CHAPTER 10

THE CONSTELLATION GROUP'S REORGANIZATION: RELEVANT DEVELOPMENTS IN THE CONTEXT OF JUDICIAL REORGANIZATION PROCEEDINGS AND US CHAPTER 15 CASES

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Introduction

Complex cross-border insolvency cases can result in developments in the law and raise new questions of interest to practitioners and commentators. When novel legal issues arise, they can have immediate importance to the parties in dispute and the courts presiding, but can also be impactful as legal and commercial precedents that further the development of the cross-border system.

The cross-border reorganization of Serviços de Petróleo Constellation S.A.'s (with its affiliated debtors, the "**Constellation Group**") is an example of a case that generated hotly-contested legal issues among the parties, and as a result led to multiple decisions that serve as precedents in Brazil and the United States, and that have helped shape cross-border insolvency law in those jurisdictions. This article describes the Constellation Group's restructuring proceedings – including a r*ecuperação judicial* and Chapter 15 cases in the United Statess – and examines some of the notable and precedential issues and decisions that arose therein.

BACKGROUND

10.1 Overview on the Constellation Group and the Events Leading Up to its Insolvency Filings

At the time of commencing its restructuring process, the Constellation Group was primarily an oil & gas group with business activities that consisted of onshore and offshore drilling and investing in "joint ventures and associated entities related to the operation of floating production

storage and offloading units."[1] More specifically, the Constellation Group owned certain onshore and offshore drilling rigs that were located within and outside of Brazil, and had their primary operations and management centers in Brazil.[2] Outside of Brazil, the Constellation Group also maintained operational and managerial centers around the world, including, among others, the United Kingdom, Luxembourg, Paraguay, India and Panama.

Furthermore, the Constellation Group's employee and customer/revenue centers were largely based in or emanated from Brazil. For example, (a) approximately 93% of the company's employees were located in Brazil; (b) its largest customer was Petrobras, the state-owned Brazilian multinational oil & gas group; and (c) approximately 99% of its revenues "derived from Customer Contracts with Petrobras for operations in Brazil."[3] Its primary operating assets (i.e., its onshore and offshore drilling rigs) were almost all located within Brazil – seven of the eight offshore drilling rigs and eight of the nine onshore drilling rigs were located in Brazil.[4] However, as will be important for reasons noted below, most of the legal entities that made up the Constellation Group were organized under the laws of other countries. Of the ten Constellation Group entities that filed for Chapter 15 relief, only one was incorporated in Brazil – the others were incorporated in either Luxembourg, the Cayman Islands, or the British Virgin Islands.

As an oil & gas business, the Constellation Group's financial success was subject to, among other things, the cyclical nature of the oil & gas market. When commodity prices were high, the business grew rapidly and leveraged itself to be able to finance such growth.[5] However, when the price of oil precipitated dramatically in the years following, the need for onshore and offshore drilling rig capabilities waned, and with it, so did the Constellation Group's ability to maintain the debt load that it accumulated in the boom years. The Constellation Group therefore found itself with a need to right-size its capital structure.

1 See Petitioner's Declaration and Verified Petition for Recognition of the Brazilian RJ Proceeding and Motion for Order Granting Related Relief Pursuant to 11 U.S.C. §§1515, 1517, and 1520, In re Serviços de Petróleo Constellation S.A., No. 18-13952 (MG) (Bankr. S.D.N.Y. 2018) (ECF No. 7).
2 Id. at 7.
3 Id. at 8, 10.
4 Id. at 9.
5 Id. at 15.

The Constellation Group's restructuring efforts began in 2017 and culminated with the filing of a *recuperação judicial* or "RJ" proceeding (the "**RJ Proceeding**") for 18 (eighteen) debtors in the 1st Business Court of Rio de Janeiro (the "**RJ Court**") on December 6, 2018, and corresponding Chapter 15 cases before the United States Bankruptcy Court for the Southern District of New York on the following day.[6] Beyond satisfying the conditions of the company's plan support agreement, the foreign representative's purpose in commencing the Chapter 15 cases was to protect the Chapter 15 debtors and their assets in the United States and to stay certain ongoing arbitration between the Constellation Group and a joint venture counterparty, Alperton Capital Ltd. ("**Alperton Capital**").[7]

10.2 Insolvency Proceedings in Brazil

The Brazilian Bankruptcy Law – Law No. 11,101 of 2005 (the "**BBL**") sets out three (3) insolvency regimes for distressed companies: (a) judicial reorganization (*recuperação judicial*); (b) out-of-court reorganization/prepackage reorganization (*recuperação extrajudicial*); and (c) bankruptcy liquidation (*falência*).

