CORPORATE RECOVERY AND RESCUE

Mastering the key strategies necessary for successful cross border workouts

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Introduction

1. This paper focuses on cross border workouts. These are restructurings where the debtor's assets and creditors are spread across various countries and jurisdictions. The continuing process of globalisation and the expansion of international business has made it much more likely, if not inevitable, that companies in financial difficulty (in particular the larger companies) will have a significant number of assets and creditors abroad. This was certainly the case in the last UK recession; the active involvement of creditors based abroad (particularly US debt traders) had a significant impact on a number of UK based restructurings. It became, and has become, necessary in these types of cases to have regard to, and take account of, the different expectations, attitudes and, in some cases, objectives of creditors who come from a different corporate and financial culture and who are used to operating in a different legal and workout environment.

2. More recently, there have been further developments. The collapse of various economies around the world (particularly in East Asia and Eastern Europe) has resulted in a huge number of substantial companies finding themselves in financial difficulty and in need of a debt restructuring. Many of these companies had previously had access to the international financial and capital markets and been parties to international financings of one kind or another (including bond issues, project financings, forex and derivative transactions). The international banking and capital market transactions brought with them the international financial community who have then become involved in dealing with the consequential financial difficulties. As a result, a wide range of companies (and in many cases industry sectors and whole economies) have needed to restructure and to start doing so in a hurry. To be able to do so effectively they have needed first to secure urgent access to those with restructuring experience and expertise (including bankers, financial advisers, accountants and
lawyers) and secondly to develop rapidly the practice and principles needed to guide the implementation of restructurings. In many, if not most, cases the countries in question did not have readily available either the local expertise or the local culture and practice with which to deal with the restructurings. They have needed to import from abroad both the talent and the technology in order to cope with the rush of restructurings with which they have had to deal.

3. In these circumstances, many of the recent restructurings in places such as Thailand, Indonesia, China and Russia have seen attempts being made to adapt the basic principles of workout methodology represented by, for example, the London Approach. The adaptations have been required to ensure that the workout process is consistent with local conditions; the challenge has been to ensure that the key elements of the process are respected and preserved and that the process remains viable and effective.

4. In this paper I wish to consider a number of the key issues which arise in cross border workouts; in particular, those problems and aspects which are peculiar to cross border cases and which need satisfactorily to be addressed if the restructuring is to be successful.

The points I will consider are:

(a) the impact on the restructuring process of local conditions; in particular the impact of the local business culture and the legal and judicial systems (including the law governing directors’ duties and the rights of creditors, including secured creditors);

(b) the way in which the underlying principles and methodology of the London Approach have been applied and adapted in restructurings abroad;

(c) the approach taken to documenting the standstill in cross border cases;

(d) the impact of the attitude adopted and role performed by the debtor and its management and the problems associated with obtaining useful and independently verified financial information;

(e) the process of co-ordinating the creditors and the role played by the steering committee; and
(f) how the restructuring can be made effective and binding even if the unanimous approval of all creditors proves to be impossible.

Impact of local business culture/legal and judicial systems

5. In the case of restructurings based abroad which are being managed by international banks there are a number of background factors which significantly impact on the restructuring process and which have to be understood and taken into account. These background factors are the various elements of the local conditions which particularly affect the debtor - creditor relationship (and also the relationship between creditors inter se). These background factors can vary substantially from jurisdiction to jurisdiction and, to state the obvious, from the conditions applying in the UK. I will consider a few of the more important factors.

6. The ability to enforce contractual and other rights is extremely important. In the UK legal rights can be enforced with the assistance of a modern and transparent court system which, when the need arises, facilitates rapid judgments which can be readily enforced (of course English litigation can be far too expensive and slow although the ability to obtain urgent and wide ranging interlocutory relief such as injunctions is of great practical importance and the Woolf reforms may even assist in making commercial litigation faster and cheaper).

7. However, these conditions do not exist in many other jurisdictions in which restructurings have had to take place. In many countries the court systems are slow, unpredictable and opaque in their operations. In any particular case it is necessary to ask:

(a) how long does it realistically take to get a case through the courts? In many jurisdictions in the Far East, for example, companies in financial difficulty are considerably comforted by the fact that an unsecured creditor will usually have to wait 3 years before getting a judgment!

