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Four-Part Series: How to Prepare for a Real Estate Enforcement in Europe

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Table of Contents:

How to Prepare for a Real Estate Enforcement in Europe, Part 1


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This is the first article in our mini-series on European real estate enforcements and restructurings. Given the continued financial stress being experienced across the global economy, we expect that lenders in the real estate finance space will be actively reviewing their portfolios and considering how a downside enforcement scenario may play out. In this introductory article we cover the key points lenders should address when preparing for an enforcement.

A quick note: Not all enforcements will look the same and a “one size fits all” approach is therefore not available. We have covered here the key considerations that arise in enforcements. Similarly, we appreciate that the sequencing laid out in this article may not always be appropriate to all enforcement scenarios, and the early involvement of legal advisors is recommended.

Step 1: Recognizing the early warning signs of distress

Before preparing for an enforcement, lenders should be on the lookout for the early warning signs of distress. These signs can be obvious or may be more subtle and will differ from deal to deal. That said, some of the key signs that lenders should look out for are outlined below.

Signs of stress

This may include:

- occupancy rates decreasing;
- an increase in tenant rent arrears and in tenants giving vacancy notices;
- in a development deal, contractors withholding work or taking recovery action in relation to work completed;
- interest/debt service reserves being utilised to pay interest;
- less engagement from the propco/sponsor, servicing standards falling, and dwindling information flow and quality;
- contractor/developer insolvency; and
- capex or opex spend reducing below sustainable levels.

Impact of distress in documentation

There may also be indications within the transaction documentation, such as:

- financial covenant and reporting breaches;
- general covenant breaches particularly around leases/property covenants; and
- misrepresentations.

Step 2: Engage advisors

It is advisable that legal and valuation experts are engaged at an early stage. These advisors are needed to undertake key preparatory steps. Lawyers should be engaged to review the terms of the credit agreement to determine: (i) if there are any continuing events of default (as to which, see below); (ii) what actions need to be taken by which percentage of the lenders to accelerate the loan; (iii) what security is held and how it can be enforced; (iv) the terms of any intercreditor agreement ("ICA"); and (v) whether any consents are required. The ICA is a very important document. It will usually set out the powers of the security agent, which creditors can control the enforcement process, and the agency granted to the security agent by each lender and obligor to take actions under the ICA to facilitate enforcement. This is commonly referred to as the "distressed disposals" regime.

Engaging a valuer can also be critically important to an enforcement. In the vast majority of cases there is a need to undertake a marketing exercise or desktop valuation of the assets to be enforced over. We will cover the importance of establishing value in the next edition of this mini-series.

Step 3: Determine which events of default have occurred

When it comes to enforcement planning, not all events of default are created equal. Lenders should consider which events of default have occurred and are continuing. This is an important aspect of the role of the lender's legal advisors. Generally, it is always preferable for lenders to accelerate and take enforcement action on the basis of a clear event of default – such as payment default, breach of a financial covenant or breach of an important undertaking (such as breaching a negative pledge covenant). These types of events of default are easier to establish and generally go the heart of the "bargain" between borrower and lender. For example, proving that a borrower has failed to make a payment when due under a credit agreement is not difficult. By contrast, establishing certain other events of default will not always be clear cut. For example, if the lender wants to enforce on the basis that a borrower has breached a representation in the credit agreement, it is easier for the borrower to contest this. This creates execution risk. Regardless of the merits of the challenge, these actions by borrowers may make lenders hesitant to enforce if there is the threat of litigation risk.

(Step 3A: Do not forget directors' duties)

The duties of directors comes into sharp focus when a company is experiencing financial distress, even if the director is appointed to a property-owning SPV. Under English law, during periods of solvency, the directors owe a duty to the company's members to promote the success of the company. During times of financial distress a shift in the directors' duties occurs, and the directors will also owe duties to the company's creditors to avoid increasing losses to creditors. These duties, and the

additional risk of being found liable for wrongful trading, can be powerful incentives for directors to co-operate with lenders in times of distress. The scope and content of directors' duties does differ from jurisdiction to jurisdiction so it is important to anticipate how directors in the relevant jurisdiction will behave. Notably, the Supreme Court recently clarified the scope of director's duties under English law (*see here a link to our Clients and Friends Memo on the Sequana decision*).

