turnovers (presumably provided by the then management).

The failure of management’s initial proposals in November 2013 and December 2013 to address the financial distress indicates that the causes for financial distress extend beyond internal efficiency causes of pricing and labour costs, and may be related to its existing business structure, product range and market demand, which may be related to specific business environment of each foreign subsidiary, as well as the unsustainability of its existing financial obligations.

To the extent that the causes of the financial distress relate to the existing business structure, product range and market demand, the financial distress would not have been avoided unless strategic measures are implemented to improve the underlying business.

However, had the causes of financial distress been properly identified, the management could have proposed appropriate measures earlier to address the causes of financial distress and achieve a successful turnaround.

It was only in March 2014 that new restructuring plans were drawn up with a focus on increasing turnover in combination with large cutbacks, evaluation and reassessment of the entire business mix (product range) and the sale of entities other than the Benelux countries (i.e. entities of the group other than Flow Management Works) and entities controlled by Flow Management Work.

Notwithstanding efforts to improve the underlying business fundamentals, the initial plans did not include financial restructuring. Whilst in April 2014 the new CEO had contributed € 10 million via unsecured loan and had made a proposal to extend to lend another € 27.5 million to Flow Management Holding BV, and in June 2014 the shareholder holding company made proposals to contribute at least € 27.5 million, there was no substantial improvement of financial resources of the company as these proposals were subject to a standstill agreement amongst all the banks.

Furthermore, the initial plans to address the causes of the financial distress (in November and December 2013 did not address the deferment or remission of current financial obligations which may have exacerbated the financial distress. In fact, in January 2015, a total of € 25 million were repaid to providers of working capital, which would exacerbate the financial distress of the company. Whilst proposals were made in June 2014 by the shareholder holding company to effectuate the financial restructuring at Flow Management Work BV, which included a deferment of repayment of the € 35 million additional working capital in accordance with a repayment scheme from 2015 and repayment of other loans scheduled for 2014 to 2017, the postponement of refinancing of the remaining € 360 million working capital until 2019 and of the other loans until 2020 subject to liquidity and cash sweeps, the waiver of default interest and other default of contractual obligations, these proposals were subject to a standstill agreement amongst all the banks.

Had the management, the shareholding company and banks reached a comprehensive agreement on a restructuring plan that addresses the improvement of business performance, the improvement of financial resources via injections from shareholders and management, together with financial restructuring of existing financial obligations to a sustainable level, the total amount of € 25 million repaid to the providers of working capital could have been utilized to improve business operations and thereby increase the value of the enterprise and attractiveness of the business to potential purchasers on a going concern basis, which may improve the returns of the banks.

1. ***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?***

In general, an out-of-court restructuring process offers the ability to achieve a debt restructuring without the potentially high cost of court proceedings and adversarial nature of proceedings in a formal restructuring procedure. Out-of-court restructuring processes also provide confidentiality of the restructuring process as compared to public exposure in court proceedings in a formal restructuring procedure. In Singapore, the formal restructuring processes involve court proceedings which are accessible to interested parties. Creditors in general that are not directly involved in the formal debt restructuring proceeding of only financial obligations as well as shareholders/ investors of public listed companies undergoing formal debt restructuring proceedings are entitled to have access to the court proceedings by obtaining the court’s approval.

In addition, given the nature of a contractual nature of out-of-court restructuring processes, the out-of-court restructuring processes offer more flexibility in reaching an agreement on the terms of the debt restructuring. The consensual nature of out-of-court processes necessitate good faith negotiations and sharing of information with creditors and stakeholders, which will increase mutual understanding and thereby enhance cooperation to achieve an acceptable resolution. Out-of-court restructurings are usually not subject to court supervision and hence terms that might not otherwise be allowed under formal restructuring procedures are possible under an out-of-court restructuring process. In Singapore, the formal restructuring processes involve court proceedings and an important consideration of court supervised processes is the concept of fairness to all creditors. Court approval of formal restructuring proposals will therefore require companies that seek court approval of the restructuring proposals to ensure that the proposals and restructuring processes are fair to creditors.

