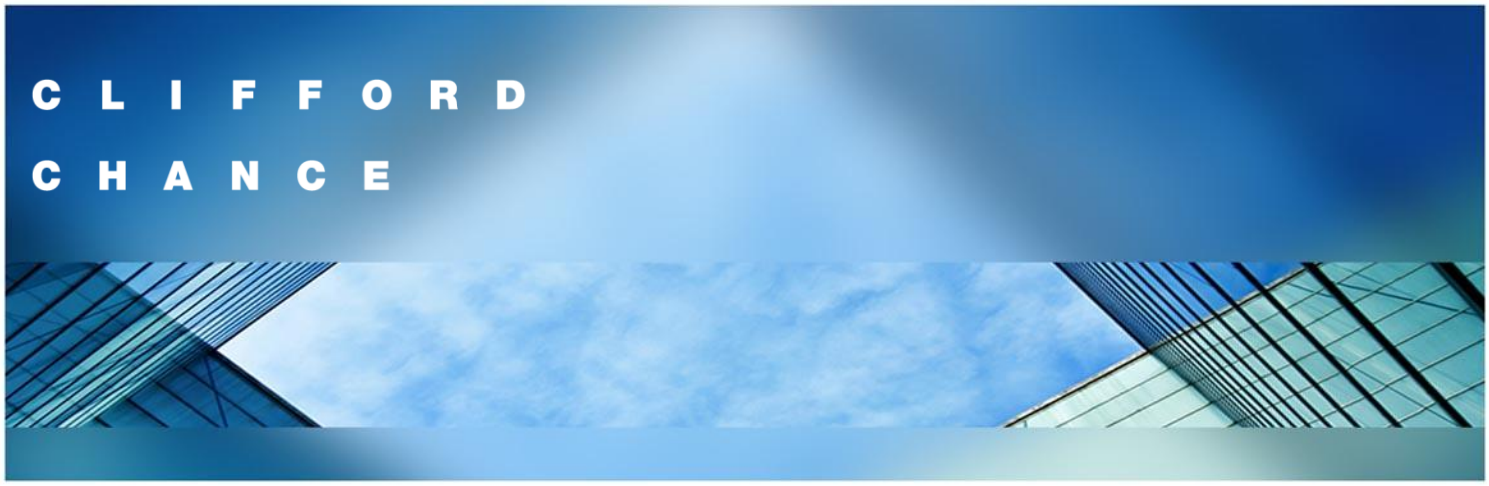

THE CASE FOR GOOD FORUM SHOPPING: INSIGHTS FROM *MEGA NEWCO*

A recent case from the bankruptcy court for the Southern District of New York, *In re Mega Newco*, addresses the use of corporate entities created for restructuring purposes and the potential for improper COMI manipulation.

When a company undergoing a foreign insolvency proceeding initiates an ancillary proceeding under Chapter 15 of the US Bankruptcy Code, the relief available to it in the United States will depend on (among other things) the company's relationship to the jurisdiction where the foreign proceeding is pending at the time the Chapter 15 petition is filed. If the company has its "center of main interests" (COMI) in the foreign jurisdiction, the foreign proceeding may be recognized under Chapter 15 as a foreign main proceeding. If the company does not have its COMI in the foreign jurisdiction but instead has an "establishment" there, the foreign proceeding may be recognized under Chapter 15 as a foreign nonmain proceeding. And if the company has neither its COMI nor an establishment in the jurisdiction, then the foreign proceeding will not be recognized at all and cannot benefit from the relief available under Chapter 15.

Bankruptcy courts are generally concerned with the potential for mischief and manipulation of COMI and will look to whether there is any evidence of any insider exploitation, untoward manipulation, or overt thwarting of third-party expectations. As an increasing number of distressed companies forum shop around the globe for laws that will be most favorable to their restructuring—especially as more jurisdictions provide viable and efficient restructuring frameworks, courts and commentators have raised concerns that a company may seek to restructure in a jurisdiction that is not its COMI or in which it does not have an establishment and then seek to have that restructuring recognized in the United States under Chapter 15.[1]

These concerns were raised most recently in a case out of the Southern District of New York, where a Mexican financial services company with no connections to the United Kingdom incorporated a new English subsidiary to take advantage of

Key Takeaways

- US bankruptcy court holds it is not per se improper for a company to "manipulate" its center of main interests (COMI) to take advantage of favorable restructuring laws in different jurisdictions
- It can be expected that US courts will carefully scrutinize transactions to determine whether a non-US debtor "improperly" manipulated its COMI to frustrate creditors or thwart their legitimate expectations
- Creditor support of a restructuring transaction—and lack of objections—may be critical in persuading a US court to recognize and enforce a foreign restructuring where the debtor's COMI may have been manipulated