Step 4: Formulate your "Plan A – Consensual Solution" and your "Plan B – Enforcement Strategy"

Ideally, enforcement planning should always involve a "Plan A – Consensual Solution" and a "Plan B – Enforcement Strategy." Enforcements can be expensive and are subject to real execution risk. Unpredictable management, contractors, and a lack of access to key information and personnel are just some of the factors that can complicate an enforcement. As such, lenders will always prefer a consensual solution where the terms are acceptable.

Plan A – Consensual Solution

A well-advised sponsor whose asset is distressed will often engage with its lenders with a view to agreeing a revised deal. For example, if a propco anticipates that it will not be able to comply with certain provisions under the credit agreement – such as a breach of a financial covenant – it will approach its lenders to seek a waiver. At this juncture, lenders can consider negotiating a consensual outcome with the sponsor in exchange for agreeing to the waivers sought by the sponsor. Ultimately the viability of a "Plan A – Consensual Solution" will depend on valuation, debt service capacity, and the attitude and financial means of the sponsor. The Consensual Solution could be in the form of "soft" waiver conditions, such as: (i) more stringent information requests; (ii) tightening up "permissions," for example, reducing leakage through payments to the sponsor as managing agent/servicer or contractor; and (iii) obtaining additional credit support. Or, depending on the relative bargaining strength of the parties, the lenders may seek to impose more stringent, "hard" waiver conditions. These could include:

- replacing the sponsor as managing agent/servicer;
- requiring cash injections from the shareholders;
- appointing receivers;
- imposing new milestones around the delivery of key items, such as regulatory consents; and
- adding restructuring professionals to the board, for example, a chief restructuring officer or board observer.

Indeed, these measures can also aid the lenders if an enforcement is eventually required.

Plan B – Enforcement Strategy

Ideally, while the "Plan A – Consensual Solution" is being structured, work on the "Plan B – Enforcement Strategy" should be "dual-tracked" to save time and costs

and to give the lender leverage in negotiations; lenders want to be in a position to swiftly action an enforcement if the “Plan A – Consensual Solution” negotiations become stymied. When preparing the enforcement strategy, the following points should be considered by the lenders and their legal and financial advisors:

- What assets form part of the security net and in which jurisdiction are they located?
- Is court involvement required? The process of enforcement can differ significantly from jurisdiction to jurisdiction.
- Should enforcement be by way of a share enforcement or an asset sale?
- Are there tax implications depending on how the sale takes place?
- Are any regulatory consents required?
- Could enforcement trigger change-of-control provisions in other transaction documents?
- How should the sale be implemented? For example, via an administrator or receiver sale, or other remedy? We will cover these issues in depth in a latter edition, including how to assess the pros and cons of each remedy.
- Is a “light-touch” enforcement possible? This could involve lenders exercising their powers under share security to replace the board. This can have its upside as it can be less disruptive and may be appropriate in development scenarios where there may be a project that needs to be completed to maximise recoveries.
- Will the enforcement action by the lenders trigger insolvency breaches in any key supply and/or work contracts that the borrower is party to? This is particularly relevant if the lender is financing a development which is in progress. Are there any restrictions on enforcement in key operational contracts? For example, the propco may be party to a non-disturbance agreement requiring the lenders to provide notice to a counterparty that it intends to take enforcement action.
- How should value be established? We will cover this in detail in our next edition.
- Is management input required to execute the enforcement?