(b) when you eventually manage to persuade a judge to hear your case, will you get a fair hearing or a politically motivated one? Many of the large restructurings abroad have significant implications for the countries (or even cities) concerned and generate substantial local and political interest. Local courts are often to a greater or lesser degree subject to political influence and foreign creditors will often be unable to obtain a fair hearing and vindicate their rights. One immediately thinks of the recent decisions of the Indonesian Supreme Court in connection with the interpretation of
the new Indonesian Bankruptcy Code (which came into force on 20th August, 1998). Certain international banks who were unhappy with the conduct of restructuring negotiations sought to commence a bankruptcy against the Indonesian debtor and presented a petition for bankruptcy under the new Code. One of the conditions that must be satisfied under the Code before there can be a declaration of bankruptcy is that the debtor must have failed to pay a debt "which is due and payable". The Indonesian Supreme Court was not prepared to accept that indebtedness which had been accelerated following an event of default satisfied this requirement. Whilst one has to recognise that there may be some local legal problems in construing the effect of financing documentation with which the local court is unfamiliar, this appears to be a clear case of the highest court being influenced by political considerations requiring the protection of local debtors.

(c) to what extent is the outcome of any application to the local court predictable? Many international financings involve security or other debt structures which are regularly employed in financings across the world but which may well never have been tested in the local courts; in fact, the structures and techniques used will often stretch to the limit local commercial law which has not been fully developed by the local courts. Consequently it may be very difficult to predict the outcome of any application to the court.

(d) to what extent can any judgment obtained readily be executed?

8. In such cases, creditors have to recognise that they have no effective recourse through the courts. From the perspective of those attempting to put together a restructuring this can be both unhelpful (in providing the debtor with additional negotiating leverage) and helpful (in making it more difficult for dissatisfied creditors to disrupt the restructuring by taking action in the short term to collect what is owed to them).

9. Another important factor is the extent to which the local jurisdiction has a modern and workable bankruptcy law. Most of the jurisdictions in the Far East and Eastern Europe which have recently faced financial collapse have had (admittedly under pressure from the IMF) to recognise that they needed to introduce new, updated, bankruptcy laws to ensure that failed debtors and their creditors, particularly international creditors, could be properly dealt with. Thus the bankruptcy laws of Korea were significantly amended in February 1998; Indonesia, as noted above, introduced a new Bankruptcy Code in August 1998; Thailand introduced
major amendments to the Thai Bankruptcy Act in April 1998 and Russia also introduced in 1998 a new bankruptcy law (with a new law relating to the bankruptcy of credit institutions having been introduced this year).

10. The recognition and ease of enforcement of secured creditor's rights are also important. In many jurisdictions there are uncertainties as to the validity of certain types of security interest particularly those relating to intangibles. Furthermore, appropriate methods of enforcement are either unavailable or unworkable. To add to the difficulties faced by secured creditors, even if they have security interests which are recognised by the local courts and capable of being enforced, new bankruptcy laws will often stay the enforcement of security interests following the commencement of a bankruptcy proceeding and may, in practice, result in the expropriation of the rights of secured creditors where that is necessary to enable the local business to carry on trading and survive.

11. Local conditions will also be relevant to the availability and reliability of financial information. In many of the cultures with which it is now necessary to deal information has not, traditionally, been readily available to outsiders. The truth, including the real figures and details of relevant financial arrangements and transactions, is confined to a small, select, group of insiders (usually locals). The restructuring process, which is based upon access to and review of basic financial information, is either inconsistent with or very much against the grain of such a culture. Furthermore, for those countries which have only recently and incompletely adopted the Western approach to business transactions there may well be dealings which do not bear careful scrutiny and which those involved would rather foreign creditors did not see. Situations in Russia and parts of the Far East immediately come to mind. Even where financial information is made available it will often not have been validated by reference to accounting standards or due diligence requirements consistent with regimes in the West.

12. An assessment also needs to be made of who is really in control of the debtor and, in particular, who is running the restructuring negotiations on the debtor's behalf. Directors of some foreign companies do not always have the authority and power which directors of an English company would have. There may, for example, be tiered boards or other management organs within the corporate constitution which either have to be consulted on, or perhaps have the ultimate say with regard to, the approach to the restructuring negotiations. The shareholders of the debtor may well be enormously influential through corporate committees or boards and therefore capable of significantly impacting the process. It
becomes very important to understand the decision making process of the debtor so as to be able to identify who the key decision makers are who need to be approached directly (at appropriate points in the process) and whose consent and support is required. Directors’ insolvency related duties are also important in this context.

Finally, it is necessary to be clear, and keep in mind, local attitudes to negotiations. At one end of the cultural spectrum there is the softly softly approach which requires understatement and evasion in public discussions in order to allow progress to be made and the saving of face. This is obviously typical of cultures in the Far East. At the other end of the spectrum is the "in your face" or, at least, the aggressive "negotiate every point to death" approach. On occasions, this can be seen in the Russian and US context.