Furthermore, the number of parties involved in an out-of-court restructuring process is typically more limited than a formal restructuring procedure that involves the court process. Thus, out-of-court gives more certainty over the outcome of the restructuring compared to a formal restructuring process where all creditors and interested parties may be involved.

On the other hand, given that out-of-court restructuring processes require unanimous agreement amongst all relevant creditors, the formal restructuring processes provide tools to achieve a restructuring even there is no unanimous agreement amongst the relevant creditors. In Singapore, scheme of arrangement proposals for debt restructuring offers cram down mechanisms, such as the ability to push through a debt restructuring proposal via a scheme of arrangement by obtaining approvals from a majority in numbers of creditors constituting 75% of the claims of all relevant classes of creditors[[1]](#footnote-1). Further, the Singapore scheme of arrangement regime has provisions similar to the US Chapter 11 regime which enables the court to impose a scheme of arrangement on dissenting classes of creditors provided that creditors’ rights are protected. First, the restructuring proposal must be approval by a majority in number of creditors constituting 75% in value of the claims of the total number of creditors of the company[[2]](#footnote-2). Second, the restructuring proposal cannot discriminate unfairly between two or more classes of creditors[[3]](#footnote-3). Third, the restructuring proposal must be fair and equitable where no creditor in the dissenting class is to receive an amount that is lower than what the creditor is estimated by the court to receive in the most likely scenario if the restructuring proposal does not become binding[[4]](#footnote-4), and the value of security held by secured creditors are required to be safeguarded[[5]](#footnote-5). Further, where the dissenting class comprises unsecured creditors, no creditor with a claim that is subordinate to a creditor in the dissenting class is to receive any payment or retain any property, unless provision has been made for the claim of each creditor in the dissenting class to be fully repaid[[6]](#footnote-6). However, this latter requirement does not require shareholders of the company to divest their shares before the cramdown can be imposed.

Another disadvantage of the out-of-court restructuring process is that the success of the consensual process depends largely on the willingness of creditors to cooperate and make concessions to achieve a viable restructuring plan. Unlike a formal restructuring process, there is no legal provision for an automatic stay of actions by creditors and will have to rely on forbearance agreement by all creditors not to take legal action against the company. In Singapore, the commencement of formal restructuring processes such as a restructuring via the scheme of arrangement or judicial management, afford the company automatic protection against legal actions taken by creditors[[7]](#footnote-7), and such protection may be extended by the court depending on the progress of the restructuring and creditor support.

1. ***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.***

*Adriaanse & Kiijl 2006* presented an informal reorganization approach that involves two processes, business restructuring and financial restructuring. It advocates the approach that it is impossible and undesirable to carry through financial restructuring without restructuring the business operations.

The business restructuring process usually consist of the following phases:

1. stabilizing, which entails taking actions aimed at increasing incoming and reducing outgoing cash flow to create breathing space to meet critical financial obligations;
2. analysing, which entails drawing up a restructuring plan to turnaround its business, which covers both short term and long-term objectives as well as the proposals to implement these objectives;
3. repositioning, which entails the implementation of the restructuring plan and reporting to interested parties on the restructuring in an open and timely manner; and
4. reinforcing, which entails strengthening the management structure of the company as well as the company’s balance sheet.

The financial restructuring process usually consist of the following measures:

1. deferment or remission of current financial obligations; and
2. generating additional liquidity or additional financial resources.

In the case study, management initially adopted the approach to stabilise the situation to increase cash flow by proposing the initial plans to increase prices and implement spending cuts (with regards to labour costs in particular). However, it appears the analysing phase only covers the short term objectives and not the long-term objectives given that management made the assumption that the existing business structure continued to operate properly and the existence of market demand and the forecast for so-called “hiring and leasing days” with a view that a profit will be made from January 2014.