A final word

Finally, we want to address two key points that will feature throughout any enforcement process – namely, (1) timing and (2) communications between the lenders and the propco group. It is important that planning with legal, financial and valuation advisors commences at an early stage. In an ideal situation, all of the preparatory steps and diligence items would be completed before enforcing. However, this is not always possible. If the propco group tried to disrupt the lender’s actions, for example, by filing for insolvency, the lenders may be required to take swift defensive action. We will consider how to deal with these kinds of borrower manoeuvres in a latter edition. On communications, it is important that all correspondence with the propco group is recorded on file and that file notes are

kept of any conversations with the propco group. This can provide useful evidence and be used to establish that the lender has acted properly. Particular care should be given to the use of reservation of rights letters. In a recent Clients and Friends Memo we canvassed the key points of a High Court decision that considered these issues in detail and which in our view is required reading for lenders and restructuring professionals.

How to Prepare for a Real Estate Enforcement in Europe, Part 2 – The Importance of Valuation in Enforcements


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Former British Prime Minister Tony Blair once famously declared that "our top priority was, is and always will be education, education, education." To adopt this mantra in an enforcement context, for lenders the top priority should always be *valuation*, *valuation*, *valuation*.

Kicking off Part 2 of our mini-series on "How to Prepare for a Real Estate Enforcement in Europe," the focus turns to valuation. In Part 1 we detailed what steps lenders should take when preparing for a real estate enforcement. A key preparatory step is obtaining robust valuation evidence.

Valuation determines who controls the enforcement

A real estate enforcement typically involves a sale by a secured lender (or security agent on behalf of a club/syndicate of lenders) of a secured asset (or more often shares in a propco) and the application of the sale proceeds to the secured debt owed to creditors. The value of that secured asset, and where that value "breaks" in the capital structure of the borrower, will determine which of the stakeholders are "in the money" and which stakeholders are "out of the money."

Why is this important? Where the value "breaks" determines which stakeholders have an economic interest in the assets and are therefore likely to be able to control the enforcement process. They can do this because of the ability to "credit bid" secured debt claims. This involves bidding a release of the debt up to the full face amount of the claim. Unless a bidder emerges who is prepared to pay the full face amount of the secured debt in cash, the credit bidder will be the winning bidder in an auction for the secured assets. Issues may arise where value breaks close to the face amount of the debt being bid that will expose the bidder to a greater risk of the sale being challenged, and it will often be prudent in those circumstances to obtain independent valuation evidence (we have included a note on valuation challenges below). Although uncommon in practice, another scenario to contemplate is if the valuation shows that the value exceeds the secured debt. In this scenario the interests of the company (or junior creditors if there are any) will need to be considered.

Duties of secured lenders

Under English law, lenders have certain duties when selling secured assets. A key legal duty for lenders is to take reasonable care to obtain the best price reasonably

obtainable in the circumstances.[1] However, lenders are not required to delay the sale in the hope or possibility of obtaining a higher price in the future, especially if this mean the lenders would incur additional expenses by holding the asset.[2] A similar duty is imposed on receivers and administrators (although it has been argued that the duty is more stringent on these office-holders). The courts have been reluctant to prescribe what specific steps lenders need to take to satisfy the duty and, indeed, this duty will be assessed on a case-by-case basis. Despite this, lenders should always take steps to act reasonably to establish value before transacting to minimise litigation risk.

How value is established

Value is typically established either by: (i) obtaining a "book" valuation or (ii) through running an M&A/sale process of the asset. In many larger transactions the intercreditor agreement should also be reviewed, as it will typically set out certain fair value "safe harbours" that will allow the security agent to be deemed to have satisfied its duty of care to the debtor.

If a "book" valuation (sometimes called a "desktop" valuation) is obtained, the lenders should ensure that the valuation expert engaged is experienced in valuing the specific type of asset and is familiar with the market where the property is located. Demonstrating that the valuer has adequate expertise is important where the lender intends to rely on the valuer's advice. In some cases lenders will require some degree of cooperation from the borrower in order to obtain information necessary to undertake the valuation. However, lenders often have a general right to request information and often will want to make the provision of information a condition to any amendments or waivers sought by the borrower (see our discussion on waiver conditions in Part 1.) The valuation produced should be independent, supported by sound commercial judgment and able to withstand scrutiny from the company, other creditors and the court. A valuation guide such as the RICS "red book" may also be a helpful guide but is not necessarily determinative.[3]

