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# Global Insolvency Practice Course 2019/2020

## Responses to take home case study module A

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 ("Flow") is clearly overly leveraged and suffering financial distress as a result of what would appear to be largely internal causes. The case study does not provide a lot of information on the operations of Flow or discuss the markets in which it operated, however, both the automotive sector and the property sector were negatively impacted by the financial crash in 2008. Leasing is also an area which has undergone technological and regulatory change both of which may have had an adverse impact on the business. The case study does not provide sufficient information to provide a proper assessment of the organizational failure at Flow from an Industrial Organizational perspective (ie the impact on Flow of jolts in the external environment caused by changes of a technological, regulatory, economic or demographic nature). Nevertheless, it is likely that a business of this nature would have been effected by external environmental factors and that in particular the financial stress caused by the 2008 crash may have had a significant impact on its markets.

There is no information in the case study to determine the extent to which the relevant factors from an Organizational Ecology perspective (ie population density, industry life cycle, age and size) had an impact on the financial distress. Nevertheless, Flow would appear to be a large company on the basis of balance sheet and employee metrics which would suggest that it had a competitive advantage assuming that these metrics are indeed large when compared to competitors. If this is the case, then this ecological factor could be potentially ruled out as being determinative of its failure.

In my opinion, the case study supports a view of Flow's organizational failure from the voluntaristic perspective advocated by the Organisational Studies and Organizational Psychology literature. The key issues initially identified by management all relate to internal matters which concern issues at management level and, in particular, bring into question the competence of the CFO, the issues being (i) wrongly issued management bonuses, (ii) a wrongly booked contingency gain, (iii) wrongly booked profit, and (iv) wrong cost price calculations. These are fairly fundamental issues which the case study states that management initially identified as being causative of Flow's financial problems.

In conclusion, it would appear that the CFO was one of the key causes of the failure and, as such, the failure could have been prevented with a better qualified CFO.

2. **What are in general advantages and disadvantages of an out-of-court restructuring (workout) as compared to a formal bankruptcy procedure? More specific, what are the advantages versus disadvantages *in your country*?**

Workouts do not involve judicial intervention and as a result they are a more flexible and expeditious tool which allows for value to be maximised. Nevertheless, they lack some of the protections that are commensurate with the oversight derived from formal processes. The key advantages of workouts over formal bankruptcy processes are elaborated in the paper by Jan Adriaanse and Hans Kuijl, as being flexibility, silence and control. These advantages are set out in more particularised detail and added to in the 2012 World Bank study on Workouts[1], as follows:

1. Flexibility and ease of adapting a restructuring plan that addresses the specific needs of the debtor's business.
2. Ease of negotiation between all stakeholders as workouts are less confrontational and have no formal procedural rules.
3. Expeditious as negotiation between creditors and the debtor can proceed at a higher speed on the basis of freedom to contract and with no court involvement.
4. Lower cost as formal insolvency procedures are costly in terms of time, money, and reputation.
5. Provide for enterprise group wide restructuring solutions.
6. Maximises value from an operational perspective as a result of:
    a. Confidentiality which allows reputational damage to be minimised.
    b. No stigma that attaches to a formal insolvency.
    c. Continuation of the debtor's business.
    d. No changes in management.
    e. No changes in rights of parties (ie insolvency defaults not triggered).
    f. Lack of regulatory impact which may be important to prevent the debtor losing a license or any other type of regulatory authorization to operate its business.

The key advantages of formal bankruptcy processes over workouts are set out in the 2012 World Bank study on Workouts, as follows:

1. Lack of unanimity requirement.
2. Recognition by foreign courts.

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[1] *"Garrido, Jose M.. 2012. Out-of-Court Debt Restructuring. World Bank Study. World Bank. © World Bank. https://openknowledge.worldbank.org/handle/10986/2230 License: CC BY 3.0 IGO."*

3. Analysis of the debtor's financial position better facilitated.
4. Moratorium on creditor action.
5. Protections against directors' liability.
6. Fewer chances of lender liability actions.
7. Punishment of fraudulent behaviour.
8. Pursuing avoidance actions.
9. No requirement for the debtor's consent.
10. Availability of bankruptcy specific remedies like subordinating the claims of insiders.
11. Avoids difficulties of multi-party negotiations.