It was only in March 2014 that new restructuring plans were drawn up to include long term objectives, with a focus on increasing turnover in combination with large cutbacks, evaluation and reassessment of the entire business mix (product range) and the sale of entities other than the Benelux countries (i.e. entities of the group other than Flow Management Works) and entities controlled by Flow Management Work.

In relation to the implementation phase of the restructuring, there was an initial attempt in to ensure reporting to banks by the engagement of an accounting firm to investigate the procedures within the company and for management to report based on actual costs and turnover on a monthly basis. Subsequently, an independent turnaround consultancy agency was engaged in December 2013 which concluded that the company was viable, but the view was based on market share and achieving the estimated turnovers (presumably provided by the then management).

In relation to the reinforcing phase of the restructuring, there are attempts to strength the balance sheet of the company via requests to pay off the equity capital so that the solvency rate returns to a minimum of 5% and the proposal to sell 350 cars to improve the solvency rate. There was also an initial attempt to strengthen the management structure by requiring that the shareholder company take measures with regard to management, in particular the CFO. Subsequently, the banks required the appointment of a CRO in the board of directors of Flow Management Holdings BV.

In terms of strengthening the company’s balance sheet, there were initial attempts by the banks to require the board of the shareholder company to take measures to strengthen the equity capital position to raise € 35 million to repay part of the debts and to raise an amount of € 12.5 to 15 million to further strengthen the equity capital position. It was only in April 2014 that the new CEO had contributed € 10 million via unsecured loan and had made a proposal to extend to lend another € 27.5 million to Flow Management Holding BV. In June 2014, the shareholder holding company made proposals to contribute at least € 27.5 million, but these proposals were subject to a standstill agreement amongst all the banks.

In terms of strengthening the company’s management structure, there were initial requests by the banks in December 2013 for the board of the shareholder holding company to take measures with regard to management (in particular the CFO), and a new CFO will be appointed in January 2014. In March 2014, the banks also required the appointment of a CRO in the board of directors of Flow Management Holding BV.

However, the initial plans (in November and December 2013) did not address the deferment or remission of current financial obligations which may have exacerbated the financial distress. In fact, in January 2015, a total of € 25 million was repaid to providers of working capital, which would exacerbate the financial distress of the company. Whilst proposals were made in June 2014 to address the deferment or remission of current financial obligations, these proposals were subject to a standstill agreement amongst all the banks. It was only in July 2015 that a restructuring agreement was finally signed that addressed the deferment and remission of existing financial obligations.

*Pajunen, 2006* advocates the identification and management of stakeholders of the company in the turnaround efforts based on the position of a stakeholder’s influence of the company and the dependency of the company on the resources from the stakeholder. *Pajunen 2006* advances 6 propositions in stakeholder management to enhance the continuing support of governing stakeholders and increase probability of a successful turnaround:

1. Securing the continuing support of governing stakeholders in a existence -threatening crisis, including the management of minor stakeholders that has a combined influence which may cause substantive negative consequences for the company.
2. Frequent and open communication between management and governing stakeholders.
3. To leverage on and use of personal relationships between management and governing stakeholders.
4. To facilitate communication between different governing stakeholders.
5. To achieve common understanding of the long-term objectives amongst the governing stakeholders.
6. To associate the company’s positive performance during the turnaround process with management’s conduct.

In the case study, while there appears to be attempts for communication between management and the banks (as seen in the invitation of the banks by the board of Flow Management Holding for a meeting in November 2013 to explain the causes of losses and negative corrections, as well as the appointment of an accounting firm to investigate the procedures within the company, and the appointment of a turnaround consultancy agency to express a view on the company’s viability, more frequent and open communication between management and the banks, in particular to evaluate and assess the underlying business, could have been helpful to enhance the success of the restructuring. This help facilitate achieving a common understanding of the long term objectives amongst the banks as well as between shareholder, management and creditors to help reach an early agreement by all stakeholders on the restructuring plan and which may in turn facilitate the support of shareholder company and management to provide additional financial resources to enhance the balance sheet of the company.