If a sale process is pursued, this should be managed by an independent advisor (such as a real estate agent or firm of accountants). The process should be run before the enforcement is undertaken, perhaps as a condition to any waivers that may be requested by the borrower, although in some cases it may be necessary to do it in parallel or as an intermediate step following appointment of receivers or other steps to remove incumbent directors. As part of the sale process a range of trade and financial buyers should be contacted. The lenders should also seek advice on the appropriate method of sale – for example, querying whether sale by way of an auction is appropriate. The length of the process will differ depending on the financial position of the borrower. A typical sale process after enforcement might be as short as one to two weeks if there is a cash liquidity crunch. If there are no immediate liquidity issues, the process could be longer. In addition, a data room should be made available for prospective bidders.

Although there are conflicting authorities on whether book valuations or sale processes carry greater evidential value, the general consensus is that because a sale process produces a "real" valuation with real bidders invited to participate, it should generally be afforded greater weight than a book valuation, which is inevitably a theoretical exercise.

These considerations relate to the position under English law. Lenders will need to take specific advice when looking to enforce in European jurisdictions regarding their legal duties and any valuation requirements. However, the key takeaway for lenders is that to reduce litigation risk they should run an open and transparent sale process, with broad marketing of the asset and following the advice of the investment bank or accounting firm managing the process. Risks will arise when lenders try to limit the information published to bidders, or limit the universe of parties invited to bid.

Valuation challenges

When lenders take enforcement action there is always the risk of challenges from stakeholders, such as junior creditors and the borrower. Challenges in enforcement often turn on valuation. For example, a junior creditor at risk of being "out of the money" might put forward competing valuation evidence to try to establish that they are "in the money" to get a seat at the table. It will be important to analyse any such competing valuations on their merits during negotiations to assess whether the assumptions and methodology employed are appropriate for the property concerned and whether the lender's own valuation is sufficiently robust.

Another area ripe for challenge for junior creditors and borrowers relates to the lender's duty to take reasonable care to obtain the best price reasonably obtainable. While there is no legal obligation for lenders to make their valuation evidence available, there may be merit in disclosing assumptions and methodology in some cases to demonstrate the steps that the lenders have taken to discharge their duties and to quell any brewing challenges. This reinforces the importance of ensuring the lender retains suitably qualified and reputable professionals to undertake any valuation or M&A process.

Ultimately, the optimal route for lenders will be to appoint an insolvency practitioner, whether a receiver or an administrator (in the case of a propco), who will assume any risk of undervaluing the property in a sale transaction. We will look at this in more detail in our next edition.

[1] *Cuckmere Brick Co. Ltd v Mutual Finance Ltd* [1971] 1 Ch 949. Some of the cases refer to the obtaining of a "proper" price.

[2] *Silven Properties Ltd v Royal Bank of Scotland* [2003] EWCA CIV 1409.

[3] See *Swiss Cottage Properties Limited (in liquidation)* [2022] EWHC 1495 (Ch).

How to Prepare for a Real Estate Enforcement in Europe, Part 3 – Implementation (or Getting the Deal Done!)


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Having covered how to prepare for an enforcement in Part 1 and stressed the importance of valuation evidence in enforcements in Part 2, the focus of our mini-series now turns to implementing the enforcement.

Let's imagine the following scenario:

There is a continuing event of default under the finance documents, negotiations between the lenders and the company have stalled, and the lenders no longer believe that the borrower can repay the loan. At this juncture, the logical next step is that lenders will be asking how they can enforce their security and how long it will take to get their money back. A headline point to stress in this situation is that implementing a real estate enforcement is not something which can be done at the drop of a hat. The planning and execution of an enforcement will always take longer than expected. Indeed, considering enforcement options for the first time when liquidity is "drying up" may disadvantage lenders. A well-planned enforcement should not be rushed.

What Do You Need to Get the Deal Done?

