American University International Law Review

Volume 13 | Issue 1 Article 3

1999

Potential Exiting through ADRs (and/or GDRs?) for International Private Equity Investors

Jerry Feigen

Recommended Citation

Feigen, Jerry. "Potential Exiting through ADRs (and/or GDRs?) for International Private Equity Investors." American University International Law Review 13, no. 1 (1999): 109-124.

POTENTIAL EXITING THROUGH ADRS (AND/OR GDRS?) FOR INTERNATIONAL PRIVATE EQUITY INVESTORS

JERRY FEIGEN*

The thrust of Mr. Mailander's article, *Searching for Liquidity: United States Exit Strategies for International Private Equity Investment*[1] captures one of the single most important aspects of the private equity industry, i.e., timely distribution of portfolio investment with maximum valuation potential. This "exiting" issue has been one of the key factors responsible for bringing the relatively young private equity and venture capital industry into play as a major economic investment engine in the United States. Mr. Mailander is to be congratulated for reintroducing American Depositary Receipts (ADRs) as a global liquidity vehicle for private equity and venture capital transactions, benefiting worldwide entrepreneurs and fund stakeholders.

Given my early involvement with the development of the United States venture capital industry, this commentary offers some personal thoughts and suggestions relative to Mr. Mailander's article. My

* Jerry Feigen is President of Jerry Feigen Associates, a consulting and training firm formed in 1990 and specializing in new enterprise development and venture capital. Currently, he serves as the Executive Director of the Venture Capital Institute, a 23 year-old worldwide professional education and training organization. Mr. Feigen is an adjunct professor at Georgetown University Law Center, currently teaching a course for LL.M. and M.B.A. candidates on International Venturing and New Enterprise Development.

1. Christopher J. Mailander, *Searching for Liquidity: United States Exit Strategies for International Private Equity Investment*, 13 AM. U. INT'L L. REV. 71 (1997).

comments will focus on (1) the development of private equity and venture capital flows, internationally and in the United States; (2) the technical use of ADRs and the potential of Global Depositary Receipts ("GDRs"), given the expanded world private equity and venture capital transaction markets; and (3) specific questions and suggestions for the next step in evaluating ADRs and GDRs as global liquidity vehicles and investment structures.

I. THE DEVELOPMENT OF PRIVATE EQUITY AND VENTURE CAPITAL FLOWS

Fifty years ago, the first publicly-owned institutional venture capital organization, American Research and Development, was formed in the United States to invest in people, ideas, and innovation. At the same time, a similar group, named 3i, was formed in the United Kingdom with the same purpose. Members of the venture capital and private equity industry achieved success or failure based on their ability to sell some of their portfolio in an initial public offering at a substantial value over their original costs. Such return on investment successes stimulated institutional investors, such as public and private pension funds, to become limited partners in private equity funds. This was based upon a fund manager's historic ability to achieve "significant" returns, about 20-30 percent compounded, over the 3-10 year life of a portfolio investment and, more importantly, over the life of the individual equity fund itself.

According to a study by the Staff of the Federal Reserve Board (FRB Report), the private equity market consists of stakeholders operating, investing, and supporting professionally managed equity investments in the unregistered securities of private and public companies.[2] Professional management is provided by specialized intermediaries and, to a limited extent, by institutional investors. Private equity managers acquire large ownership stakes and take an active role in monitoring and advising portfolio companies. The "venture capital" component of the private equity market represents investments in earlier stage deals, thereby requiring greater monitoring and financial support by fund management. Additionally, these

2. *See* George W. Fenn et al., *The Economics of the Private Equity Market*, STAFF STUDY—BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, at 2 (Dec. 1995) [hereinafter FRB REPORT].

investments, when successful, achieve substantially greater returns for the greater risk taken compared to other fund "asset" classes.