In the UK, the advantages and disadvantages of workouts compared to formal bankruptcy procedures largely map the World Bank's formulation set out above.

The key formal bankruptcy processes in the UK are liquidation and administration. Liquidation is a terminal procedure which is not comparable to a workout. Administration is a rescue tool which is an effective means of salvaging the business of a distressed company through a pre-packaged administration sale which has benefits akin to the points listed above for a workout. A pre-packaged administration does not, however, have the same operational benefits listed at points 6(a),(b),(e),(f), set out above in relation to workouts around maximising value. Nevertheless, the business is immediately sold upon the company entering administration which minimises the impact on value of these factors. In terms of the advantages of formal bankruptcy, set out above, these all apply in an administration.

It is noteworthy that the UK also has a very effective hybrid restructuring tool, the scheme of arrangement which sits somewhere between a workout and a formal process. This provides for all the benefits set out above for workouts albeit not to the same degree and save for (i) certain restrictions on the type of deal that can be agreed as a result of judicially prescribed class and fairness considerations (ie point 1 on workouts above) (ii) the public nature of the process (ie point 6(a) on workouts above) and (iii) default triggers resulting from the scheme constituting a compromise with creditors (ie point 6e) on workout above). The scheme also has the benefits set out above at points 1 to 3 above for formal bankruptcy procedures and arguably some degree of protection in relation to points 4 and 5 above as well, as the scheme provides for Court oversight which involves a limited moratorium, as well as defences to director liability claims. In the UK, there is also a hybrid restructuring tool called the Company Voluntary Arrangement which is more cost effective and flexible than a scheme when restructuring unsecured debt; however, it is not capable of binding secured creditors which limits its utility.

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

Flow followed various aspects of the turnaround/reorganisation approaches set out in the reading materials. In summary, the two key issues are that Flow did not appear to have developed or implemented a business plan to address its turnaround requirements nor did it move quickly to address the problems with management with whom the lenders clearly lost confidence. As a result, the financial restructuring appears to have been an overly drawn out process which may have caused an additional challenge to the possibility of turning the business around. In fact many of the factors listed in the conclusion of the Adriaanse & Kuijl (2006) paper as determining the success of a rescue operation appear to have been missing. Taking each factor in turn:

1. Active attitude by management and shareholders with regard to the informal reorganization

The shareholder appears to have been very slow to engage with the lenders requests for Flow to be provided with shareholder support whilst the case study does not read as management taking an overly active role in taking action to turn Flow around. Importantly it appears that despite the lenders losing their confidence in the CFO and lender requests for the CFO to be replaced, the CFO may not have been replaced.

2. Involvement of important interested parties (financiers) in the reorganization process

Flow engaged with all its lenders. However, it appears that Flow did not engage with the lenders in a sufficiently active and transparent manner, in particularly, banks C and D. This may, however, have been the fault of these banks rather than Flow.

3. Adequate and speedy reorganization of the business operations (preferably with the help of third parties)

There does not appear to have been a significant reorganization of the business operations but to the credit of management Flow did involve the help of third parties through engaging an independent accounting firm and then a CRO later in the restructuring process.

4. Transparency (towards financiers) with regard to the financial situation and the intended reorganization

Flow allowed an independent review of its position and did provide limited financial updates but Flow lost the confidence of its lenders as the financial updates kept missing their mark and crucially insufficient reasons appear to have been provided to justify this. In a restructuring scenario it is important to keep lenders regularly updated with a full suite of relevant financial information including monthly management accounts and 13 week cash flow forecasts.

5. Injection of risk –bearing capital (equity)

The shareholder eventually provided an unsecured loan which would have assisted Flow with cash flow issues but would not have addressed the negative equity position that the banks were clearly keen to resolve this.

The other notable issues are:

1. Stakeholder influence

The shareholder (in their capacity as CEO) appears to have had the most power and resulting influence from their network position for a significant period of the restructuring which may have been detrimental to the restructuring. Generally the success or failure of restructurings are dictated by key dominant individuals at the debtor and the removal of the shareholder from the board along with the appointment of a CRO (who was later kept on in the restructured entity) appears to have been a key positive development in the restructuring. Albeit management changes were slow to be implemented which appeared to significantly damage the confidence of the banks.

