

Forum Shopping On A Global Scale



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It always seems there are several “hot” topics abroad in the land of insolvency and restructuring and the current era is certainly no exception. While topics such as the health care industry and the rise of cryptocurrencies are getting their fair share of attention and their day in the sun, the steady growth in the trend toward the “globalization” of our industry continues to be an issue that truly permeates the daily practice. From my perspective, one overlooked and mostly unnoticed aspect of this trend in our business is the quiet but increasing competition over the future venues of large and mid-sized cases.

It's not just in the United States that venue continues to be a feverishly debated topic as this issue, too, has gone global. Much of this seems driven not so much by the choices practitioners in our industry make but, rather, by the dictates and desires of those who control the large pools of capital waiting to be deployed in the service of distressed investing,

always hoping for outsized returns in what otherwise appears to be a globally slow era for investment returns.

My contention has always been that changes to the practice in our industry in the 1990s caused an evolution in the restructuring process whereby larger cases became more of a vehicle for a “financial play” and less of an opportunity for an operationally-driven reorganization. While this development was not necessarily a bad thing, many in our field spent a good bit of time thereafter bemoaning the fact that claims trading seemed to have hijacked the process. Now, this many years on, and despite the initial reluctance to embrace claims trading, such activity – and the ever-expanding pools of international capital that are now routinely committed to it – has become not only the norm but, in fact, the expectation in most mid-sized and large cases. Retail insolvency, to cite just one example, is a segment in our industry that's become strongly dependent on these distressed investment funds.

My experience is that the firms that raise and deploy this kind of capital thrive by excelling in the contest of analyzing and pricing risk, and therefore also prize a level of predictability in the investment equation. Once courts in a certain area establish a reputation for competence in complex matters, as well as a track record in the application of consistent themes and practices in how cases are managed, these locales tend to thrive. It also doesn't hurt if these courts are geographically proximate to where those who raise and invest these sums tend to live and work. In my opinion, the courts in New York and Delaware have long benefited from this association and, of late, the courts in Houston and Richmond are having their moments, as well. I make these observations to neither endorse nor oppose any particular point of view within the ongoing debate about venue, but merely to discuss, as a part of this overall presentation, my observations on where the current state of play resides.

Similarly, and overseas, for years certain foreign jurisdictions have attracted a disproportionate share of restructuring matters. This is due to the fact that, again, at least from my observation, they are situated near where the larger financial centers and the capital pools exist or have reputations as dependable, business friendly and predictable locales with proven legal and procedural regimes. In this category, both London and Hong Kong have long been obvious centers of such efforts and, of late, Singapore and the Cayman Islands have seen a decent rise in activity.

Much as is the case with the venue argument within the US, a bit of a backlash occasionally develops regarding the perceived unfair dominance of several of these international financial centers. In particular, and with regard to the evolution of the insolvency practice on the European continent, the European countries, seeking a greater degree of control over their own matters, have long been one of the most fervent backers of the concept of Center Of Main Interest ("COMI") which, in short, defines the venue of any insolvency as that location where the endeavor traditionally has had its operating headquarters.

Many believe that this concept evolved and was espoused by the Europeans as a counterweight to the tendency of many Continental businesses to look to the UK and its extremely well-defined and well-regarded practical and legal regimes, the famous English "Scheme of Arrangement" being one strong example, when they consider their options for reorganization. Indeed, some who seek to alter the current venue selection tendencies in the US have pushed to get something akin to a COMI definition recognized, in either law or practice, as a

determining factor regarding where businesses may situate their insolvencies.

But what I'm seeing more and more is that the vast capital pools, both the ones that are well-established and the ones that are ever still being raised by those in the hedge fund, private equity and claims trading businesses, are to a large degree still dictating both where the "action" is and where it's likely going to continue to be. In my opinion, while the COMI argument still rages on, most pointedly in Europe in an attempt to hinder the UK as a focal point for filings (aided by Brexit casting a shadow over the near-term viability of the English practice), the EU has decided that imitation may be the sincerest form of flattery. Their latest directive to the remaining 27 member countries of the EU is that they all will be required to promulgate and implement their own version or copy of one of the UK's best-known and most often employed restructuring vehicles, the aforementioned English Scheme of Arrangement.

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Likewise, Singapore, seeking to raise its competitive position and visibility in the industry, has implied that the longer-term political issues and related uncertainty that may affect Hong Kong as a suitable focus of venue may play out to the Lion City's advantage. In furtherance of gaining an edge not just on their Southeast Asian rival, but also on other international jurisdictions as well, Singapore is deeply into a well-oiled public relations campaign touting the reform of its insolvency statutes and regime, all designed to sell itself to the broader worldwide business and legal communities as a destination of choice for corporate restructurings. At first glance, many of the changes to the Singaporean insolvency regime will remind observers of selected aspects of the American Chapter 11 structure. As an example, and in opposition to what exists in most foreign jurisdictions, these new changes to the Singaporean laws offer, for the first time, protections to new capital seeking to prime existing creditors and creating, in effect, the structure for DIP lending.

That said, while these attempts to modernize regimes around the world are certainly welcomed by all who practice, they should be recognized for what they are — plainly the first shots in the next war over competition for venue location for large and mid-sized restructurings worldwide and, along with it, all the dollars, pounds and yuan that will flow into corresponding local economies in support of that work. From my perspective, and much like what has happened in the US, it will be the decision of those who control the capital pools, as well as the perceived ease and predictability of doing a restructuring under a given system, that will likely determine the “winners” in this contest. Clearly, existing financial centers where this capital is largely raised and deployed will prove to be a strong factor in which locales succeed, as will the geographic location of the firms that tend to dominate in this distressed investing business.

Given all of that, I tend to believe that five main locales will emerge as the overwhelming winners in the venue battle for worldwide restructuring activity by the middle of the next decade: New York, Delaware, London, Hong Kong and Singapore. While many other venues will still get a good share of the smaller and mid-sized cases, I believe that with both the increasingly global component seen in most large bankruptcies, as well as the locations of the capital investment pools that are dominant in the industry, these five jurisdictions are likely to leave others far behind.

For select matters, such as oil and gas or those that involve certain international financial aspects, such locales as Houston and the Caymans will still see their share of cases but, on balance, it's hard to avoid the conclusion that, as the industry continues to globalize, the arc of events that is placing these five dominant venues in the forefront will not in any way measurably change. Of course, each of these locales still possesses some structural infirmities which will need to be smoothed over or dealt with if they are to continue to prosper. For example the “Legends” decision, limiting the ability of Joint Provisional Liquidators to do a financial restructuring under Hong Kong law, or the “Gibbs” rule in the UK, which inhibits the disposition of liabilities incurred under English law, in my opinion still present hurdles to be overcome with respect to the conduct of restructurings in those particular jurisdictions.

In conclusion, the point I am trying to make in this article is to let the reader know that not only do I expect these five current centers of activity to flourish as the location of venue for larger cases as the worldwide restructuring industry continues to evolve, but I predict, as well, that competition among these five locales to land ever

larger and more complex cases will grow measurably more intense in the coming years. The competition between, say, New York and Hong Kong will seem as vigorous in the future as the past competition between New York and Delaware has been for US practitioners. My recommendation, therefore, to all who are now confronted with matters that cross a wide range of geographic locales is to carefully analyze, as you already do for your cases within the US, which venue best suits the outcome you're trying to obtain for your client, and which venue has a regime that capital pools of investment will find most attractive. The world grows ever smaller in business and those of us in the insolvency industry are about to have that experience brought home in the next wave of bankruptcies as the current era of economic expansion inevitably comes to a close. ■