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## The International Scene

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### Olinda Star Achieves Broad Intercompany Cross-Border Relief



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Complex intercorporate structures and related financings pose specific challenges in the cross-border insolvency context. Where a number of affiliates are liable for the debts of a common corporate enterprise, complete insolvency relief requires all of the entities to achieve insolvency protection in all necessary jurisdictions.

These challenges were on display in Hon. Martin Glenn's recent decision in *In re Olinda Star Ltd.*<sup>1</sup> Not only does this decision demonstrate potential hurdles in achieving broad intercompany insolvency relief, it also demonstrates that if at first you do not succeed in obtaining that relief, you might be able to try again.

#### Background

Olinda Star was a member of the Constellation group of companies, which was involved in oil drilling and production, located primarily in Brazil. As a member of the Constellation group, Olinda Star was a guarantor of indebtedness owing by other members of the group.

In December 2018, all of the Constellation group members, including Olinda Star, filed for insolvency relief in Brazil. A subset of those same entities whose place of incorporation was the British Virgin Islands (BVI), including Olinda Star, also filed separate insolvency proceedings in the BVI. Olinda Star's BVI insolvency proceeding was commenced to facilitate the implementation of the Constellation group's restructuring strategy on a global basis. To that end, the BVI proceeding was intended to be a "soft-touch" proceeding.

While the BVI-appointed joint provisional liquidators (JPLs) would oversee Olinda Star's restructuring and have authority over transactions outside the ordinary course of business, Olinda

Star's existing directors would otherwise retain day-to-day control of the company. It was the intention of all parties that the primary aspects of Olinda Star's restructuring would be dealt with through the Brazilian proceeding.

#### Strike One: U.S. Court Declines to Grant Recognition to Olinda Star

To ensure that their restructuring would be given effect in all relevant jurisdictions, the entire Constellation group, including Olinda Star, sought to have their Brazilian insolvency proceedings recognized in the U.S. through chapter 15 filings in the U.S. Bankruptcy Court for the Southern District of New York. The U.S. granted recognition of the Brazilian insolvency proceedings of most of the Constellation group's entities as either foreign main or foreign non-main proceedings, depending on the respective entities' center of main interest (COMI).<sup>2</sup>

However, the U.S. court declined to recognize the Brazilian insolvency proceeding of Olinda Star, because at the time its recognition petition was heard, the Brazilian court had dismissed Olinda Star's underlying insolvency proceeding for lack of jurisdiction, such that there was no Olinda Star Brazilian proceeding remaining for the U.S. court to recognize.<sup>3</sup> This presented a problem for Olinda Star, and the Constellation group as a whole, because a failure to include Olinda Star in the intercompany insolvency

<sup>1</sup> 614 B.R. 28 (Bankr. S.D.N.Y. 2020).

<sup>2</sup> The U.S. court's opinion concerning recognition of the Constellation group's Brazilian insolvency proceedings, *In re Serviços de Petróleo Constellation SA*, 600 B.R. 237 (Bankr. S.D.N.Y. 2019), is discussed in a prior article: George W. Shuster, Jr. and Benjamin W. Loveland, "At the Edge of the Universe: Are Chapter 15's Principles of 'Universalism' Too Parochial for the Realities of Today's Global Economy?," XXXVIII *ABI Journal* 8, 20-21, 61-62, August 2019, available at [abi.org/abi-journal](http://abi.org/abi-journal).

<sup>3</sup> The U.S. court declined to grant recognition but did not dismiss the petition. At the time of the U.S. court's decision, an appeal of the Brazilian court's dismissal of Olinda's Star's Brazilian proceeding was pending.

relief strategy would risk U.S. creditors, including those under Olinda Star's U.S. law-governed guarantee for the group's indebtedness, potentially being able to pursue their claims against Olinda Star even where those claims had been compromised as against other Constellation group entities.

## If at First You Do Not Succeed....

Having been shut out of chapter 15 relief in the first instance, Olinda Star pivoted to an alternate strategy. In consultation with creditors supporting its restructuring, it decided to pursue a parallel restructuring of Olinda Star's guaranty obligations in the BVI through a BVI scheme of arrangement that mirrored the terms of the approved restructuring plan in the Brazilian proceeding.

In other words, Olinda Star pivoted from a "soft touch" BVI insolvency proceeding, supporting a Brazilian proceeding, to a more robust BVI proceeding. Olinda Star's scheme of arrangement was approved by the BVI court in February 2020. Olinda Star returned to the U.S. court to seek dismissal of its earlier petition for recognition of the Brazilian insolvency proceeding and to seek recognition of the BVI insolvency proceeding for the same basic purpose as its initial approach in the U.S.: to extend to the U.S. the effect of the restructured guarantee obligations in accordance with the Constellation group's approved Brazilian restructuring plan.