Each enforcement will look different. However, there are three key things that must be done in every lender-led enforcement:

1. Firstly, creditors need to agree what enforcement action will be taken. If there is a divergence of views between creditors, steps will need to be taken to bind in those dissenting creditors to the enforcement plan.

2. Next, the secured asset will need to be sold.

3. And lastly, to provide a "clean" sale, the claims of junior creditors (typically intercompany and shareholder loans) will need to be released.

We will now look at each of these in turn.

Step 1: Bind Dissenting Creditors

A key factor to iron out in the early stages of enforcement planning is working out what creditors want to do. While each creditor will want to have their debt repaid, it is not uncommon to see a divergence in opinion between creditors in how best to achieve this. The more complex the capital structure, the harder it will be to get

all creditors on board with the proposed enforcement strategy, and this can have a negative impact on the ultimate recovery.

In simpler capital structures – for example, a lender club deal – getting consensus amongst all creditors to the enforcement strategy may be relatively straightforward. To minimise execution risk, best practice is for the creditors to document their agreement by way of a restructuring term sheet and a lock-up agreement. A lock-up agreement seeks to bind creditors into an agreed method of enforcement. It can be seen as something of an *agreement to agree*. The lock-up agreement and restructuring term sheet will typically address the following matters: (1) when default/acceleration notices will be issued; (2) whether, and what type of, insolvency procedure will be used to implement the enforcement; (3) funding; (4) how the asset will be sold – for example, marketing periods and the engagement of advisors; and (5) signing of key documents – for example, to release security interests.

In complex capital structures – for example, involving numerous and disparate bondholders – getting consensus will not be as easy and may not always be possible. In these situations, a way forward can be through utilising a statutory in-court restructuring procedure. In England, the two key court procedures in the restructuring "toolkit" are the Scheme of Arrangement and the Restructuring Plan. Both of these can be used to bind minority creditors who do not agree with the terms of a proposed restructuring. The Restructuring Plan can be particularly useful as it permits "cross-class cram-down." This allows a restructuring to be imposed on an entire class of dissenting creditors, providing that: (1) the court is satisfied that if the Restructuring Plan is implemented, none of the dissenting class would be "any worse off" than they would be in the "relevant alternative" (typically, the "relevant alternative" to the Restructuring Plan being implemented will be an insolvent liquidation); and (2) at least 75% in value of a class of creditors, with a genuine economic interest in the restructuring, vote in favour of the plan.

Until recently, the English courts were the main (and really, *only*) option in Europe if companies and creditors needed to bind-in dissenting creditors to a proposed restructuring. However, similar court-driven processes have recently been implemented across Europe, and "cross-class cram-down" is now available in several jurisdictions, including in the Netherlands with the WHOA Scheme, the German StaRug, the Spanish Restructuring Plan and the French Accelerated Safeguard procedures. Indeed, we are starting to see these regimes be put to the test – for example, in Spain through the *Celsa* restructuring, France with the ongoing *Orpea* matter and *Leoni AG* in Germany.

Step 2: Sell the Asset

Assuming enough creditors are on board with the enforcement strategy, the next step is to sell the secured asset. The typical path to recovery for real estate lenders is to exercise their rights under the security package they hold to sell the secured real estate asset. Typically, in a real estate enforcement, the creditors will hold a legal charge or mortgage over an asset which can be enforced to recover value. This sounds simple, but of course there's always plenty that needs to be considered.

Under English law there are three key remedies for lenders wanting to sell a secured real estate asset:

1. by the lender exercising power of sale; or
2. an administration sale; or
3. a receivership sale.

The appeal in each of these methods is that lenders can enforce without any (or, in the case of administration, minimal) court involvement, theoretically facilitating a more efficient path of recovery. Deciding which remedy is most appropriate will depend upon a number of factors and is something that will need to be considered by a lender's lawyers and financial advisors. One key factor is that a seller is under a legal duty to act in good faith and take reasonable care to achieve the best sale price reasonably obtainable at the time. Due to these duties, lenders are understandably very reluctant to be the selling party and in practice lenders will usually exercise their rights under the security documents to appoint an administrator or receiver (who are subject to a similar duty). The administrator or receiver will then be tasked with marketing the asset, negotiating the key transaction documents, completing the sale, and then applying the proceeds of sale to pay down the debt.