During periods of significant economic health and buoyant stock market activity, investment returns are enhanced to the extent that, in cyclical periods of inactivity and recession, returns are variegated based on patient illiquidity until the national economic and financial health improves again. The traditional and mainstream financial focus on short-term minimal risk returns and assured spreads gives way to more organized, high-risk portfolio management. This high-risk portfolio management consists of hard charging entrepreneurial teams seeking long-term success and maximum profit potential for the value provided by equity fund managers and other investee stakeholders.

The advent of a venture capital industry in the United States coincided with the development of new industries such as electronics, computers (hardware and software), biotechnology, healthcare, and information technology. The venture capital industry also benefited from the further development of traditional industries that have since grown into strong national and international operations, i.e., retail chains, office supplies, franchises, and even funeral homes.

Concomitant with the United States venture capital industry's growth was the development of the National Association of Securities Dealers Automated Quotations system (Nasdaq). The Nasdaq serviced private equity backed portfolio firms with listings on an electronic exchange. The Nasdaq exchange focuses on the firms' smaller sizes and cost considerations compared with the larger firm standards and costs of the New York Stock Exchange (NYSE). In addition, long-term backing by several venture funds tended to create more stable initial public offerings (IPOs) and after-markets for new issues. To entice investors, particularly institutional investors, to become players in new industries and growth, some assurance of the availability of a national mechanism for "exiting" investments, at least during the 10-15 year tenure cycle of an individual private equity fund, was necessary.

The international component of the United States private equity venture capital industry surfaced in the 1970s when the successful managers of venture capital funds were able to persuade United States and foreign institutional investors and high net worth individuals to invest in their new venture and/or private equity fund. The economic successes of such funds and their individual portfolio investments appeared to foreign partners as a new and alternative asset investment class, capable of achieving greater returns than traditional investment opportunities. These fund successes created interest in new venture fund structures for investing in Europe. Additionally, Europe's need for economic and technological growth stimulated governments and private financial institutions to adopt incentives for private equity investing.

The emergence of the United Kingdom and European venture capital industry, in the early 1980s, paralleled what occurred in the United States during the 1960s and 1970s. Diverse European law and the historically low risk investment banking culture of Europe, however, resulted in some basic distinctions between United States and European venture capital industries. For example, in Europe the emerging private equity funds and their management had difficulty achieving returns based on long-term investing in the "early" stages of business development. These investment schemes were unlike the traditional arbitraging of a fixed spread to achieve current income streams. Legal, accounting, and tax standards required new thinking and overhaul. Additionally, the stock exchange and capital market systems of the United Kingdom and Europe had not changed sufficiently to provide an active market exchange system to accommodate emerging firms that were unable to meet the existing "major" exchange listing requirements. Thus, unless an investment was sold to a synergistic business or back to management, private and public investors essentially had no exchange or market mechanism to find and evaluate the growth firms' securities.

In the late 1980s and early 1990s, enterprise, venture, and private equity funds backed by organizations, such as the United States Agency for International Development (AID) and the International Finance Corporation (IFC), were formed to support industry privatization and investor wealth creation through new enterprise development in the former Soviet countries and other developing nations around the globe. These funds invested in new and existing businesses, both large and small. Even with the hundreds of millions of dollars representing these new enterprises and venture capital funds, the venture managers found that to support private investing to document returns, they also needed to have a stable exiting source for their investments. The value added potential had to have quantifiable and documented successes. The dilemma centered on how to attract increased amounts of venture capital for growth, while creating wealth for private investors. Regardless of the geographical locale, however, motivated entrepreneurs did not lack commercial ideas. Instead, it was the equity investment process and infrastructure, combined with seasoned portfolio management, that needed strong backing.

As Mr. Mailander notes, the success of private equity and venture capital funds depends on an "active listed" or "unlisted" securities market—a *bon marché*, an Easdaq or another such system— that can be used by European countries to parallel what the stock exchanges, such as the Nasdaq, have achieved.[3] These fledging securities "second" markets have recently begun to make an impact, and the first private equity fund life cycle is nearing for European and other venture partnerships and organizations. The listing of portfolio investments on an exchange market, where there are willing investors and sellers, will substantiate the true valuation successes of private and public equity funds in these emerging and growing markets in Europe and around the world.