Whilst these differences are obvious they are sometimes lost sight of or given insufficient weight. This is particularly so in an environment where international bankers are required repeatedly to explain, and to preach the gospel of, the principles of international workouts to local creditors or management who are not familiar with them. Matters are made more difficult because many of the factors mentioned above mean that there are more delays and resistance from management/shareholders than would ordinarily be experienced in a UK workout. The international creditors are, as a result, forced to maintain pressure for developments and real progress. At the end of the day, what is called for is flexibility and innovation - one needs to remember that new ways need to be developed of achieving the old objectives - and a great deal of time spent on communication. In this context, it is very easy almost always to underestimate the amount of time or effort that will be required in explaining and consulting about options and reasons supporting a particular conclusion.

Exporting the London Approach

There is now a set of basic principles and a methodology for international restructurings that can be applied in restructurings across the world and which command widespread support from the international financial community and regulators. The result of the recent financial crisis in various parts of the world has been to generate the need for, and facilitate the articulation of, a statement of international best practice with respect to cross border workouts.

Because so many of the corporates that have suffered financial difficulty in various parts of the world recently have, as noted above, benefited from international financing the
international banking community has been involved with and often had to manage the process of the restructuring. The international banking community has vast experience in dealing with workouts and, in large measure, a common approach to these kinds of situations. It has been necessary to explain and adapt this common approach to meet the needs of each of the countries concerned.

15. The international bankers have recognised the need to use and take advantage of the methodology established in western countries, and particularly the UK, which have previously had to deal with a large number of restructurings and developed considerable experience in doing so. It made sense in an emergency to take off the shelf and use the existing know how; there was no point in re-eventing the wheel. In addition, the approach to consensual, out of court, restructurings which has developed in London is particularly flexible and adaptable. It is also of course based on basic principles of fair treatment for all creditors and so should secure support from all those involved in international financings.

16. Furthermore, one should not lose sight of the significance of the role played by the relevant regulatory authorities (particularly the local Central Banks) in encouraging, and where necessary imposing, this approach on local debtors; nor, indeed, the importance of the influence of the IMF in making bankruptcy law reform and a system for dealing with international restructurings in accordance with internationally accepted standards conditions to the advance of the vast loans which many of the countries concerned have needed in order to be able to reconstruct their own economies.

17. The basic elements of the London approach were, of course, set out by the Bank of England in the 1980s and 1990s (having been developed in response to the multi-bank restructurings of the secondary banking crisis of the 1970s). They can be summarised as follows:

(a) agreement to a standstill by all lenders;

(b) immediate pro rata provision of new facilities where necessary;

(c) equality of treatment of all lenders in a similar position;

(d) appointment of a lead bank to co-ordinate the rescue and procure the obtaining and dissemination of timely and independently reviewed financial information to all lenders;

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(e) the involvement, as appropriate, of the Bank of England, as an intermediary;

(f) the preparation of a business plan by the debtor explaining how the debtor’s business was to be restored to viability and proposals for any financial restructuring that was required;

(g) approval and documentation of the financial restructuring which would usually, although not always, involve the unanimous agreement of all lenders to appropriate revisions to their facilities and the debt and equity structure of the debtor.

18. These basic principles have been used as a basis for establishing the appropriate approach to restructurings in a number of foreign countries. Hong Kong (where the Hong Kong Association of Banks issued “Guidelines on Corporate Difficulties” in June 1998) and Indonesia (where the Indonesian government adopted the “Jakarta Initiative” in September 1998) are good examples. The approach adopted in Thailand is also worthy of particular mention.

19. As the Thai economic crisis unfolded the experience of the international institutions and advisers involved resulted in principles based on the London Approach being adopted in the larger workouts. Accordingly, the financial creditors in Thai workouts have arranged for the appointment of steering committees and the adoption of informal standstills. Against this background, the financial institutions in Thailand developed what has become known as the Bangkok Approach. The Board of Trade of Thailand, with various other bodies and with the support of the Bank of Thailand, have co-operated to draft and issue a "Framework for Corporate Debt Restructuring in Thailand" (the "Framework"). The Framework has now been supplemented by a set of standard form documents for the regulation of the standstill and restructuring process to which debtors and creditors can accede if they choose to do so (bearing in mind that since many international financial institutions have already signed up to the principle of using these documents one can expect considerable, and probably increasing, pressure from the Bank of Thailand for the use and execution of the standard form documentation in appropriate cases). The standard form documentation comprises an Intercreditor Agreement and a Debtor - Creditor Agreement.

20. The introduction to the Framework sets out its basic purpose as follows:
"The framework is non-binding and non-statutory but it is a statement of the approach that is expected to be adopted in corporate workouts involving multiple creditors. The framework exists based on general market acceptance and its practices may be altered or amended to serve the needs of the business and financial community. The basic premise is to ensure that a business can survive if there is a reasonable possibility that it is viable. The framework is designed to promote a spirit of timely co-operation amongst concerned lenders for their mutual benefit".