Brazilian judicial reorganization draws somewhat from Chapter 11 of title 11 of the United States Code, 11 U.S.C. §§101-1532 (the "**U.S. Bankruptcy Code**"). It is a tool generally designed to promote the effective restructuring and reorganization of viable companies in financial or economic distress. It is designed to shield a debtor from legal enforcement and other adverse actions during a certain period, so as to give the debtor breathing room to develop, negotiate and eventually obtain requisite creditor approval of a plan of judicial reorganization (the "**Plan of Reorganization**"), which can provide for operational adjustments, deleveraging and other changes to the debtor's capital structure. In general, upon approval and confirmation of a Plan of Reorganization, the prepetition claims are discharged and the debtor can enjoy a fresh start.

The BBL thus provides distressed companies with the opportunity and tools to restructure their obligations and operations, and to continue as a

6 Id. at 16.

7 Id. at 19; see also Motion for Provisional Relief Pursuant to 11 U.S.C. §§1519, 1521(a)(7), 105(a), and 362, In re Serviços de Petróleo Constellation S.A., No. 18-13952 (MG) (Bankr. S.D.N.Y. 2018) (ECF No. 5).

going concern throughout the restructuring process. Nevertheless, complex cases – particularly where cross-border elements are involved – often raise issues that go beyond the statutory text of the BBL, and courts presiding over judicial reorganization cases must also rely on judicial precedents and sometimes decide issues of first impression.

10.3 Chapter 15 of the U.S. Bankruptcy Code

The recognition of non-U.S. reorganization and liquidation plenary proceedings in the United States occurs under Chapter 15 of the U.S. Bankruptcy Code. Congress adopted Chapter 15 of the U.S. Bankruptcy Code in 2005, and it represents the United States' enactment of UNICTRAL's Model Law on Cross Border Insolvency.[8] In short, Chapter 15 applies (a) when "a foreign representative is seeking assistance in the United States in connection with a foreign proceeding;" (b) "where assistance is sought in a foreign country in connection with a case under the U.S. Bankruptcy Code;" (c) "when there are pending concurrently a foreign proceeding and a Chapter 7 or Chapter 11 case under the U.S. bankruptcy law;" and (d) "when creditors in another country have an interest in either commencing or participating in a case or proceeding under the U.S. Bankruptcy Code."[9]

Since its adoption, Chapter 15 has been widely utilized by entities around the world, as enforcement of a non-U.S. insolvency plan under Chapter 15 is often necessary when the plan seeks to restructure or cancel securities issued under U.S. law. In particular, a number of Brazilian businesses that raised debt in the U.S. capital markets have used Chapter 15 to obtain enforcement of restructuring plans under the BBL.

JUDICIAL REORGANIZATION – CERTAIN LEGAL ISSUES

10.4 Jurisdiction of Brazilian Courts to Rule on Judicial Reorganization Proceedings Filed by Foreign Corporate Debtors

Despite the lack of specific rules in the BBL regarding judicial reorganization proceedings filed by debtors organized outside of Brazil, Brazilian

8 1 Collier on Bankruptcy §13.03 (Overview of Chapter 15).
9 Id.

courts have acknowledged their jurisdiction to adjudicate cases of foreign corporate debtors, particularly where those debtors are part of Brazilian corporate groups. For instance, the judicial reorganization proceedings of the OAS Group,[10] the Oi Group,[11] and the OGX Group – all[12] of which predated the Constellation Group's RJ Proceeding – all included at least one non-Brazilian entity as a debtor.

In each of those three (3) cases, the relevant court of appeals (the São Paulo State Court of Appeals for the OAS Group's judicial reorganization proceeding and the Rio de Janeiro State Court of Appeals for the Oi Group's and OGX Group's judicial reorganization proceedings) found that the judicial reorganization proceedings filed by the foreign companies of those groups (each a non-operating company whose sole intent was to raise funds abroad) had their center of main interest ("**COMI**") in Brazil, and were therefore eligible to seek judicial reorganization. In those cases, notwithstanding the lack of a clear statutory provision regarding foreign-debtor filings, the Brazilian courts determined that allowing foreign-organized companies to seek judicial reorganization in Brazil was necessary to ensure the efficient restructuring of the Brazilian groups.[13]

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10 See interlocutory appeal No. 2084295-14.2015.8.26.0000, ruled before the 2nd Specialized Corporate Chamber of the State Court of Justice of Rio de Janeiro (http://www.tjrj.jus.br/).