It is no coincidence that the fund managers of many substantive international private equity funds were pioneers of the United States venture capital movement. This relationship has resulted in a formal and informal linkage in their overseas activities, an important element in the new global investing market place. This has also led to an evolving "transnational" deal making capability, as well as a heightened need to assure an ability to liquidate deals in different parts of the globe. These deals are based on liquid markets and potential investor wealth in selected geographic areas with middle market investment interest.

In the past five to seven years, United States stock market activity has increasingly achieved an international business acceptance as the most likely IPO venue for investors in foreign based issuers. The difficulty, as Mr. Mailander indicates, is that in the past there was a lack of cohesive securities laws and information flow upon which United States and global investors could rely. Historically, the complicated

---

3. *See* Mailander, *supra* note 1, at 82 (describing private equity and venture fund reliance on second tier markets).

standards for accounting, legal, and tax requirements in such transactions made it too costly for the "smaller" issuers to achieve consistency among investor potential countries. To some extent, the early United States venture pioneers, the increasing acceptance of the European Union, as well as the now "privatized" economies of the former Soviet states, have, in the last five to eight years, made it potentially easier to achieve uniformity and consistency in laws, regulations, and standards. Governments now realize that the flow of investment capital is correlated with investor friendly changes in laws, regulations, and standards that will bring comfort, rather than roadblocks, to potential investors. Global economic needs and instant electronic information flow have caused institutions and governments to dramatically rethink historic culture, legal precedents, securities trading and ownership barriers, and tax repatriation limitations.

For example, in October 1997, Coopers & Lybrand reported that

> the European Commission published a communication on the practical aspects of the introduction of the "euro" as the standard currency for the European Union . . . . Member states have been requested to provide their transition plans before the end of 1997 including statements in accounting, reporting and tax declarations in euro.[4]

While we certainly have not achieved a standard currency yet, we can expect to achieve this by the 21st century. The currency standardization movement is accelerating at a much greater pace than the efforts made to create an ADR, Special Drawing Rights System, based on exchange rates for major currencies, as adopted by the International Monetary Fund in 1969 to supplement its members' existing reserve assets. The great need is for global "equity."

II. THE USE OF ADRS AND THE POTENTIAL OF GDRS

Why are we now focusing on such an arcane financial structure as ADRs, as presented in Mr. Mailander's article, to provide an exit mechanism?[5] The reason for the importance of ADRs is that in today's global atmosphere, ADRs may evolve as *the* international fi-

4. Coopers & Lybrand L.L.P., INTERNATIONAL BRIEFINGS 41 (Oct. 1997).

5. *See generally* Mailander, *supra* note 1 (arguing that ADRs can provide an alternate exit strategy in international private equity investment).

nancial liquidity vehicle for the next several decades or until a globally acceptable currency evolves. With the rapid increase in Internet commercial transactions, the time for a globally acceptable currency may be sooner rather than later.

ADRs were first introduced in 1927 as the result of British laws that prohibited British companies from registering their shares overseas, since shares were not allowed to leave the United Kingdom. ADRs permitted access to United States investor funds as the United States reluctantly became involved in global economics and politics.

Mailander establishes and defines the following regarding ADRs:

> A foreign company seeking to access the United States market may make a direct offering of its stock or utilize American Depositary Receipts (ADRs). For the investor, ADRs offer the advantage of avoiding problems with currency translation, subjecting the investor to commissions in both the home country and the United States, subjecting the investor to tax and settlement practices in the foreign company's home country, and avoiding United States restrictions on purchasing foreign securities imposed on such institutional investors as banks and money managers. The United States depository bank for the ADRs assumes the responsibility for collecting, converting to United States dollars, and distributing the share dividends. The depository bank also provides investors with current information about the foreign issuers and votes the securities at the direction of the investors. Additionally, the United States holders may freely sell the ADRs or the underlying shares in the foreign market. These advantages enhance the receptivity of the United States investor to acquiring the foreign company's securities.[6]