21. The Framework consists of 19 basic principles most of which have explanatory notes described as "implementing policies".

22. The following are the 19 principles:

(a) any corporate debt restructuring should achieve a business rather than just a financial restructuring to further the long term viability of the debtor;

(b) priority must be given to rehabilitate assets to performing status in compliance with Bank of Thailand regulations;

(c) each stage of the restructuring process must occur in a timely manner (and reference is made to a timetable which establishes a timetable for creditors' meetings, the appointment of a steering committee, the submission of creditors' claims, the production and delivery of information, the appointment of an independent accountant or other experts, the preparation and submission of a plan and creditors' meetings thereon);

(d) from the first debtor-creditor meeting if the debtor's management is providing full and accurate information in accordance with the timetable laid down in the Framework and participating in all steering committee meetings creditors shall standstill for a defined extendable period to allow informed decisions to be made;

(e) both creditors and debtors must recognise the absolute necessity of active senior management involvement throughout the duration of the debt restructuring;

(f) a lead institution and a designated individual within the lead institution must be appointed early in the restructuring process actively to manage and co-ordinate the entire process according to defined objectives and deadlines;
(g) In major multi-creditor cases a steering committee representative of a broad range of creditor interests should be appointed;

(h) Decisions should be made on complete and accurate information which has been independently verified to ensure transparency;

(i) In cases where accountants, attorneys and professional advisers are to be appointed such entities must have the requisite local knowledge, expertise and available dedicated resources;

(j) While it is normal practice to request the debtor to assume all the costs of professional advisers, lead institutions and steering committees and creditors have a direct economic interest and hence a professional obligation to help control such costs;

(k) The Ministry of Finance and The Bank of Thailand should be kept informed on the progress of all debt restructurings;

(l) The Thai Corporate Debt Restructuring Advisory Committee is to have a role in reviewing developments in debt restructuring;

(m) Creditors with duly created security interests in property essential to the continued operations of the debtor's business should not be required involuntarily to surrender such security without adequate compensation - holders of security over non-essential property may negotiate with the debtor for a voluntary liquidation of the assets concerned;

(n) New credit extended during the restructuring process above existing exposures as of the standstill date on reasonable terms to allow the debtor to continue operations must receive priority status based on title orientated security, inter-creditor agreements or indemnities;

(o) Lenders should seek to lower their risk and hence their requisite returns through an improved security package and profitability - based benefits rather than increased interest rates and imposition of restructuring fees;
debt trading is appropriate under certain conditions but the selling creditor has the professional obligation to ensure that the buyer does not have a detrimental effect on the restructuring process;

restructuring losses should be apportioned in an equitable manner which recognises legal priorities between the parties involved;

creditors retain the right to exercise independent commercial judgment and objectives but should carefully consider the impact of any action on the Thai economy, other creditors and potentially viable debtors;

the above principles can be waived, amended or superseded in any particular restructuring.

The standstill

23. The standstill agreement is, of course, central to UK based restructurings. The purpose of the standstill agreement is to ensure that all banks and other relevant creditors do not break away and act independently during the important initial period of information gathering and appraisal. The central idea is to ensure that facilities and credit are maintained during the information gathering process, that no action is taken against the debtor which would force it to file for bankruptcy or which would destabilise the restructuring or otherwise involve individual creditors receiving preferential treatment. To achieve this the standstill agreement will contain various covenants from the debtor on the one hand and from the creditors on the other.

24. Standstill agreements, therefore, provide a justification for individual creditors to standstill - each creditor knows that it will not be worse off by standing still (because the risk is eliminated of other creditors taking action or applying pressure to achieve preferential or advantageous treatment) and indeed that it should be better off (because, inter alia, the debtor will covenant to take steps to maintain a viable business, to act in accordance with new covenants regulating the conduct of its business, to provide information to enable creditors to assess the best way forward and to pay for advice for the benefit of the creditors). From the debtor's point of view the standstill agreement buys it a breathing space in which to develop proposals for its survival and future business; the standstill agreement also provides protection to the debtor's directors who risk being in breach of their insolvency related duties.
The standstill agreement will assist the directors, amongst other things, in concluding that there is a reasonable prospect of avoiding an insolvent liquidation and therefore that there is no risk of being in breach of their wrongful trading duties.