2. Recovery

There is no evidence that there was a strategic plan to develop the business beyond the immediate position of stabilising it through retrenchment type policies.

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

**Potential reasons for Bank C and D frustrating the process**

The different bank groups had a different exposure to Flow and banks C and D appeared to have considered selling out of their positions. It is possible that a number of further differences could have existed between the positions of banks A and B, and that of banks C and D leading to a different strategic approach:

1. The bank groups may have determined that they had a different risk profile due to differences in their security package or they may have reached a different conclusion as to the robustness of the same security package based on a different view of the same legal advice or through seeking additional legal advice.

2. The bank groups may have reached different views on the liquidation value of Flow or the chances of turning Flow around.

3. The Bank groups may have faced different internal pressures regarding accounting for their loan internals or their ability to realise losses.

4. The banks may not all be primary lenders which creates different recovery incentives and strategies.

**Strategies to address hold-outs**

The key issue is often ensuring good lines of communication and appropriate governance which builds trust between parties to ensure a strategic alignment of goals. In this regard it is important to ensure that principals are speaking to each other as well as advisers. It may have been appropriate for the banks to form an ad hoc committee and agree on key governance issues, information sharing and the appointment of financial and legal advisers. The latter point regarding the appointment of shared advisers can be a very effective means of co-ordinating the restructuring.

One of the key issues in this scenario would appear to be that the banks had different views on the ability of the management to turn the company around. This issue was addressed to some extent by removing the CEO but it would appear that putting new management in took too long. It is also noteworthy that

the approach of banks A and B looking to buy out banks C and D was a sensible approach, however, it appears that the parties were not able to agree a realistic price.

Another option as an adviser of banks A and B would have been to work more closely with Flow to ensure that it developed a credible business plan which seems to have been a key feature that was missing from the restructuring. It may also have been an option for Banks A and B to work more closely with the company to develop a restructuring plan that they could implement without the consent of banks C and D. This options may have then produced a greater level of involvement from banks C and D.

The COMI for the negotiation is in the Netherlands which is a jurisdiction in which there are obligations to negotiate in good faith. This duty does not exist in a UK restructuring scenario, however, this duty could maybe have been relied upon to exert some leverage on banks C and D.

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

In response to this question each of the eight principles are addressed in turn:

**Principle 1**: Negotiations for a standstill agreement start in January 2014 at the outset of the restructuring process, however, a standstill is not signed until August. It appears clear from the case study that Flow has the support of banks A and B throughout this period and so it would appear likely that Flow may have had an informal standstill in place if there was a collective action clause in the financing documents and banks C & D did not have a sufficient majority in order to take action to recover their loans without the support of banks A and B. The case study, however, suggests that this may not have been the case if banks C and D were in a position to actually cancel their credit as they threatened to do in June 2014. If this is the case then it would appear principle 1 is only engaged from August 2014 when the standstill is signed which means Flow had been operating on the basis of a very uncertain financial platform for the first 8 months in which it engages its lenders around its organizational challenges.

**Principle 2:** It is not clear whether there were any conflicts of interest in the creditor group but it is clear that banks C and D appeared to take steps to enforce their claims against Flow in June 2014. However at this point there was no "Standstill Period" in place and so it is difficult to argue that this was a breach. Once the standstill agreement is signed then there are a number of payments to the creditors, however, there is no suggestion that these payments in any way prejudice the position of the financial creditors vis-a-vis each other.

**Principle 3:** It appears that Principle 3 is engaged as there is nothing in the case study to suggest that Flow took any action during the Standstill Period which adversely affected the return to the banks.

**Principle 4**: This may have been partially engaged through the appointment of the independent accountant and the CRO. Nevertheless, it would appear that the banks did not engage their own financial or legal advisers to assist them with the restructuring.

**Principle 5:** It does not appear that the Banks had access to all the relevant information as the case study just references somewhat sporadic financial updates which often turned out to be inaccurate.

**Principle 6:** It would appear that this principle was engaged as Flow put forward four proposals covering a range of potential restructuring and liquidation options

**Principle 7:** There is nothing in the case study to suggest that this principle was not engaged.

**Principle 8:** Additional funding is provided on an unsecured basis during the restructuring which is not afforded priority status. However, this funding is provided by the shareholder and it is provided prior to the formal standstill being implemented. As such it is not a breach of Principle 8 that this funding is not afforded priority status.