Mailander further elaborates that

> As ADRs establish an increasing presence in the United States, it is critical to note that the investor possessed the choice either of a "sponsored" or an "unsponsored" ADR. A sponsored ADR program involves a contractual relationship between the foreign issuer and the United States depository bank. The depositary agreement between the foreign issuer and bank establishes the rights and obligations of the parties with respect to the ADRs and the underlying securities. It also effectively becomes the cornerstone to defining the relationship between these parties and the shareholders. An unsponsored ADR program involves the development of the United States market in the foreign issuer's securities, but without the

6. Mailander, *supra* note 1, at 83-84 (describing the advantages of the ADR) (citations omitted).

> contractual consent of that foreign company. Both cases raise unique securities law issues that require careful consideration by the foreign company and the United States depository bank.[7]

The United States banks and their international banking linkages were the only way liquid international transactions could take place with some assurance that volatile currency changes or other local financial hazards could be overcome. Historically, the use of ADRs was limited and usually utilized by large international corporations. As private companies have grown through use of the global private equity marketplace, the number of ADR transactions, as an acceptable banking instrument with international legal precedents, has increased. This has allowed foreign issuers to take advantage of investor potential, in the United States and worldwide, through the active United States exchanges and unlisted securities systems.

Mr. Mailander points out that, with regard to the United States stock market, "the first nine months of 1996 saw the creation of 151 new ADR programs from 46 countries, in comparison to 105 new ADR programs from 31 countries in the first nine months of 1995."[8] He further states that, "of those 151 programs, 74 involved initial public offerings which raised $7.4 billion, with the remaining $2.9 billion being raised through secondary offerings of existing ADR programs."[9] As another indicator of the growth in the use of ADR offerings, "in 1992, the Nasdaq listed 87 ADR issuers, while the New York Stock Exchange listed 82, and the American Stock Exchange listed eight. By 1995, the Nasdaq presented 112 ADR offerings, the NYSE noted 166, and the American Stock Exchange listed seven."[10]

Numa Financial Systems Ltd. quantifies the ADR market as currently in excess of 1,500 ADRs from over 50 countries.[11] The majority of these ADRs are traded over-the-counter. Numa also indicates that there are very few banks acting as depositories. The Bank of New York is one such depository, accounting for approximately 60%

7. *Id.* (citations omitted).
8. *Id.* at 85.
9. *Id.*
10. *Id.*
11. *See Global Investor* (visited Nov. 6, 1997) <http://www.global-investor.com/adr/index.htm >.

of all ADR issues.

Focusing on the United States private equity industry growth and its liquidity needs, the FRB Report observes the following: "From 1980 to 1994, the amount of capital under management by the organized private equity market increased from roughly $4.7 billion to about $100 billion."[12] During that period, the venture capital component of the private equity market jumped from $1.7 billion in 1980 to $30 billion in 1994.[13] Today, venture capital represents between $40 and $45 billion under professional management.[14]

Other data shows that, from 1982 to 1992, technology related IPOs climbed from $525 million to $3.8 billion and then declined to $2.6 billion by 1994.[15] However, technology IPOs jumped to $8.1 billion in 1995, $11.3 billion in 1996, and to more than $3.5 billion in the first 8 months of 1997.[16] Narrowing the IPOs to only those that were financed specifically by the venture capital industry, "venture backed" IPOs increased from 167 deals in 1992 to an all-time high of 260 deals in 1996 with the first half of 1997 showing only 64 venture backed deals.[17] This shows that the growth and timing of liquidity, necessary to achieve substantial fund returns for investors, are part of the venture capital funding processes and cycles. These liquidity valuations must be sustained over long periods of time. Globally, ADRs can become an essential part of the private equity success story for both emerging markets and growth sectors of more seasoned economies.