*Sudarsanam, S and Lai, J, 2001* examined the frequency, timing and intensity of use of the turnaround strategies (including operational, asset, managerial and financial restructuring) and the outcome of the restructuring. The results suggest that successful recovery adopt more forward looking, expansionary and external market focused strategies than unsuccessful turnaround efforts which are pre-occupied with internal changes.

In the case study, there appears to be a lack of or delay in adoption of forward looking and external market strategies. An early adoption of a more forward looking, expansionary and external market focused strategies could be helpful in securing support of all stakeholders to a restructuring plan.

*Schmitt, A. and Raisch, S., 2013* proposes an approach that focuses simultaneously on both retrenchment and recovery phases of turnaround as opposed to a sequential approach of an initial retrenchment phase followed by recovery phase of turnaround. *Schmitt A. and Raisch S. 2013* advocates that to focus on the existing to regain stability typical in the retrenchment phase of turnaround without considering prospective necessary changes in the recovery phase will create greater stress and anxiety and make it more difficult to search of alternative courses of action. It also highlights that the focus on management control in decision processes, restricted internal communication and tighter resources control typical in the retrenchment phase of turnaround instead of structural changes that allow decentralization, employee involvement and flexibility in recovery phase of turnaround is harmful to recovery and makes it difficult for companies to change strategic orientation. In addition, the retrenchment phase tends to focus on more immediate performance results which is favoured by external stakeholders whereas the recovery phase focuses on long-term recovery plan and strategic changes required to ensure long-term survival which is favoured by internal stakeholders, such as employees. The focus on retrenchment phases will tend to lead to reduced employee commitment and loss of talented employees which may be harmful to the future recovery prospect. Therefore, *Schmitt, A. and Raisch, S., 2013* suggests that there are complementarities in retrenchment and recovery activities and integrating retrenchment and recovery activities during corporate turnarounds can be beneficial to the turnaround success.

In the case study, the approach adopted appears to be a sequential approach of an initial retrenchment phase followed by recovery phase of turnaround given that the initial proposals appear to be focused on addressing internal efficiency causes of pricing and labour costs. It was only in end-March 2014 that restructurings plans were drawn up to focus on increasing turnover in combination with large cutbacks, evaluation and reassessment of the entire business mix (product range) and external market strategies such as the sale of entities. Further, whilst there were initial requests by the banks for proposals to enhance the balance sheet of the company, the intensity of expansionary plans for capital injection and going concern sale options increased towards the later phases of the restructuring process. A simultaneous approach to consider both retrenchment and recovery phases of turnaround may help reach an earlier agreement on the restructuring plan and the implementation of the agreed plan.

1. ***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?***

From the perspective of Banks C and D, and vis-à-vis between banks and the company/ management, the behaviour of Banks C and D could have been adopted as a result of the poorer financial results despite earlier representation made by management on the causes of losses and proposed plans based on management assumptions. Strategically, this approach could have been intended to send the signal to management or the shareholder company that legal action may yet be taken against the company notwithstanding the banks had agreed initially to discuss the company’s situation in December 2013 and to impose additional requirements to drive the restructuring process. An example is the requirement of the banks for the board of the shareholder company to take measures with regards to changes to management structure, by initially requiring the change of the CFO and subsequently the appointment of a CRO. Another example would be the requirement for stakeholder company and/or management to raise addition funding to strengthen the equity capital position of the company.

From an opportunistic perspective of Banks C and D, their behaviour could be intended to increase alternative recovery options such as buy-out proposals from the other two Banks A and B.