25. Standstill agreements were originally developed in the context of multi-bank workouts in the UK. In such a case the standstill was intended to bind and only involve the relevant banks. All of the banks concerned would be familiar with the benefits of and need for a standstill agreement and could be expected readily to sign up to the appropriate documentation (perhaps a very short form standstill agreement initially with a longer, more detailed, document to be negotiated and executed in due course). As standstills extended beyond the banking community to other types of financial indebtedness and creditor difficulties could be experienced in persuading all other financial creditors to sign up to a standstill agreement. Despite this the bank creditors would in some cases be prepared to execute a standstill agreement with the debtor even though certain other creditors had not been prepared to sign up (obviously the standstill agreement for the banks would have to have appropriate termination provisions enabling the banks to withdraw from the standstill if hostile action was taken or contemplated by the creditors left outside the standstill).

26. Cross border workouts tend to involve (subject of course to exceptions) a larger number of creditors and also various different types of financial creditor. The financial crises in the Far East and Eastern Europe have also brought into the process institutions with limited experience in restructurings (including not only banks who are not used to having to restructure their borrowers but export credit agencies and quasi-governmental bodies such as the EBRD).

The wide diversity of attitudes and experience can make it more difficult to achieve the consensus required for a standstill. If certain major creditors are not prepared formally to confirm their agreement to the standstill then it will be almost impossible to persuade other creditors to sign up to a standstill agreement.

Furthermore, there can, on occasions, be so many parties involved that the process of negotiating and persuading all of the key creditors to sign up to the standstill appears to be so time consuming and costly as to make it not worth while. In certain circumstances the process of attempting to secure a standstill may be diverting and therefore unhelpful; it may also simply be cost-ineffective. These considerations have greater significance in an
environment where there are substantial doubts about the prospects of success because it is likely that a number of creditors (e.g. bearer bondholders) can be expected not to sign.

27. The standstill agreement will also have less significance for a debtor and management in a jurisdiction where first, creditors have no realistic prospects of bringing proceedings against the debtor and executing any judgments against the debtor's assets; secondly, where directors are not subject to any relevant insolvency-related duties which involve them in the risk of personal liability if they allow the debtor to continue trading or operating whilst insolvent and thirdly, where the debtor is able to have resort to a bankruptcy proceeding that will effect a stay on the enforcement of creditors' rights, including secured creditors, and which holds out the prospect of a continuation of the debtor's business under the control, or at least with the involvement, of existing management.

28. In these circumstances, formal standstill agreements do not get signed. Instead, the parties accept a de facto standstill. Whilst standstill agreements are signed in many cross-border restructurings there are a number of significant examples of workouts in, for example, Thailand and Russia which are taking place at the moment with only a de facto standstill.

29. There is a half way house which has been used in some cases (particularly in Russia) where it proves impossible or impracticable to have a formal standstill agreement signed but where the debtor nonetheless wishes to send a clear signal to creditors by confirming that it intends to abide by the basic principles of a standstill (as they affect a debtor). In these cases the debtor signs a unilateral standstill statement which is then notified and circulated to all creditors. The unilateral standstill document will, in short-form, confirm the debtor's intention to undertake restructuring negotiations and during those negotiations to treat creditors fairly and not to enter into transactions otherwise than in the ordinary course of business and on arms' length terms for full market value. Unilateral standstills have proved to be quite important in the context of Russian bank restructurings because of the requirements of the Central Bank of Russia for there to be demonstrable signs of progress in the restructuring process (in accordance with principles of the standstill laid down by the Central Bank of Russia).

Role of the debtor and information

30. The role of, and confidence by creditors in, management are always important aspects of the workout process. The steering committee and certainly the lead bank will need to develop a good working relationship with management if the restructuring is to succeed. Management,
in turn, needs to understand and "buy into" the process. Managing this aspect of the restructuring can often be difficult. There are additional complications and issues to be dealt with in a cross-border context.

31. Particular difficulties can be experienced when the workout is taking place in a country where there is a business culture dominated by secrecy and the limitation of the flow of information beyond a few insiders. In such an environment management will, at least in the early stages, be reluctant to produce information requested by the lead bank or to provide access to the company's books and records to financial advisers or investigating accountants.

Restructurings based on the London Approach depend, of course, upon good quality information being delivered on a timely basis together with the opportunity for an independent review of that information. Creditors need to be able to assess the viability of the debtor's business and the options available to them; in particular, whether a restructuring represents a better alternative than bankruptcy. The workout process can be fundamentally undermined where the necessary information is not available and the requisite independent review cannot be done.

32. In practice, there have been many problems in persuading management (and shareholders) to accept the need for, or to allow, wide ranging disclosure made on a timely basis. The information gathering process can be painfully slow and convoluted. Management, in many of these cases, is adept at being evasive and manufacturing problems as to why information which has been promised has not been delivered. Information, of course, is power and limiting and slowing down the process of disclosure is a way of controlling the restructuring process. The result can be lengthy delays in the provision of important information and, ultimately, damage to the creditability of the whole process.