Europe and Asia, distinct international private equity/venture capital markets, illustrate the significant rise in private equity capital under management. The total European venture funds raised in 1992 were 38.5 billion ecu or $34.7 billion. By 1995, the total cumulative funds raised grew to 50 billion ecu or $44 billion. European venture investments increased from 6,197 deals in 1992 to 4,955 deals in 1995. The European Venture Capital Association (EVCA) indicated that European private equity managers raised $7.9 billion in 1996, a

12. FRB REPORT, *supra* note 2, at 65.

13. *See id.*

14. *See id.*

15. *See* George (Chip) Vetter, Remarks at the 1997 Venture Capital Institute Conference (Sept. 10, 1997).

16. *See id.*

17. *See id.*

significant increase from the $4.4 billion raised in 1995.[18] For Europe in 1996, seed and start-up private equity investing accounted for 18%, buyouts represented 21%, expansion stage investing represented 51%, and the remaining 10% was in other types of private equity investing. Fifteen years ago, the amount of such venture funds under professional management and their deal flow was relatively negligible and certainly not considered an industry.

Turning to Asia, the venture capital and private equity funds under professional management grew from $31.0 billion to $33.4 billion between 1994 and 1995. When the Japanese venture groups are excluded, the rest of Asia soars 41% from $13.2 billion in 1994 to $18.6 billion in 1995. Asian venture capital investments totaled $1.2 billion in 1992 and increased to $5.5 billion in 1995. Again, looking back just 10 years, we find the very beginning of a private equity industry in Asia. The *Asian Venture Capital Journal* published its first issue in January 1988.[19]

Looking beyond the recent setback in Asian stock markets, the long-term nature of private equity investment potential still remains in its infancy. For example, the Malaysian Exchange of Securities Dealing and Automated Quotations Board (MESDAQ) opened on October 6, 1997 with trading slated to begin in February 1998. A Coopers & Lybrand report stated that "MESDAQ will . . . provide the high technology based companies as well as other small and medium sized enterprises with an inexpensive means of raising capital and encourage more venture capital financing and expansion programs."[20]

Furthermore, Coopers & Lybrand indicates that a "second" technology based venture capital fund, capitalized at $100 million, will be established to invest in the information technology, semiconductor, biotechnology, and healthcare industries over the next five years.[21] The public policy aim is to create a pool of technology based entrepreneurs in Singapore by encouraging local start-ups and building strong links to foreign companies and investors.

---

18. *See* EUR. VENTURE CAP. ASS'N, EUROPEAN VENTURE CAPITAL ASSOCIATION YEARBOOK 56 (1994).

19. *See Cumulative Index—1988* (visited Nov. 5, 1997) <http://www.asiaventure.com/Avcj/cumulative/cumu1988.html>.

20. *See* Coopers & Lybrand, *supra* note 5, at 25.

21. *See id.* at 29.

The United States, as the most dominant private equity and venture capital market, has nearly $45 billion under professional management. These managers invested nearly $10 billion in 1996, and, in the first half of 1997, investments into new and renewed enterprises amounted to $5 billion. Clearly, these are historically peak times that may not last. The importance of universal liquidity instruments to tap growing capital markets, however, cannot be understated.

Judging from the public and private funds sponsoring and backing the development of Russia and the former Commonwealth of Independent States (CIS) countries through AID, the European Bank for Reconstruction and Development (EBRD), and private equity investors, we can estimate that there is more than $45 billion under management, more than equaling the current United States funds under professional management. From a worldwide perspective, it is interesting to note that in terms of IFC multinational private sector venture capital investing, as of 1995, there were 83 venture capital and private equity funds with $685 million in IFC investment and $4.4 billion in outstanding commitments. As of October 1997, IFC backed venture and private equity backed funds rose to 91% with $700 million invested and $5.2 billion in outstanding commitments. Taking Asia, Latin America, and Africa as a whole, with regard to professionally managed venture capital and private equity funds, we can estimate another $35 to $40 billion. Thus, with nearly $130 billion of private equity and venture capital backing in some form of professionally managed funds, global liquidity is more than an occasional transaction issue.