For lenders, appointing a receiver or administrator to sell the asset can be seen as something of a "protective buffer." It allows lenders to exercise a degree of control over the process while maintaining a safe distance from the risks and duties associated with the sale of the asset. There are certain advantages and disadvantages to the receivership and administration remedies. The receivership method is more of a private remedy, as the receiver is appointed by the secured lender and owes its duties primarily to its appointor. As such, receivership can be an efficacious enforcement option if lenders are seeking to sell a specific site or building. Administration is more public as it is considered a "rescue procedure." The administrator owes its duties to all of the company's creditors and is also required to prepare reports on the conduct of the directors, and whether the company has engaged in transactions that have breached applicable insolvency laws (whereas a receiver has no such duties).

As a final point, at the outset of the deal it is important that lenders understand what their "exit route" looks like and what enforcement options are available to sell the secured asset. These may differ considerably across jurisdictions, and lenders should always seek local legal advice to understand their options.

Step 3: Release the Claims of Junior Creditors

Lastly, when the asset is sold, it needs to be sold free of claims. This means that security granted by the company, and claims against the company, need to be released. The senior secured lenders will often be driving the enforcement bus. However, junior and unsecured creditors (often mere passengers on the bus) may be reluctant to release their claims to facilitate a sale, particularly if they feel they are being "short-changed." It may be possible for a consensual deal to be struck between junior creditors to release their claims for less than the full amount of their debt. If this kind of deal is not possible then recourse can be sought through an appropriately drafted intercreditor agreement. In any secured financing, the intercreditor agreement is a critically important document. An intercreditor agreement will set out the powers and duties of the various lenders involved in the financing, as well as the role of the security agent and its relationship with the lenders and the borrowers and the guarantors.

A key feature of an intercreditor agreement is the distressed disposal provisions, which set out the powers granted to the security agent by the parties to facilitate an enforcement. A well-drafted distressed disposal provision will empower the security agent to release the claims of junior creditors. Certain conditions will need to be met before the security agent can effect the release. These requirements will differ from deal to deal, but often the security agent is required to show evidence of value, for example by conducting a sale process or obtaining a valuation (for more information, see Part 2 of our mini-series here). There may also be requirements set out regarding the treatment of non-cash consideration.

What's Next?

If you have followed the series to date, you should now have an insight into: (1) how to prepare for a restructuring; (2) the importance of robust valuation evidence; and (3) key implementation considerations. However – we're not yet done! In our next (and final) article, we will cover challenges to enforcement and what lenders can do to protect themselves in these situations. And for those readers that make it to the end, we will even include an "Enforcement Checklist," summarising the *dos and don'ts*!

How to Prepare for a Real Estate Enforcement in Europe, Part 4 – Challenges


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In this mini-series on European real estate enforcements and restructurings, we have covered how to prepare for an enforcement in Part 1, emphasised the importance of valuation evidence in Part 2 and highlighted key enforcement implementation considerations in Part 3. In this final installment, we will cover how lenders can best position themselves to face challenges from stakeholders looking to stop an enforcement process.

Challenges by Stakeholders

It is impossible to predict with exact certainty the types of challenges that stakeholders may launch against a creditor leading an enforcement process. That said, lenders may be faced with the following:

1. Uncooperative Directors

Firstly, directors or shareholders of the debtor company may actively resist the enforcement. A common strategy used by opposing stakeholders is to directly attack the conduct of the lenders through an onslaught of correspondence. This strategy could be enough to "muddy the waters" and complicate a lenders' enforcement strategy, or cause the lenders to become nervous and reluctant to undertake their planned enforcement action.

2. Applications to Court

There is a risk (however remote) that a stakeholder could apply to Court on an urgent, expedited basis seeking to stop the enforcement. For example, the company may seek an injunction to stop a lender exercising its power of sale in relation to the secured property or a declaration that the lender's actions are not permitted (such as raising technical challenges on the enforcement documentation).