33. Objections to the extent of the work to be done by professionals (particularly the financial advisers or accountants advising the steering committee) becomes part of management's defensive techniques. There are, of course, genuine concerns about the level of professional fees in these cases particularly in cultures where companies are not used to heavy professional involvement in transactions. It is also crucial to control costs and to ensure that professionals are only dealing with the tasks which they need and have been instructed to address.

Even taking into account these legitimate concerns, there is no doubt that debtors in many cases take the opportunity to question and argue about the role and cost of professional
advisers in order to reduce the amount of information available to, and verification work being done for, creditors and in order to secure a negotiating advantage.

34. These problems are not easy to deal with. The threats and leverage available to creditors in many foreign jurisdictions are, for the reasons discussed above, limited. However, there are a number of things which can be done. The debtor has to be made to realise at an early stage that if it wants to achieve a restructuring it will have to meet certain basic standards and these include an acceptable level of disclosure of information and transparency. Clear (and properly communicated) messages, milestones and minimum requirements need to be set out and pressure needs continually to be applied. The relevant regulators can also sometimes assist in applying pressure to provide information to meet with international best practice standards. For example, the Thai authorities have provided guidance as to what information should be disclosed to creditors in the Framework. This list includes information about the group structure of the debtor, its subsidiaries and associates; group liabilities; liabilities to third parties; inter-company positions; group assets; a business plan (including a market analysis); cashflow analysis and projections; major agreements for the last three years and any other information on the current condition and future viability of the debtor. The Jakarta Initiative also contains a similar statement with regard to the nature and type of information to be disclosed. Of course, these statements are non-binding and only of persuasive force. It is necessary in each case to negotiate with the debtor for the disclosure of precisely what is required.

35. There is a further problem. Even if it proves possible to gain access to the debtor's financial information and books and records concerns can remain regarding the reliability of the information. It is necessary to recognise that standards of accounting, auditing and due diligence will probably be very different in the foreign jurisdiction concerned so that the important financial information may not already be available in an acceptable format or have been reviewed by auditors to an acceptable standard. This will result in further delays and, ultimately, expense. It is important to get a handle on the extent of this problem at an early stage in the process.

The Steering Committee

36. In the traditional London Approach workout all the debtor's banks would be called together to attend the first all bank meeting at which the banks would be asked to confirm the appointment of the lead bank and the appointment of members of the steering committee.
The role and mandate of the lead bank (as chair of the steering committee) and of the steering committee itself would in due course be properly documented ultimately in the inter-creditor documentation entered into as part of the standstill arrangements.

37. However, in many cross-border cases life is not this simple. There are two particular problems. First, there are likely to be a large number of international creditors from a range of different countries with a variety of different types of financial exposure. It is often very difficult and expensive to get everyone together at an early stage and not everyone, at least initially, wishes to participate in the process. The practical reality is that the debtor and its advisers need to identify the major international creditors with the greatest exposure and likely appetite for serving on a steering committee. They need then to be approached and be brought together for a preliminary discussions amongst the proposed members of the steering committee. They can then decide whether they are prepared to act and, if so, on what terms.

38. In these circumstances an informal steering committee is formed. It is informal in the sense that it is not formally appointed by the creditors and therefore has no mandate from them. The committee's role is simply to assist the debtor in the development of its restructuring proposals which, in due course, will be put to all creditors for their approval. Of course, this is the limited role which, in any event, is performed by a steering committee even in the context of a UK restructuring; however, in the types of cross-border workout under discussion extra care is required to bear in mind the committee's limited role in the absence of any formal confirmation by creditors of the committee's appointment. To deal with this, once the informal committee has agreed to act terms of reference for the committee to document its functions and procedures should be prepared and signed by committee members and the debtor. As soon as practicable all creditors should be told about the formation of the informal committee and its role should be clearly explained in writing to all creditors so that there is no misunderstanding about what the committee is doing. And members of the informal committee will wish to ensure that there is regular contact with all creditors (subject to the execution of appropriate confidentiality agreements) and, in due course, meetings of creditors can be held if appropriate.

39. The second problem arises from the inter-relationship between the domestic and international financial institutions. In some cross-border workouts the domestic debt will be dealt with separately from the international indebtedness although the international financial creditors will wish to have details of the restructuring agreed with domestic debt holders (to ensure fair
treatment of all creditors) and be satisfied that the domestic debt restructuring is binding and effective before the international debt restructuring becomes effective.

There are many cases, however, where the domestic and international financial creditors have to work together. There can be some suspicion that the domestic banks are more supportive of the debtor than the international banks or that the domestic banks will leak information to the debtor or otherwise try to argue for and promote the debtor's point of view in inter-creditor discussions. This can be a very significant problem. Effective co-operation between both domestic and international banks is likely to be essential for the success of the restructuring; a huge amount of effort needs to be put in to ensure effective and regular communication between the two groups of banks and the development of a working level of trust.