As a first step, the U.S. court dismissed Olinda Star's earlier chapter 15 petition for recognition of the Brazilian proceeding.<sup>4</sup> Citing to other cases in which it had previously permitted withdrawal of a petition where the foreign restructuring had not proceeded and the debtor pursued alternative restructuring proceedings, the court concluded that cause existed to grant Olinda Star's request to withdraw its earlier petition in favor of its petition to recognize its BVI proceedings.

The court found that the provisional relief granted at the outset of the earlier proceeding — the implementation of the automatic stay — was no longer necessary to protect Olinda Star from creditor action within the U.S. The court intended to contemporaneously recognize the BVI proceeding.

Simultaneously, the court recognized Olinda Star's BVI insolvency proceeding as a "foreign main" proceeding, meaning that it determined that its COMI was in the BVI. Ironically, in its first chapter 15 case, Olinda Star and the same JPLs had petitioned the court to recognize Olinda Star's Brazilian proceeding as a foreign main proceeding on the basis that its COMI was in Brazil. Those same parties now argued that Olinda Star's COMI was in the BVI. The court acknowledged this seeming inconsistency, but emphasized the Second Circuit's mandate that COMI must be determined as of the time of the chapter 15 filing, without regard to a debtor's historical operational activity.<sup>5</sup>

In evaluating Olinda Star's COMI as of the second petition date, the court began with the rebuttable presumption

that a debtor's COMI is where the debtor has its "registered office" — in this case, the BVI. The court then proceeded to consider various factors relevant to determining whether the presumption should hold, including the location of those who actually managed the debtor, the location of the debtor's primary assets, the location of a majority of creditors and the jurisdiction whose law would apply to most disputes.

The court focused on the location of those who actually managed Olinda Star. In doing so, the court noted that Olinda Star had not conducted significant business activities in the BVI prior to the commencement of its BVI insolvency proceeding. By contrast, the court gave weight to the activities of the BVI JPLs in the months following the commencement of the BVI insolvency proceeding and prior to Olinda Star's second chapter 15 petition for recognition. The court noted that while the BVI proceeding was a "soft touch" proceeding in which Olinda Star's director maintained the power to direct the company, the JPLs had overseen the exercising of that power.

The court also credited evidence that the JPLs had played a pivotal role in engaging with creditors on strategy and causing the BVI scheme of arrangement to be put forward to creditors and the BVI court for approval. These facts were sufficient for the court to conclude that as of the date of the filing of the second petition, the BVI-located JPLs managed Olinda Star for the purposes of the COMI determination.

The court engaged in a similar analysis with respect to the location of Olinda Star's assets. Because its primary asset was a transient oil-drilling rig presently located in the Indian Ocean, the court looked again to where the business was run, which inquiry essentially overlapped with its analysis of the location from which Olinda Star was managed: the BVI.

Finally, the court examined the reasonable expectations of third parties and creditors, and considered the level of creditor support for recognition of the BVI proceeding as a foreign main proceeding. Again, the court looked at this question through the lens of the BVI proceeding. The court noted that the JPLs' appointment had been well publicized, putting Olinda Star's creditors on notice that it was being effectively managed from the BVI. It also credited the fact that a majority of Olinda Star's creditors had expressly required it to centralize its restructuring in the BVI, injected new money on the basis that the guarantee would be restructured in the BVI and overwhelmingly approved its BVI scheme of arrangement.

Having concluded that Olinda Star's COMI was in the BVI and recognized the BVI proceeding as a foreign main proceeding, the court had no trouble concluding that it should grant full force and effect to the BVI scheme of arrangement within the U.S. as a form of discretionary relief pursuant to § 1521. In reaching its determination, the court recognized that the U.S. and BVI "share common-law traditions and fundamental principles of law, including an emphasis on procedural fairness."<sup>6</sup>

## Conclusion

*Olinda Star* demonstrates both the difficulties in achieving a unified approach to foreign insolvency pro-

<sup>4</sup> *In re Serviços de Petróleo Constellation SA*, 613 B.R. 497 (Bankr. S.D.N.Y. 2020).

<sup>5</sup> *In re Olinda Star Ltd.*, 614 B.R. at 41 (citing *Morning Mist Holdings Ltd. v. Kryss (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013)); but see *In re Ocean Rig UDW Inc.*, 570 B.R. 687, 704 (Bankr. S.D.N.Y. 2017) ("[T]o the extent that a debtor's COMI has shifted prior to filing its chapter 15 petition, courts may engage in a more holistic analysis to ensure that the debtor has not manipulated COMI in bad faith.")

<sup>6</sup> *In re Olinda Star Ltd.*, 614 B.R. at 47.

ceedings for multinational corporate groups and the creative strategies that debtors have undertaken (and courts have permitted) to address those difficulties. Through its second petition for recognition, Olinda Star not only had its “second bite” at the chapter 15 apple through a revised cross-border insolvency strategy, it also “bootstrapped” the actions taken by the JPLs in its BVI insolvency proceeding as a basis for chapter 15 recognition of that proceeding. At least in this case, the U.S. court concluded that was enough. **abi**

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