[1] *See e.g., In re Codere Finance 2 (UK) Ltd.,* No. 20-12151 (MG) (Bankr. S.D.N.Y. Oct. 9, 2020), ECF No. 13 (recognizing a UK scheme proceeding as a foreign main proceeding where the debtor was an entity newly created in the UK solely for the purposes of accomplishing a scheme on the basis that there was overwhelming support, a lack of objections and the interests of creditors and other interested entities were sufficiently protected, but noting that caution is in order and all factors would need to be reviewed in any similar case, in particular if objections were present).

the UK's scheme of arrangement and then sought relief under Chapter 15 to recognize and enforce its English scheme in the United States. Despite concerns regarding the maneuver, the US bankruptcy court ultimately recognized the scheme, relying on the fact that no interested parties objected to recognition and that to deny relief would itself frustrate creditors' expectations regarding the restructuring. The decision is notable insofar as it reaffirms the ability of companies undergoing financial distress to potentially manipulate the location of their COMI for restructuring purposes, at least so long as creditors and other stakeholders are on board and no objections are raised.

BACKGROUND

Operadora de Servicios Mega, S.A. De C.V., Sofom, E.R. (the "**Parent**") was a financial services company based and headquartered in Guadalajara, Mexico. In 2020, the Parent issued a set of notes (the "**US Notes**") under an indenture governed by New York law. By 2024, the Parent faced liquidity constraints and needed to restructure the US Notes.

But restructuring the US Notes was no simple task. Outside of bankruptcy, the US Notes could be restructured as desired by the Parent only with the consent of 100% of the noteholders, making the task generally impractical. While bankruptcy laws available to the Parent would have permitted a restructuring with less than 100% consent, they would not allow the Parent to surgically restructure *just* the US Notes without addressing its other liabilities in a court-supervised process, which the Parent was seeking to avoid. A UK scheme of arrangement would address this issue (while also promising to be less expensive and time-consuming than other alternatives), but the Parent had no "sufficient connection" to the UK—the relevant test to establish jurisdiction of English courts.

The Parent's solution was to incorporate a new English subsidiary, Mega Newco Limited ("**Mega Newco**"), specifically to assist in restructuring the US Notes through a UK restructuring process—a maneuver that was pioneered in connection with the 2015 restructuring of the Spanish gaming company Codere Group[2] and which has been adopted in several recent restructurings to establish a connection with the UK. After Mega Newco was created on September 30, 2024, it became an additional obligor on the US Notes and commenced its own English scheme proceeding in November 2024. The holders of more than 75% of the US Notes voted in favor of the scheme, which was sufficient for the English court to have jurisdiction to sanction the scheme. Because Mega Newco (unlike the Parent) was incorporated in the UK, which is enough to create a "sufficient connection," and because the other conditions necessary to sanction the scheme were met, the English court entered an order approving the scheme.

On November 25, 2024, Mega Newco commenced a Chapter 15 case before the Bankruptcy Court for the Southern District of New York seeking recognition of the English scheme proceeding as a foreign main proceeding or, alternatively, a foreign main proceeding. No party objected to recognition of the scheme proceeding or to the enforcement of the English court's scheme approval order.

[2] Clifford Chance represented Codere on this transaction.

THE BANKRUPTCY COURT'S DECISION

First, the court held that the English scheme proceeding could not qualify as a foreign nonmain proceeding because Mega Newco did not have an "establishment" in the UK. An establishment is an actual place from which economic market-facing activities are regularly conducted, and the court found that Mega Newco never engaged in any regular market-facing activities from the UK. Its restructuring activities alone were insufficient to demonstrate the existence of an establishment.

The court next turned to whether the scheme qualified as a foreign main proceeding and, specifically, whether Mega Newco had its COMI in the UK. Under the Bankruptcy Code, the location of a corporate debtor's registered office is presumed to be its COMI[3]—for Mega Newco, that would be the UK. No party argued that Mega Newco's COMI was anywhere other than the UK, and there was no evidence that the company's COMI was outside the UK.

Still, the court expressed concerns with granting recognition. It saw "significant risks" with the process used to restructure the US Notes. The issuer of the notes (the Parent) was not a party to the English scheme proceeding and, because the Parent's COMI was in Mexico rather than the UK, the English court would not have had jurisdiction to approve a scheme commenced by the Parent. Indeed, the incorporation of Mega Newco in the UK was admittedly done for the sole purpose of facilitating a restructuring of the US Notes using an English process that would not have otherwise been available to the Parent.