A connected problem relates to the choice of a lead bank. In some cases it is not self evident who the lead bank should be. Domestic banks will have substantial exposure and the local knowledge and presence on the ground required of the lead bank. However, the international banks will usually feel uncomfortable in leaving a local domestic bank to run the restructuring (for the reasons mentioned above). Therefore it becomes necessary to find an international bank to act as a joint lead and joint leadership can give rise to problems of its own. Problems can also arise from the relative inexperience of members of the steering committee in dealing with these kinds of problems and the reluctance of debtors to pay for the benefit of the restructuring process sometimes means that it is impossible to persuade a major creditor to act as a lead bank because it will not be properly remunerated for doing so.

There have been some problems in Thai workouts, for example, because of the reluctance of institutions to adopt the role of lead bank. Sometimes, as noted above, this is because those with the highest exposures feel they lack the experience whilst those institutions with experience consider that the relatively small size of their exposure does not justify the management time involved in taking the lead. In other cases there is reluctance as between domestic and foreign institutions for one to assume the lead. Unless this problem is satisfactorily resolved the restructuring process can become further complicated and there can be serious additional delays and difficulties in driving the restructuring process forward. You can end up without an effective lead bank and lose all the associated benefits.
Making the restructuring effective

42. Restructurings based on the London Approach have traditionally depended upon achieving unanimity. The consent and agreement of all banks is required in order to enable the restructuring to be effective. It is accepted that each bank must make its own independent commercial judgment regarding the proposed restructuring and what is in its own best interests. However, financial institutions operating in London were expected to have regard, when deciding whether or not to agree to a restructuring, to the principles laid down by the London Approach and the need to support the majority view wherever possible.

A number of pressure points can be used to try to persuade doubters that they should support a particular restructuring proposal. Doubters could for example be reminded that a failure to support the restructuring in question might result in a lack of support, in a subsequent restructuring, for a proposal or plan supported on that occasion by the doubting bank! In addition, the Bank of England could play a role in applying pressure on dissenters to come into line. Insolvency proceedings with a scheme of arrangement (under which the requisite majority could bind the minority of creditors) were the ultimate threat but rarely used (it is worth noting that the need to obtain the unanimous support of all creditors and the advantages of introducing a procedure which operates on the basis of the majority rule principle are some of the important unresolved issues in the ongoing debate about the merits of the London Approach and how it needs to be adapted).

43. Achieving unanimity is even more difficult in cross-border workouts. It can be done but it is not easy where there are a large number of different types of creditor involved and particularly where the debtor has accessed the capital markets via a bond issue. Bondholders increase significantly the number of creditors involved and, at least in the case of eurobonds where holders wish to remain anonymous, introduce additional complications into the restructuring process (particularly with regard to providing holders, trustees or their representatives with the information they need in order to support a standstill and adequately involving them in the negotiations of a restructuring plan).

44. These complications are caused by the increased number of creditors who need to be involved in international restructurings (often being a function of the size of the debtor concerned) and also because of the geographical spread of the creditors involved. Where you have a large number of creditors in a variety of different jurisdictions the process of properly involving them in the restructuring negotiations just becomes more complicated. However, further
difficulties are caused by the geographical spread of assets in many cross-border cases. Not only do you tend to have creditors in a variety of different jurisdictions but you also find assets in a variety of different places. This means that the restructuring must be effective not only in the home base of the debtor in question but also abroad at least in those jurisdictions in which the debtor has or will in the future acquire assets.

45. Dealing with bondholders is made much easier in cases in which a trustee has been appointed to act on bondholders' behalf. The trustee and its advisers can participate in the restructuring negotiations, give their views on how bondholders' interests should be taken into account when preparing the restructuring proposal and then become involved in the process of consulting and obtaining decisions from bondholders on what is proposed. However, there are many cases in which trustees have not been appointed. It then becomes necessary to devise a method by which the bondholders can be identified and involved in the process. Lead managers often have an important role to play. They will have placed many of the bonds and usually know who the holders are (they are often their clients!). They can assist in contacting and involving holders.

Furthermore, the bonds will often contain majority voting provisions which enables the majority of holders to bind the minority. The terms and conditions and the provisions of the trust deed constituting the bonds will need to be carefully examined and the powers of the majority to bind the minority (usually pursuant to the passing of an extraordinary resolution approving and giving effect to a restructuring proposal by the debtor) will need to be reviewed. If all other creditors can be persuaded to agree to the restructuring then it becomes necessary to prepare appropriate circulars to bondholders containing the information they will need to have in order to review the restructuring proposal and the form of an extraordinary resolution on which they will vote at a bondholders meeting convened for that purpose. Provided the extraordinary resolution is passed then all holders both present and future will be bound by the restructuring.

