

WORKING OUT  
*in europe*





BY RICHARD HAWKINS

## Workouts are difficult. We all know that. Add different languages and cultures, distance, time zone problems, differing and sometimes uncertain legal environments and even hostility towards foreign lending institutions and you can imagine how much harder they can be.

There is no United States of Europe, no uniform set of rules that govern all jurisdictions across the continent. Some European countries are not even in the EEC and others are at differing stages of membership.

Some EEC legislation has tried to normalize competing regulatory problems such as the Centre of Main Interest (COMI), which attempted to determine which insolvency procedure takes precedent when group entities in more than one EEC jurisdiction enter into bankruptcy proceedings. This has often caused more confusion and has slowed down proceedings as apparent self interest takes precedent over asset realizations.

Lenders now tend to construct security instruments in respect of multijurisdictional assets and attempt to domicile these assets in countries considered as "friendly." Looks great on paper, but can still run afoul of local courts taking a different view to the clever guys who set up these programs. This is called re-classification risk.

Alternatively, lenders can look to take local security in respect of local assets. This can also provide a challenge in a workout scenario and should be considered against the lender's ability to comply with local legal protocols, such as banking regulations, tax, employee rights registrations and licenses.

So what do cross-border workout problems look like close up? Here are some scenarios faced:

- ▶ Management of distressed companies going native and seeking their own legal and restructuring remedies

locally. This has been done as an alternative to the foreign institution's strategy. Now you have the local guys going to the local judge and putting their story forward. Whom do you reckon the local judge is going to listen to? Even when these management schemes fail, the time factor gets in the way of getting hold of the collateral.

- ▶ The inability of a company to continue trading under distressed conditions because of management's fears of personal liability arising under local insolvency laws. If the workout strategy across a group includes some continuity of operations, even with further financial support, you soon find out you are in house-of-cards land.
- ▶ Staff and management not providing essential information required by the lender. This can happen anywhere, but becomes even more stressful when the borrower's employees who were very chatty at the last audit suddenly become silent.
- ▶ Ransom creditors coming to the fore and blocking external legal and recovery processes. Local vendors surely seem to know much more about what is going on than the local management has disclosed to the lender.
- ▶ Local insolvency practitioners taking a hostile stance towards the foreign lender. One common thread across Europe seems to be that the court appoints a lawyer with scant regard to a secured lender's interest.
- ▶ Suppliers activating deep ROT (reten-

tion of title) claims and frustrating a lender's ability to collect receivables; in Germany, this is a given. Different countries throughout the EU have differing perspectives on how wide and how deep ROT can reach.

### What are the solutions?

When facing a workout, a cross-border lender should take the following actions:

- ▶ **Reverse Psychology:** UK and US lenders tend to think of the strategy in respect of their local borrower first and then assume that the workout program in other jurisdictions will tag along. Reverse this thinking straightaway. Consider the most difficult jurisdiction first and work out your exit planning from there.
- ▶ **Diligence and Audit:** Build into your audit program a "what if" scenario. How would we secure data and records? What are the workout dependencies?
- ▶ **Keep it Local:** Make sure you have local legal, insolvency, diligence and workout specialists in place that can react on short notice. Use them in the planning process.
- ▶ **Act decisively:** Don't wait around for the worst to happen, because it probably will.
- ▶ **Proactive is not good enough:** Predictive is much much better. **TSL**

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