As advisor to Banks A and B, options available to Banks A and B would include:

1. open communications between the banks to reach a common understanding of the long-term objectives so as to increase negotiating power as a creditor block vis-à-vis the company and management.
2. If a common understanding between the banks is not practically feasible, Banks A and B could explore buy-out Banks C and D with a discount in order to act more decisively vis-à-vis the company and management.
3. Alternatively, Banks A and B could explore the alternatives of formal restructuring options that provides automatic moratorium protection against dissenting creditors or cram down mechanisms, in order to bind dissenting creditors to push through a restructuring proposal.
4. ***Which of the eight principles of the ‘Statement of Principles for a Global Approach to Multi-Creditor Workouts II’ can be found in the workout process of Flow Management (explicit or implicit)?***

The following 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:

1. The first principle of a Standstill Period and second principle of an agreement to refrain from taking any steps to enforce their claims can be seen in this workout process. At the initial stage of the informal work-out process when the banks were invited by the board of Flow Management Holding in November 2013 for a meeting, all the banks agreed to discuss the company’s situation on 1 December 2013 to give time for an accounting firm to be called in to investigate the procedures within the company and to report on actual costs and turnover on a monthly basis. The initial standstill period was also extended to receive the shareholder company’s proposal to the banks’ request to pay off the equity capital to improve the company’s solvency rate. In December 2013, the banks extended the standstill period (implicitly) by agreeing that legal action will not yet be taken against the company pending the final report from the turnaround consultancy agency and to receive proposals from shareholder company on the banks request to take measures with regards to management (in particular the CFO) and to raise funding to repay part of the debts and strength equity capital position. Further, although the banks had sufficient legal reasons to terminate the credit agreements towards end December 2013, this was not done on concern that bankruptcy will negatively affect the proceeds of the assets. Throughout 2014, restructuring proposals and requests by banks continued to be exchanged amidst worsening results and exploration of four scenarios in October 2014, which resulted in a restructuring agreement finally signed on 4 July 2015.
2. The fifth principle (that debtor should provide and allow relevant creditors and/or their professional advisers reasonable and timely access to all relevant information in relation 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) could be said to be seen in the workout process of Flow Management. Initially, the company appointed an accounting firm to investigate the procedures within the company, and Flow Management Holding is supposed to report based on actual costs and turnover on a monthly basis. In addition, an independent turnaround consultancy agency was appointed to provide a view on the viability of the company and a report extended to the banks. The company has also been providing regular updates on actual result performance via announcements.
3. ***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?***

In Singapore, widely known to be a rule-based jurisdiction, possibilities for “soft law” to be used to convince creditors to adopt the Statement of Principles are limited. The approach in Singapore has been to enact legal provisions in relation to the development of insolvency law and to facilitate cross-border insolvency. For example, in 2018, Singapore has adopted and enacted the Uncitral Model Law on cross-border insolvency into Singapore law.

However, guidance statements issued by Uncitral on cross-border and insolvency law with the objective of assisting the establishment of an efficient and effective legal framework to address debtors facing financial distress may be helpful to persuade creditors to adopt the Statement of Principles. Many of the Statement of Principles can be found in, and underpinning, the provisions of the Uncitral Model Law and the Unicitral guidance statements on insolvency law and cross-border insolvency. Having adopted and enacted the Uncitral Model Law, these guidance statements, being issued by Uncitral, would be persuasive authorities to convince creditors to similarly adopt the Statement of Principles. For example, the first and second principles of the Statement of Principles can be found in the legislative guide on insolvency law issued by Uncitral which recommends that a contractual agreement to suspend adverse actions by both the debtor and main creditors may be required to allow business operations to continue and to ensure that sufficient time is available to obtain and evaluate information to formulate and assess proposals to resolve the debtor’s financial difficulties[[8]](#footnote-8). Similarly, the legislative guide on insolvency law issued by Uncitral addresses the requirement to provide information to creditors and other interested parties to enable them to properly assess the restructuring plan and the need to ensure confidentiality of the information provided[[9]](#footnote-9).