As the bankruptcy court explained:

> If we were routinely to allow this structure in all cases, no matter what the circumstances, the ordinary predicates for Chapter 15 relief could be stripped of meaning. Any debtor company could restructure its obligations anywhere it chose without even subjecting itself to a foreign proceeding. All that a debtor would need to do is to form a new subsidiary in a jurisdiction of its choice and then cause that new subsidiary to assume the parent company's obligations. The parent company's COMI would no longer be relevant to the parent's restructuring of its debts. The laws of the chosen jurisdiction would govern a restructuring, no matter how those laws might affect the legitimate expectations of creditors and regardless of whether the debtor had chosen a particular jurisdiction for the purpose of favoring insiders or for other improper reasons.[4]

Fearing that COMI was manipulated here through the incorporation of Mega Newco to take advantage of the UK restructuring process, the bankruptcy court narrowed its focus to determining whether the structure used by the Parent to restructure the US Notes constituted an *improper* manipulation of COMI.

Ultimately, the court determined that no *improper* manipulation occurred. While the structure at issue in this case could in other cases be used to frustrate and thwart creditor expectations, the court here found that was not the case for the Parent and Mega Newco. Rather, according to the bankruptcy court, Mega Newco was formed, and the scheme proceeding was used, for creditable reasons: to

[3] 11 U.S.C. § 1516(c).
[4] *In re Mega Newco Ltd.*, No 24-12031 (MEW), 2025 WL 601463, at *3 (Bankr. S.D.N.Y. Feb. 24, 2025).

permit an efficient restructuring that would enhance creditor recoveries and maximize the value of the business. A fully contractual restructuring was not possible because certain holders of the US Notes were subject to sanctions and excluded from the financial system, making it impossible to get 100% noteholder consent; and the scheme permitted "surgical" amendments to the US Notes, without affecting the Parent's wider business, in a way that would not have been possible in a bankruptcy proceeding under Chapter 11 of the US Bankruptcy Code. Additionally, the court held that the procedures did not take unfair advantage of the holders of the US Notes. In fact, the holders were involved throughout the scheme proceeding and the relevant majority consented to the restructuring. Similarly, no parties objected to recognition of the scheme or enforcement of the scheme order in the Chapter 15 case.

Given these facts, the bankruptcy court was persuaded that there was no risk to creditors, their rights or their expectations. In fact, the only thing that would thwart creditor expectations, the court said, was if the court were to decline to enforce the scheme order: “It would be absurd for [the court] to thwart the creditors’ constructive desires and expectations in the guise of supposedly protecting them.”[5]

CONCLUSION

This case is not the first example of a company successfully forum shopping and obtaining recognition of its foreign restructuring in the US, and it is likely that this practice will continue as restructuring regimes outside the United States continue to evolve and become more sophisticated. However, this case helpfully reinforces the principle that there is no *per se* rule against a debtor manipulating its COMI to take advantage of the restructuring laws of different jurisdictions and that to do so may be considered a “laudable” objective. Still, while the bankruptcy court granted recognition in this case, it did so while indicating that there would be “serious questions” as to whether recognition should be approved if parties had objected or if evidence had been presented that the incorporation of Mega Newco had been done in an unfair way or used to thwart parties’ legitimate expectations. Therefore, it is important to consider the support (or not) of creditors and other stakeholders in determining whether any COMI manipulation will be viewed as “improper.”

[5] *Id*. at *4.

CLIFFORD
CHANCE

CONTACTS

NEW YORK

Douglas Deutsch
Partner

T +1 212 878 4935
E douglas.deutsch
@cliffordchance.com

Maja Zerjal Fink
Partner

T +1 212 878 3188
E maja.zerjalfink
@cliffordchance.com

Matthew Hinker
Partner

T +1 212 878 3106
E matthew.hinker
@cliffordchance.com

Brian Lohan
Partner

T +1 212 878 3187
E brian.lohan
@cliffordchance.com

Michelle McGreal
Partner

T +1 212 878 8378
E michelle.mcgreal
@cliffordchance.com

Sarah Campbell
Counsel

T +1 212 878 3427
E sarah.campbell
@cliffordchance.com

Robert Johnson
Associate

T +1 212 878 8004
E robert.johnson
@cliffordchance.com

Madelyn Nicolini
Associate

T +1 212 878 3007
E madelyn.nicolini
@cliffordchance.com

Jared Quinn
Associate

T +1 212 895 1020
E jared.quinn
@cliffordchance.com

LONDON

Melissa Coakley
Partner

T +44 207006 1963
E melissa.coakley
@cliffordchance.com

Philip Hertz
Global Head of Restructuring and Insolvency

T +44 207006 1666
E philip.hertz
@cliffordchance.com

Tim Lees
Partner

T +44 207006 6253
E tim.lees
@cliffordchance.com

John MacLennan
Partner

T +44 207006 1642
E john.maclennan
@cliffordchance.com

David Towers
Partner

T +44 207006 8036
E david.towers
@cliffordchance.com

Iain White
Partner

T +44 207006 2825
E iain.white
@cliffordchance.com