6. **Suppose it is not possible to convince other creditors to adopt the Statement of Principles in a given situation, are there any other possibilities for "soft law" to use (perhaps specifically in your country/region)? If yes, explain in what way. If not, do you see any alternative (informal) possibilities?**

Recommendation 1.22 of the European Law Institute in the Rescue of Business in Insolvency Law (2017), Core Principle 3 of the EBRD Core Principles for an Insolvency Law Regime (2004) and Principle B3 of the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (2016) are all further examples of soft law guidance which can be used to assist stakeholders to work together in a restructuring to maximise value through a workout. The key issue for a successful restructuring is to build trust both within the creditor group and between the creditor group and the company. Ensuring all relevant information is disclosed by the company is important. In this regard, it does not appear that Flow was asked to produce a business plan or a sophisticated series of valuations both on desktop and market testing basis which were then discussed with the banks in detail. I would have worked closely with Flow to ensure that it provided all the necessary information to the other banks in order to ensure their support.

The fact that two banks did not sign the standstill could potentially have been used as a stick to encourage Flow to produce all the necessary business plan and valuation information which may have enabled the other banks to make an informed decision to support Flow.

Another option would have been to put pressure on Flow to do everything it could to move the process forward by reminding the directors of their duties to creditors and the potential liabilities they may face for any further losses the company incurred as a result of the directors actions whilst the company is in the zone of insolvency.

A further option is to ensure that the appropriate level of management at the hold-out banks had oversight of the matter and were aware of the potential reputational damage that their bank could be exposed to if it was seen to be responsible for causing the premature liquidation of Flow with the concomitant loss of potentially 3,000 jobs. This may involve senior management at banks A&B raising the issue with senior management at banks C&D. Senior management may also be able to identify other restructuring potential where banks C and D may require the support of bank A and B which could be pointed out to banks C and D to create a generally more collaboration approach.

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

The essence of the restructuring is that (i) the banks purchased the de-leveraged operating group in preparation for a sale of the group to a third party and (ii) certain board members are involved in the new structure. The restructuring is implemented on a consensual "work-out" basis involving the agreement of all the parties and does not involve a hybrid or a formal insolvency process. This allows value to be maximised. The restructuring involves the 5 key steps set out below:

**STEP 1: an internal reorganisation of the operating group under a new shell entity, Flow Management II BV, (together the "Restructured Group")**

The restructuring outline suggests the operating entities are accommodated "in" rather than "under" a shell subsidiary which may be suggestive of an asset sale of all the assets in the operating companies to Flow Management II BV but the outline refers to "companies" rather than "assets" being accommodated which is not feasible from an English law perspective. As such the legal mechanics for Step 1 are not completely clear but it would appear likely that Flow Management II BV is interposed into the group structure as a MidCo between Flow Management Holding BV and the operating companies.

**STEP 2: Banks A, B, C and D enforce their security or credit bid their debt as consideration for purchasing Flow Management II BV**

It would appear that the banks had security over the shares in Flow Management II BV which they enforce to transfer the Restructured Group to themselves. Alternatively, Flow Management BV may have sold the Restructured Group to the Banks on the basis of the Banks credit bidding their debt.

The banks had the following 3 loans to Flow Management Work BV (referenced at points 5, 6 and 7 of the restructuring outline): point 5 references a €32.5 million which is solely owed to banks C and D; point 6 references a loan of €337.5 million; and point 7 references a loan of €55 million. The €32.5 million and €55 million loans are both written down completely as against the Restructured Group. These two loans are both subordinated to the € 337.5 million loan and value breaks in the €337.5 million loan between the €240 million and €337.5 million mark. The difference between these amounts reflecting the write down of € 97.5 million of the €337.5 million loan as against the Restructured Group.

The written down amounts appear to remain outstanding as against Flow Management Holding BV suggesting that Flow Management Holding BV may have originally been a guarantor but as part of the reorganisation it became the borrower under the three loans. This would be suggestive of the banks enforcing or a forced sale rather than a credit bid structure although the outline is not entirely clear on the legal mechanics for the transfer and whether it is implemented by an enforcement or consensual transfer where debt is credit bid as consideration for the sale.