This worldwide proliferation of tens of billions of dollars of private equity and venture capital funds is now at a scale where fund investors and partners need a reliable, global structure for their portfolio issuers that will provide the maximum potential for liquidity and valuation. Depositary Receipts (DRs) offer an exit mechanism for this investment. The Banker's Trust Internet site characterizes DRs as follows: "[t]he Depositary Receipt trades and settles in a market other than that of the issuing entity and the terms of the Depositary Receipt may differ from the underlying security with respect to: base currency, denomination, maturity, tax treatment, ownership rights, settlement practices and return on investment."[22] Depositary Re-

22. *What are Depositary Receipts?* (visited Nov. 5, 1997) <http://

ceipts can be launched as part of a public or private offering, or they can be created without an offering to represent currently traded securities. They are often used to overcome obstacles that issuing companies may face in selling their securities to their targeted investors. The following characteristics are representative of DRs:

Ownership Restrictions

- Limited foreign ownership in some countries
- Certain national limitations on bearer securities
- Some U.S. pension funds are not permitted to hold non-U.S. shares

Market Differences

- Settlement practices
- Currency
- Certificate form (bearer vs. registered underlying securities)
- Lack of local market liquidity
- Regulatory Restrictions

A Depositary Receipt is generally a tradable instrument, which is *usually but not necessarily,* listed on an internationally recognized stock exchange and is issued by a depository to an investor. The DR evidences the deposit of the underlying security with a local custodian appointed by the depositary. Additionally, the DR indicates the terms and conditions upon which such securities are to be held by a custodian for and on behalf of the investors. DRs have been issued both in definitive bearer form with coupons attached, and in registered form. Following the trend towards "dematerialization," however, DRs are increasingly created in registered global note form and held in nominee names within the clearing systems, where records of ownership are maintained.

DRs enable an issuing company to place its equity or debt in a foreign market, thereby "internationalizing" the profile of the company in its investor base and, at the same time, expanding its name recognition. DRs can be used as a vehicle for corporate acquisitions and Employee Stock Ownership Plans (ESOPs).

---

www.bankerstrust.com/ms/dreceipt/depwhat.htm>.

An "international" offering in DR form is distributed to international investors by a global syndicate of financial institutions. The markets in which the DRs are intended to be sold or traded are reflected in their name. Thus, Global Depositary Receipts (GDRs), which are usually in registered form, are directed at international investors including Euromarket and certain United States investors. International and European Depositary Receipts (IDRs and EDRs respectively) are intended largely for Euromarket investors, while ADRs have been created for United States investors wishing to invest in shares of non-United States companies.

The evolution of GDRs, as an "internationalization" of the DR structure, is a sign that global liquidity and uniformity has multimarket potential when the equity markets of the United States are not sustained in a current cycle. The use of a GDR approach by other stock markets would enhance the investor and valuation potential of growth enterprises seeking investors who reside in sustained growth economies. It is important to note that in economies where verifiable information history is sparse or nonexistent, the current market valuation may be the best method of true valuation for investors.

An interesting article in the *Wall Street Journal* dated October 20, 1997,[23] adds even greater support for the increasing internationalization of private equities and the need for global liquidity instruments. The California Public Employees Retirement System (CALPERS), limited partners in United States and international private equity funds, began

> ramping up its overseas exposure in the late 1980s. In 1989, its goal was to put 8% of its portfolio in international shares; that target was increased to 20% in 1995, with a three year period to achieve it. Money invested in foreign shares has risen from $8 billion at the end of June 1993 to nearly $24 billion as of June 30, 1997. By the end of July, CALPERS was within a whisker of its 20% target, with 19.6% of its portfolio in foreign shares, compared with 44.8% in United States shares. . . . CALPERS seeks markets based on a variety of factors that include political stability, economic-growth prospects, and stock-market trading environment. For example, CALPERS consultants have recommended against investments in India, primarily because of the lack of liquidity and poor settlement system. In 1994, 80% of trades in India failed to be completed, according to

23. Sara Webb, *Calpers Sees New Targets Overseas*, WALL ST. J., Oct. 20, 1997, at C1.

> the consultants, Wilshire Associates . . . CALPERS decided to tackle corporate governance issues in Britain, France, Germany and Japan first because these are the countries where it has its biggest holdings.[24]

