

Retreat or progress in cross-border restructuring?

Chris Laughton reports from the 15th joint conference between R3 and INSOL Europe which took place on 7 June 2018 in London



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Over 60 senior delegates from nearly 20 jurisdictions met in the heart of the City, in sight of the Tower of London, to explore the theme “retreat or progress in cross-border restructuring”.

Glen Flannery and Nico Tollenaar, who have for many years chaired this most successful of co-labelled cross-border restructuring events, brought together an impressive team of speakers from around the world. UK, other European, offshore and North and South American perspectives were delivered by lawyers and insolvency practitioners, as well as by experts from the banking, legislative and journalistic communities.

A strength of the conference was its familiar format, beginning with Richard Fisher and Henry Phillips of South Square discussing the year’s common law cross-border cases. Richard considered the wane of universalism in the context of the rule in *Gibbs* (a nineteenth century English Court of Appeal case, which decided that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceedings). He also explained that Article 21 of the UNCITRAL Model Law could not be used in *Re International Bank of Azerbaijan* to gain a permanent stay and overcome the rule in *Gibbs* procedurally. Henry identified from *Carlyle Capital Corporation*

Limited (a Guernsey case), that a director who gives some, albeit inadequate or incompetent, consideration to actions he honestly believes are in the interests of the company will not be guilty of a breach of loyalty.

Market developments

Maintaining tradition, John Willcock, Editor of *Global Turnaround*, interviewed a panel on market developments and as media sponsor also provided a special report for the conference¹. After reminding delegates that Brexit is a massive uncertainty generator he invited John O’Driscoll of Walkers to speak of the attractiveness of a Cayman provisional liquidation as a restructuring tool. It can be used to give a breathing space, leaving management in place in a light touch case (as in the *Ocean Rig* case), and fits well with Chapter 11 or an English Scheme, but it might benefit from rebranding to lose “liquidation” from the title!

Ilona Wolffram-van Doorn from the Dutch Ministry of Justice and Security spoke fascinatingly on the implementation of a statutory basis for pre-packs in the Netherlands and on legislation being drafted for a Dutch Scheme of Arrangement. The current idea favours two types of scheme: one subject to the European Insolvency Regulation and COMI etc., and the other being outside the EIR, applicable if there is “sufficient connection” to the

Netherlands jurisdiction and governed by private international law rules.

Werner Meyer of Simmons & Simmons then told the Air Berlin-Air Niki story. Air Niki filed for insolvency in Germany and was successful at first instance but overturned in the court of appeal. Meanwhile the German administrator had agreed to sell the business and assets to IAG, subject to the insolvency status being resolved. A creditor then filed to open main proceedings in Austria and the Austrian administrator sold the business and assets to Lauda Motion. It is unfortunate that there was not more cooperation between the German and Austrian courts and administrators as a good deal of value was destroyed by the jurisdictional argument. John’s conclusion on the conference theme of retreat or progress might best be interpreted as two steps forward from Cayman and the Netherlands but one step back from Germany and Austria!

Cayman complexities

Chris Duffy of Alix Partners and Nick Herrod of Maples & Calder took delegates back to Cayman for a more detailed look at the *Ocean Rig* case heralded by John O’Driscoll. Key features included a pre-appointment COMI-shift from the Marshall Islands, which had no restructuring regime; light touch provisional liquidations; a litigation trust to hold and