An alternative informal possibility would be to appoint insolvency practitioners that are members of the Insol International Group of Thirty-Six to provide guidance and convince to creditors to comply with the Statement of Principles. The Insol International Group of Thirty-Six has ongoing support for the Statement of Principles, many of these members are significant insolvency practitioners in Singapore.

Another alternative informal possibility would be to rely on the coercive effect of cram down mechanisms and moratorium under the formal restructuring proceedings to disincentivize creditors from acting in a manner inconsistent with the Statement of Principles.

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

The restructuring agreement signed on 4 July 2015 outlined the following:

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 Ma

Management Work BV, as well as to a number of board members (including the CRO);

1. Flow Management Holding BV will be liquidated in an undisclosed manner. All claims against this BV will be cancelled by the banks and the shareholder of Flow Management Holding BV;
2. Flow Management Holding BV and its shareholder will cancel all claims against Flow Management II BV and its subsidiaries;
3. the banks (C and D) which in the past provided Flow Management Work BV with additional working capital will waiver an amount of € 32.5 million. In fact, the entire debt is written off;
4. the consortium who in the past provided Flow Management Work BV with working capital will waiver an amount of € 97.5 million. A € 240 million claim against Flow Management Work BV remains; and
5. the € 55 million loan in Flow Management Work BV is cancelled in full.

In essence, the Restructuring Agreement envisages, and will result in, the transfer of the assets of Flow Management Holding BV to (indirectly through the new shell subsidiary, called Flow Management II BV ) 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) in return for:

1. all claims against Flow Management Holding BV will be cancelled by the banks and the shareholder of Flow Management Holding BV;
2. the waiver of the entire debt owing to Banks C and D of € 32.5 million as additional working capital extended to flow Management Work BV;
3. the partial waiver of an amount of € 97.5 million debt provided by the consortium of banks to Flow Management Work BV; and
4. the cancellation of the entire € 55 million loan provided by the consortium of banks to Flow Management Work BV.

As a result of this restructuring, the foundation is laid for selling the company (now being ‘Flow Management II’) in a going concern situation for the benefit of those who had financed Flow Management Holding BV and the new management of Flow Management Holding BV who had improved the performance of the business of Flow Management Holdings BV due to the reorganisation.

Flow Management Holding BV will be liquidated in an undisclosed manner. All claims against Flow Management Holding BV will be cancelled by the banks and the shareholder of Flow Management Holding BV.

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

Potential issues that may arise from the Restructuring Agreement include:

1. The implementation of the Restructuring Agreement requires the transfer of shares in the foreign subsidiaries to Flow Management II BV. This requires the cooperation of both the respective board of directors of each of the foreign subsidiaries of Flow Management Holding BV and the creditors of each of the foreign subsidiaries. If these foreign subsidiaries are insolvent or facing distress, the management of these foreign subsidiaries owe duties to act in the interest of the creditors of these foreign subsidiaries and may not give effect to the Restructuring Agreement.

Furthermore, if the creditors of the foreign subsidiaries place the foreign subsidiaries into liquidation, the local laws of the foreign subsidiaries may prohibit the transfer of shares. Therefore, separate restructuring efforts at each of the foreign subsidiaries may be required to avoid liquidation of the foreign subsidiaries in order to implement the Restructuring Agreement.