It should be noted that 70% of the CALPERS overseas investments are indexed or passively managed. Nonetheless, a substantial amount remains in active professionally managed private equity and venture capital funds. The step toward international private equity investing would not have been undertaken twenty years ago, during the "prudent man" and "plan assets" limitations era. That era was marked by public pension fund managers responsible for the long-term well being of their retired employees. This is indeed a new era which requires constant verifiable information, uniform securities and tax treatments, and clear standards that are acceptable across multi-country borders for the settlement of transactions. The need for consistency for the smaller, middle market transactions being pursued by private equity and venture capital managers in the international arena is much greater.

As discussed by the *Global Investor*, ADRs may have been originally devised for United States investors, but all of their attractions are equally applicable for foreign investors. For example, an investor in Kuwait may be interested in buying shares in Telefonica De Argentina, in which case the United States traded Depositary Receipts may be more attractive than dealing directly in the Argentinean market. In addition to the advantages listed above, the investor can analyze price history charts and follow real-time prices (as with any other United States security), transaction fees may be less, and the foreign currency investment may be more competitive than converting funds directly to Argentine Dollars.

In an illustration of Russian structured ADR deals, the September 1997 issue of *The Russian* reports that

> in the next several months, investors may get the chance to buy into Russian banking more easily as RCB (Russian Central Bank) restrictions are relaxed and more ADRs appear on the United States equity market. The ADR route has been by far the most popular method for channeling Western investment into restricted, emerging market industries. Already, Inkombank and Vozrozhdenyie offer a New York - listed ADR and it is

---

24. *Id.*

> anticipated that the Menatep bank will soon follow. These three, it is expected, will soon gain RCB approval to hold 3% of their capital in foreign owned ADRs.[25]

The article also quotes a Baker & McKenzie partner as suggesting that "setting up an ownership vehicle to make a local investment is bread and butter work for us not just in Moscow, but throughout Eastern Europe."[26]

Thus, ADRs have become part of acceptable private ownership restructuring for transactions in countries such as Russia and Eastern Europe where there are presently restrictions on foreign ownership. These countries seek western investors and have established country specific equity funds, the investee issuers of which seek liquidity potential.

III. QUESTIONS & SUGGESTIONS FOR EVALUATING ADRS

Mr. Mailander's article would have been of even greater future value if more details and information on ADRs and GDRs were analyzed to determine if there is truly a global liquidity market place for investors and growth companies using such banking depositary instruments and agreements. Also, attention should be paid to whether venture backed securities can find a liquidity niche for the venture and institutional investor through ADRs and GDRs. Can transnational private deal making be enhanced using a more efficient and less costly ADR or GDR instrument? What improvements, on a global scale, need to be made in these depositary arrangements? Are there changes in securities law, banking requirements, tax stipulations, and universal GAAP standards that can make ADRs or GDRs more efficient and less costly for small and middle market transactions? Another interesting future study would be a comparison of the use of ADRs by "venture backed," middle market, or emerging foreign issuers as opposed to major international corporations and oligopolistic industries. Can private equity or venture funds or their affiliates act as "unsponsored" ADRs or third party holders of issuer

---

25. Ted Kim, *The Luxury of Loopholes*, THE RUSSIAN, Sept. 1997, at 20.

26. *Id.* (quoting Clive J. Cook, partner at the London law firm of Baker & McKenzie).

shares?

Finally, what is the real incremental value added to the long-term institutional and individual investors of private equity funds in using ADRs or GDRs to overcome cyclical downturns in overheated stock markets and achieve the superior returns they expect in a 10 to 15 year professional portfolio? What are the true direct and indirect technical costs and premiums for such transactions from the investors' and issuers' standpoints?

These are indeed difficult questions that we must begin to answer. If the flow of new enterprise ideas and all the stakeholders that benefit from such potential cannot be seeded and fertilized by professional investors in that market, we can only retreat rather than move boldly into the next century.