46. But what happens where it proves impossible to persuade a material minority of creditors to agree to the restructuring proposal? The following issues then arise:

(a) is an appropriate reorganisation proceeding available, either in the home base or elsewhere, which can be used in the circumstances without undue disruption and which incorporates majority voting provisions which enable the restructuring proposal to be crammed down on the dissenting minority?
(b) will the reorganisation proceeding be effective in all relevant jurisdictions in respect of creditors or assets abroad? (For example is the proceeding to have extraterritorial or merely territorial effect?)

47. The first question therefore is whether a suitable reorganisation proceeding is available which allows for majority rule in respect of the restructuring proposal. So the first issue is "suitability". A number of issues have to be considered. For example, is majority voting on a restructuring plan only available within and after commencing an insolvency proceeding or is a separate procedure available (such as an English scheme of arrangement) which does not require the commencement of insolvency proceedings? Insolvency proceedings may be inevitable because of the need to stay hostile action by dissenting creditors. However, there may be advantages in at least starting without such proceedings if they are not essential. If majority voting is only available in the context of an insolvency proceeding, to what extent is it possible to have a pre-packaged plan by arranging for the requisite majority of creditors to agree to the reorganisation in advance of the commencement of the insolvency proceedings? Consideration must be given to the speed with which insolvency proceedings can be progressed; the extent to which the reorganisation plan has to meet certain pre-determined criteria (for example as to the level of dividend payable to creditors); the unpredictability and the risk of a hijacking of the insolvency proceedings and the extent to which the proceedings will involve the appointment of an insolvency officeholder who will wish to review afresh and be satisfied as to the justification for the terms of the reorganisation plan. The restructuring of Alphatec Electronics within a Thai rehabilitation proceeding is a good example of how successful results can be achieved.

Consideration also needs to be given to whether the proceeding pursuant to which the plan is approved is regarded by its home jurisdiction as having extraterritorial or only territorial effect. For example, the Korean statute governing corporate reorganisation proceedings there specifically states that the proceeding does not apply to assets abroad.

48. The second issue is "availability" - will a jurisdiction which has a suitable procedure as part of its law allow the debtor to file a proceeding there? It would be usual to consider first the jurisdiction in which the debtor is incorporated and then the place where it carries on its principal business. Jurisdiction to commence insolvency or reorganisation proceedings would usually be assumed on one or both of these grounds.
49. Once the most appropriate jurisdiction has been established consideration must be given as to how the variation of creditors' rights made pursuant to the reorganisation plan can be made effective in other relevant jurisdictions.

50. In particular:

(a) Will the reorganisation plan be binding and effective in each country in which the debtor has, or will following implementation of the plan have, assets?

(b) Will the reorganisation plan be effective and binding in each country in which the debtor can be wound up or made subject to a reorganisation proceeding?

51. The practical point here is that it is necessary to ensure that dissenting creditors are unable, following the approval of the reorganisation in the chosen jurisdiction, to obtain judgments and attach assets abroad or to commence insolvency or reorganisation proceedings against the debtor. Such action could obviously stabilise or completely undermine the reorganisation.

52. In this context advice needs to be taken from each relevant jurisdiction to establish the local requirements for recognition of the reorganisation plan and the commencement of insolvency or reorganisation proceedings against the debtor. The result of these enquiries is likely to be that proceedings will be required in a number of jurisdictions in order to give world-wide effect to the reconstruction. Obviously the exercise is only sustainable if a limited number of jurisdictions are involved. Whether proceedings can be limited to a few jurisdictions will depend upon the place of incorporation of the debtor concerned and where it carries on business.

53. The English approach to the recognition of foreign reorganisations which seek to vary or discharge a debtor's obligations to its creditors is based on the governing or proper law principle. That is, the English courts will recognise and give effect to a foreign discharge or variation of indebtedness where the relevant proceeding takes place pursuant to the governing law of the debt in question. Thus, where a debtor incorporated in France, for example, seeks to vary or discharge indebtedness governed by New York law pursuant to a French court reorganisation plan the English courts will not regard the discharge or variation as effective and will allow the creditor in question to attach assets in the UK (assuming that the English court has jurisdiction over the French debtor and there are no other grounds for staying the action by the creditor concerned). The governing law principle probably also allows the
recognition of discharges or variations of indebtedness where the discharge or variation is
effected in a way recognised by the governing law of the indebtedness. Accordingly, if, in the
earlier example, New York law recognised or gave effect to the French reorganisation plan
then the English courts would also recognise it and give it effect.

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