1. A potential issue may arise in respect of justification of the transfer of all the assets of Flow Management Holdings BV for the benefit of 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), to the exclusion of other creditors of Flow Management Holdings BV. In liquidation, the assets of a debtor are to be realized for the benefit of all creditors in general.
2. Legal issues may also arise as to whether the transfer of all the assets of Flow Management Holding BV to discharge the debts owing by Flow Management Work BV to the consortium of banks (A, B, C, D) constitutes undervalue transaction, depending on the value of the assets transferred to the consortium of banks A, B, C and D. As the consortium of banks (A, B, C, D) are creditors of Flow Management Holding BV, the transfer of the assets of Flow Management Holding BV to discharge the debts owing by Flow Management Work BV to the consortium of banks (A, B, C, D) may constitute unfair preference of these creditors.
3. Potential breach of fiduciary duties by directors may arise. Issues of potential breach of fiduciary duties owed by the directors of Flow Management Holding BV may arise in approving the transfer of all the assets of Flow Management Holding BV 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) in return for the cancellation of claims against this BV by the banks and the shareholder of Flow Management Holding B. Similar issues of potential breach of fiduciary duties owed by the directors of the shareholder of Flow Management Holding BV (i.e. the directors of Lease Group Holding United Kingdom Ltd) in approving the cancellation of all claims by Lease Group Holding United Kingdom Ltd against Flow Management Holding BV, and the justification for the cancellation of all claims by Lease Group Holding United Kingdom Ltd against Flow Management Holding BV.
4. ***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]***

At that time, there were friction amongst Banks A and B versus Banks C and D about cooperation in finding a solution. Banks C and D also threatened to cancel the credit extended to the company. In these circumstances, the Insolvency Restructuring and Dissolution Act of Singapore allows companies intending to propose a scheme of arrangement to apply to court for a moratorium[[10]](#footnote-10), during which all proceedings against the company would be restrained so as to allow breathing room for its restructuring efforts. This moratorium mechanism against dissenting creditors may take away the bargaining position of these dissenting creditors.

However, procedurally, the applicant company must provide the necessary information to show evidence of creditor support[[11]](#footnote-11), or publish a notice of the application[[12]](#footnote-12). Substantively, the moratorium application must be made in good faith[[13]](#footnote-13), and that there has to be real evidence of support from the general run of creditors[[14]](#footnote-14). The notice requirement of the moratorium application may trigger the default of other obligations and accelerate the claims against the company. Further, in order to succeed in the moratorium application, the company must obtain and evidence sufficient support from creditors in general. If there are sufficient support from creditors of the moratorium application or of the proposed debt restructuring, calling for a moratorium under scenario 4 would be a good option given the situation at that time whereby Banks C and D were not cooperative of the restructuring efforts at the material time.

1. Section 210(3) of the Companies Act 1967, Singapore [↑](#footnote-ref-1)
2. Section 70(3)(a) and (b) of the Insolvency, Restructuring and Dissolution Act 2018, Singapore [↑](#footnote-ref-2)
3. Section 70(3)(c) of the Insolvency, Restructuring and Dissolution Act 2018, Singapore [↑](#footnote-ref-3)
4. Section 70(4)(a) of the Insolvency, Restructuring and Dissolution Act 2018, Singapore [↑](#footnote-ref-4)
5. Section 70(4)(b)(i) of the Insolvency, Restructuring and Dissolution Act 2018, Singapore [↑](#footnote-ref-5)
6. Section 70(4)((b)(ii) of the Insolvency, Restructuring and Dissolution Act 2018, Singapore [↑](#footnote-ref-6)
7. Sections 64(8) and 95(1) of the Insolvency, Restructuring and Dissolution Act 2018, Singapore [↑](#footnote-ref-7)
8. UNCITRAL Legislative Guide on Insolvency Law, Part 1, page 24. [↑](#footnote-ref-8)
9. UNCITRAL Legislative Guide on Insolvency Law, Part 1, pages 24 and 25. [↑](#footnote-ref-9)
10. Section 64(1) of the Insolvency, Restructuring and Dissolution Act 2018, Singapore [↑](#footnote-ref-10)
11. Section 64(4) of the Insolvency, Restructuring and Dissolution Act 2018, Singapore [↑](#footnote-ref-11)
12. Section 64(3) of the Insolvency, Restructuring and Dissolution Act 2018, Singapore [↑](#footnote-ref-12)
13. *Re IM Skaugen Se and other matters* [2019] 3 SLR 979 at [69] [↑](#footnote-ref-13)
14. *Re IM Skaugen Se and other matters* [2019] 3 SLR 979 at [50] and [58] [↑](#footnote-ref-14)