It is not clear what valuation evidence was obtained to support this step. To the extent that appropriate consideration was not exchanged and depending on the mechanics of the security documents regulating enforcement then this step would potentially be vulnerable to being unwound as a transaction at an undervalue.

**STEP 3: Banks A, B, C, D provide a management incentive package to certain board members.**

It is not clear that the Board members who receive shares paid any consideration as such it is likely that they received the transfer of shares on the basis of an agreement with the banks pursuant to which the shares were initially transferred to the banks who then transferred them to the relevant board members in consideration for a management incentive plan.

To the extent that appropriate consideration was not exchanged then this step would potentially be vulnerable to being unwound as a transaction at an undervalue.

**STEP 4: Flow Management Holding BV liquidated and claims against this entity cancelled by the banks and the shareholder**

The shareholder lent €10 million to this entity during the restructuring which is written off along with any other amounts it lent to this entity prior to the period covered by the case study. The references to "claims" being cancelled may also refer to providing protection against any claim brought by an officeholder for steps 2 and 3 being challenged as transactions at an undervalue or other misfeasance by the directors or potentially the lenders as shadow directors.

It is not clear from the case study what claims the banks had against this company but it would appear possible that the banks had claims under guarantees and they may have other claims for misfeasance by the directors.

**STEP 5:** Flow Management Holding BV and its shareholder cancel claims against Flow Management II BV

It is not clear from the case study what claims may exist but they may include claims for a transaction at an undervalue and misfeasance by the directors

**ADDITIONAL POINT: The outline also has a further discussion of liquidation**

It is not clear whether this liquidation relates to the liquidation of Flow Management Work BV which is an operating entity that is part of the Restructured Group or the liquidation that is referenced in the outline of Flow Management Holding B.V.

Ultimately the write downs of debt are such that the Restructured Group has a positive net equity and is a going concern ready to be sold.

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

This is a multi-national group with boards of directors with potential liabilities for insolvent trading across a multitude of jurisdictions. It would therefore be important to have a good understanding in each of the jurisdictions where group companies have solvency issues of (i) the financial interdependencies of the relevant entity with the rest of the group, (ii) the operational interdependencies of the relevant entity with the rest of the group (iii) and the insolvency laws in each of these jurisdictions to ensure that there are no uncontrolled insolvency filings as a result of director or creditor actions which could lead to a rapid loss of control of the group and resulting loss of value as entities are potentially filed into uncontrolled insolvency processes in different jurisdictions.

1. **Financial Interdependencies**

The operating companies are in the Netherlands, Spain, France, Australia, South Africa and USA whilst the immediate holding company is in the Netherlands. The Dutch operating company is the borrower and the banks are described as being the banks of the Dutch holding company. It is not clear which entities are insolvent but the case study would suggest that the Dutch operating entity, being the borrower, is insolvent and that the Dutch holding company may also be insolvent (the banks are described as being its banks suggesting it may be a guarantor as well as their being a possibility that the other operating companies are also insolvent either as a result of their losses or as a result of them being further guarantors.

It would be important to better understand which companies are guarantors and the extent of the security package as there may be the possibility that some companies have available unencumbered assets to borrow against and no negative pledges in place to prevent this. If this is the case the banks may want to try and take further security albeit this could potentially be subject to avoidance actions if these entities subsequently entered an insolvency process.

It would also be important to understand the intercompany loan positions which could crystallise in the event that an intercompany lender files for a bankruptcy process as this could cause a domino effect of other group entities having to file for insolvency if intercompany loans are on demand and are called upon to be repaid to intercompany lenders.

There is nothing in the case study to suggest that the English holding company or the Cayman and Swedish joint venture companies are insolvent.

**Operational Interdependencies**

The case study does not address operational interdependencies but to the extent that there are any centralised functions such as the licensing of IP or IT/HR function then this could also cause the group to potentially collapse if a key entity were to file for insolvency either because it does not have the operational capacity to continue without the relevant function or it is not possible to negotiate with an officeholder of the insolvent entity for the necessary operational functions to be restored in a time critical and/or cost effective manner.