A STRENGTH OF THE CONFERENCE WAS ITS FAMILIAR FORMAT

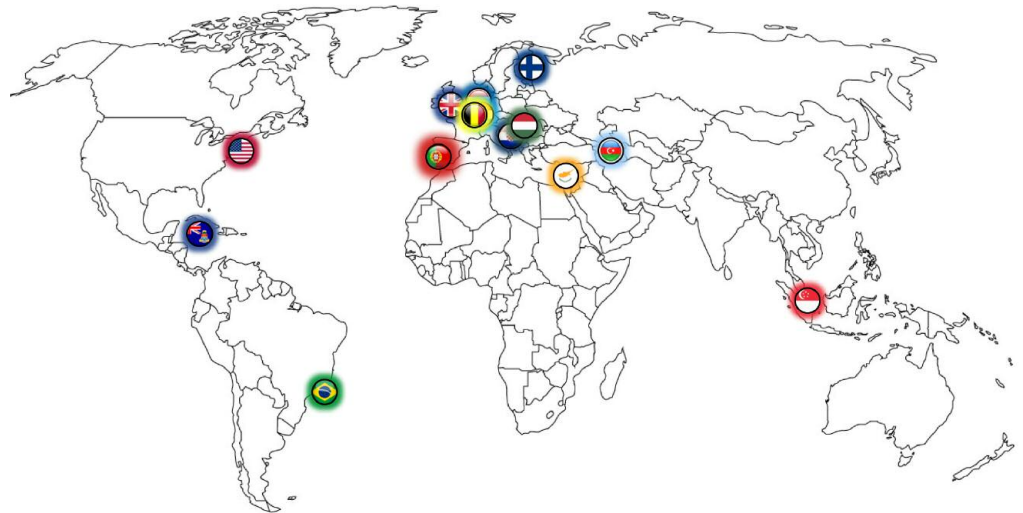


potentially pursue claims; and four linked schemes of arrangement. Much more detail was discussed than I have room to relate, but this was a complex and well-planned restructuring, which demonstrates the cost and tax advantages that Cayman can offer over the US and the UK. To emphasise progress in cross-border restructuring, Barry Cahir spoke from the floor briefly and unashamedly to point out that the Irish scheme of arrangement's 55-year heritage has been augmented since 2011 by Examinership, which is akin to Chapter 11!

Piya Mukherjee of Horten spoke as INSOL Europe's Vice President about the association, encouraging those delegates who were not already members to join us. Later, Stuart Frith of Stephenson Harwood, who is the new President of the host body, R3, explained the wishes of UK professionals and the UK government to see the continuing application of the EIR and the Recast Brussels (judgment) Regulation to the UK after Brexit, with mutual recognition and reciprocal civil justice cooperation. Notwithstanding legal difficulties like, for example, the Netherlands not recognising foreign insolvency proceedings except from the EU (as Nico Tollenaar pointed out), cooperation is clearly fundamental to effective cross-border restructuring and insolvency. The uncertainty that John Willcock highlighted is anathema.

The discussion format of the EU Developments presentation by Stephen Taylor of Isonomy and Johan Jol of ABN AMRO not only reflected their chance meeting and first conversation in New York but also facilitated a flow of ideas. They covered non-performing loans (the restructuring and hedge trader caravan is heading for Italy), bank risk vs client care (bankers have to look after clients personally), morality vs legal structure (whether it's legal or illegal, is it right?), legislators driving behavioural change using the court of public opinion, and

Around the world in one day...



the dearth of good non-executive directors due to the worry of cross-infection (involvement with a restructuring seen as unsuccessful could lead to a reputation that might damage a good company).

Cross-border case study

Finally, the latter part of the afternoon was given up to a case study of Oi Telecom, Latin America's largest ever restructuring. Playing roles with which they were largely familiar in reality were Laura Femino of White & Case as US Counsel, Marcel Groenewegen of CMS as Netherlands Trustee, Sergio Savi of Barbosa Müssnich Aragão as Brazilian adviser and Lucas Kortmann of RESOR (who had been a Netherlands adviser) chaired the session. This 70 million customer business with a 347,000 km fibre network in Brazil gave rise to a politically high-profile and truly cross-border restructuring involving different languages and cultures. Another feature of the case was the bruising nature of the litigation.

Structurally, the Brazilian group had used Dutch and other nationality SPVs to attract funds tax-efficiently. The Brazilian Recuperação Judicial ("RJ") proceedings (akin to Chapter 11), which involved substantive

consolidation, were not recognised in the Netherlands. Similarly, the trustee of the Netherlands SPV, which had valuable inter-company claims, was not recognised in Brazil. Suits, injunctions and counter-suits ensued with litigation extending to Cayman (in relation to a Cayman fund) and the US (were main proceedings in Brazil or the Netherlands and hence who controlled the US Chapter 15 proceedings?). A split board and a failed plan led to a court-imposed CEO in Brazil and a 2-day creditors' meeting in late 2017. By June 2018 matters had moved forward and another creditors' meeting was held and the plan approved just days before the conference!

The case study illustrated clearly the problems that arise when insolvency proceedings are not recognised in another jurisdiction. It also showed again the importance of cooperation between courts and practitioners. ■

Footnotes

- 1 Available at: www.globalturnaround.com/documents/R3-INSOL-EuropeInternationalRestructuringConference.pdf

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