Theoretically, there is a risk that disgruntled stakeholders (such as directors, shareholders or junior creditors) could even apply to Court without first giving notice to the senior lenders of their application. In this situation, the applicants would need to establish that there was an exceptional urgency, and an imminent risk that the real estate asset would be materially impacted by the enforcement strategy proposed by the lenders. It is, however, an onerous task to show urgency, and the directors would need to successfully justify why they did not inform the

lenders of their Court application. For these reasons, the risk of challenging directors taking this unilateral action without notification to the lenders is remote.

Risk Mitigation and Defensive Steps for Lenders

So, in a situation where a lender is faced with a board of directors who are being difficult and opposing their proposed enforcement plan, what defensive steps can a lender take?

- Firstly, as emphasised throughout this mini-series – *and particularly in Part 2* – valuation evidence is **critical**. Robust valuation evidence should always be obtained. In enforcement situations where there is a risk of challenge, this becomes even more important. Robust valuation evidence can be an effective "shield" against litigation risk.

- As part of good practice lenders should ensure accurate files are kept. In particular, detailed, contemporaneous file notes of discussions with the borrower can be an important record for lenders when defending their actions.

- Next, a robust letter to the board reminding the directors of their legal duties can be a sensible step. The letter should stress the duties of a director of a financially distressed company, and, in particular, the duty of directors to consider the interests of creditors. If the lenders are concerned that the opposing directors may make an application to the Court, this letter may also act as an opportunity to put the company on notice that if any such application were to be made, the directors will be liable for any adverse costs incurred by the lenders in defending the action.

- A more fulsome option for the lenders when dealing with difficult management would be to exercise their voting rights under the security documents. Typically, an English law share pledge will provide that following an event of default a lender can exercise the member's voting rights in the company which would allow the lenders to change the board. Lenders could seek to replace the directors and appoint their own preferred (suitably qualified) company directors in order to manage the company with the interests of creditors in mind. It is worth considering the fact that the replacement directors must be willing to immediately accept the appointment, which may come with a degree of challenge, particularly if the company operates in a highly specialised or regulated area of business.

- Alternatively, the lenders could seek to appoint administrators over the holding company. The administrator would then be granted the power to change the board (removing the opposing directors). However, any move to appoint administrators should be carefully considered and taken in line with legal and financial advice.

Enforcement Checklist

In summary of our four-part mini-series, the below checklist sets out the key considerations for lenders actioning a real estate enforcement.

1. Structure What is the structure of the company? It is critical to get the

	structure right when the deal is negotiated, as this can aid enforcement later down the line. Understanding weaknesses in structure and security provisions is essential.
2. Events of Default	What Event of Default has occurred? It will always be preferable to enforce on the basis of a clear, objective Event of Default.
3. Waivers and Amendments	Use these requests as an opportunity to tighten permissions, obtain more information, and to engage advisers to aid in the enforcement preparation stages. Preparation is key!
4. Security	Have you engaged lawyers to conduct a security review? Knowing how security can be enforced and how long an enforcement might take is crucial. Enforcement procedures may differ considerably across Europe, particularly as not all jurisdictions on the Continent are as “creditor-friendly” as the UK (and local law advice should always be obtained).
5. Valuation	Expert valuation evidence is key! Have you engaged an independent expert with experience in valuing the specific type of target real estate asset? This will be important for secured creditors to assess if the sale proceeds can repay their debt.
6. Stakeholders	Are you the only creditor? If more than one creditor is involved, it is essential to quickly understand their strategy and start working on an agreement as to how the enforcement should be implemented. Do you need management support to execute the real estate enforcement? Think about the practical aspects of the implementation and whether there is a chance that the company directors could oppose the proposed strategy.
7. Selling the Asset	How will the real estate asset actually be sold? This is a secured creditors’ key remedy. It is crucial to understand what the enforcement strategy will look like, how much it will cost, timings, any additional regulatory or statutory hurdles, and whether or not management input will be needed.