It is noted that the case study states that the Dutch holding company acts as the COMI of the operational companies which is suggestive, but certainly not conclusive, of some operational functionality being centred in the Netherlands out of the holding company. It is certainly likely that some HR operating functionality is centralised in the Dutch operating company on the basis of the descriptive element in the name of this operating company.

**Cross-border Considerations**

In terms of cross-border considerations, it would be important to do an analysis of what the filing requirement is in all the relevant jurisdictions to establish what support is required to ensure that group entities are not filed into an insolvency process either by their directors or a creditor. This involves understanding on a jurisdiction by jurisdiction basis:-

(i) whether directors have a strict filing requirement upon insolvency and what is the penalty for not adhering to the requirement – in civil law jurisdictions there is often a prescribed time within which directors must file for insolvency upon their company becoming insolvent on a cash flow and sometimes a balance sheet basis. Whilst in common law jurisdictions there is generally a more open ended test which revolves around not trading beyond the point the directors ought to conclude that there is no reasonable prospect of avoiding an insolvency filing;

(ii) additional triggers for insolvency filings such as general directors duties for trading in the zone of insolvency and not taking creditors interests into account, fraudulent trading etc. and the penalty for breach;

(iii) net equity tests which in Europe are prescribed for public companies but certain jurisdictions have them for private companies and the penalty for breach – these tests generally require the directors to call a shareholder meeting;

(iv) the number of directors that are required to take any action – generally an insolvency filing will require a majority director resolution but certain jurisdictions allow for unilateral director action; and

(v) the ability to dismiss/satisfy any creditor petition without it escalating into an insolvency filing. One solution to keep control of the group is to have a core group of directors who are close to the restructuring negotiations on each of the company boards so that each board is properly informed and able to make appropriate decisions in line with its duties and not precipitously file their entity into an insolvency process.

In a restructuring of this nature, where the group is operating without a standstill in the face of either a potential creditor insolvency filing or local directors in the operating companies filing, it would be important to plan for a cross border insolvency filing across potentially all of the operating companies and their holding company in order to preserve the possibility to co-ordinate the restructuring of the group as a whole and maximise value.

Three of the operating companies and the holding company are incorporated in the EU and would therefore have been subject to the EU Insolvency Regulation (the case study predates the implementation date for the Recast Insolvency Regulation) whilst the other three are incorporated in countries which are signatory to the UNCITRAL Model Law on cross-border insolvency. All of these companies have their COMI in the Netherlands which means that an insolvency process could be coordinated by filing them all into a Dutch process. This would provide for automatic recognition of the Dutch process in both Spain and France for each of the relevant operating companies meaning that any proceedings opened in those jurisdictions would be secondary proceedings if opened after the Dutch proceedings or would be converted from territorial proceedings into secondary proceedings if opened before the Dutch proceedings. Recognition for the Dutch proceedings would have to be sought in Australia, South Africa and USA under each of these jurisdictions' version of the Model Law on the basis of the Dutch COMI for each of the relevant operating companies.

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

In October 2014, Flow is around 2 months into a 6 month standstill period. From a UK perspective, administration would have provided a formal moratorium; however, this would not have provided any material added protection to the group in circumstances where it had a standstill in place with its major creditors. Any added protection from having a Court rather than a contractual moratorium would have been outweighed by the significant loss of value which would have resulted from the engagement of a formal insolvency process.

The UK administration process is extremely value destructive as administrators are generally not as well placed to continue to trade a business as the incumbent management. This loss of value may be mitigated to some extent through a pre-packaged administration sale where the administrators immediately sell the business upon appointment. However, this will still produce a significant insolvency discount as the sale agreement will not contain the usual representations and warranties that a buyer would expect in a solvent purchase and the marketing process conducted pre-administration is on an expedited forced seller basis. Further, an administration may well trigger insolvency related default provisions in key operating contracts as administration does not provide for any ipso facto clause protection.

Further a bridging loan could also be challenging as the banks would be concerned about it being avoided upon liquidation depending on its timing and how it is structured. If it is used to pay down certain creditors then those payments may also be avoided and additional security provided to support the loan could also be potentially challenged upon liquidation. A loan provided during administration ranks as an expense of the administration but would not rank ahead of existing security without the consent of all the security holders. Further, it ranks as an expense ahead of the administrators own expenses and fees which means that there would have to be significant unencumbered assets for the administrator to consider taking on this additional liability.