11 See interlocutory appeal No. 0051668-49.2016.8.19.0000, ruled before the 8th Civil Chamber of the State Court of Justice of Rio de Janeiro (http://www.tjrj.jus.br/).

12 See interlocutory appeal No. 0064658-77.2013.8.19.0000, ruled before the 14th Civil Chamber of the State Court of Justice of São Paulo (https://www.tjsp.jus.br//).

13 "Não obstante o Brasil não tenha ainda adotado a Lei Modelo da UNCITRAL para falências transnacionais, nada impede que empresas constituídas no exterior, mas que tenham no Brasil o centro principal de suas atividades (COMI - Center of Main Interest) e sejam inequivocamente controladas e integrantes de grupo econômico empresarial brasileiro, requeiram perante a Justiça brasileira a tutela legal prevista na Lei 11.101/05. No caso, as requerentes constituídas no exterior são integralmente controladas pela OAS S/A e atuam apenas e tão-somente como instrumentos de captação de recursos no exterior, sem atuação operacional" (free translation: "Although Brazil has not yet adopted the UNCITRAL Model Law on Cross-Border Insolvency, there is nothing to prevent companies incorporated abroad, but which have the main center of their activities in Brazil (COMI - Center of Main Interest) and are unequivocally controlled and integrated to a Brazilian business economic group, request the legal protection provided for in Law 11,101/05 before the Brazilian Courts. In this case, the applicants incorporated abroad are fully controlled by OAS S/A and act just as instruments for raising funds abroad, without operational activity") (interlocutory appeal No. 0064658-77.2013.8.19.0000, ruled before the 14th Civil Chamber of the State Court of Justice of São Paulo).

Similar to the OAS, Oi and OGX cases, the Rio de Janeiro State Court of Appeals also declared its jurisdiction to rule on the judicial reorganization proceeding of the foreign companies of the Constellation Group. The legal grounds adopted by the RJ Court for acknowledging its jurisdiction, however, had some distinctive aspects, as described below.

10.5 Jurisdiction of Brazilian Courts According to the Constellation Case

As stated above, the Constellation Group's activities and results were hit hard by the fall in oil prices caused by the global recession in the aftermath of the global financial crisis. The Constellation Group therefore found itself in need of having to right-size its capital structure.

In an effort to restructure its debts, on November 2018 the Constellation Group entered into a plan support agreement ("**PSA**") with its main financial creditors. This PSA, in summary: (a) established the terms and conditions for the restructuring of the Constellation Group's debt; (b) acknowledged that the Constellation Group would seek a judicial reorganization in Brazil (*i.e.*, the RJ Proceeding); and (c) provided that the RJ Proceeding would be filed seeking the substantive consolidation of Constellation Group's filing entities.

As required pursuant to the PSA, on December 6, 2018, Constellation Oil Services Holding S.A. (the Constellation Group's holding company located in Luxembourg) and seventeen (17) other Brazilian and foreign companies (the "**Foreign Companies**") filed the RJ Proceeding before the RJ Court.[14]

14 Serviços De Petróleo Constellation S.A., Servicos De Petróleo Constellation Participações S.A., Alpha Star Equities Ltd, Amaralina Star Ltd, Arazi S.À.R.L., Brava Star Ltd, Constellation Oil Services Holding S.A., Constellation Overseas Ltd, Constellation Services Ltd, Gold Star Equities Ltd, Manisa Serviços De Petróleo Ltda., Tarsus Serviços De Petróleo Ltda, Lancaster Projects Corp, Laguna Star Ltd, Lone Star Offshore Ltd, Olinda Star Ltd, Snover International Inc, Star International Drilling Ltd.

On that same date, the RJ Court accepted the case[15] and rendered the processing order according to Article 52 of the BBL[16] ("**Processing Order**"). In addition to verifying the fulfillment of mandatory requirements spelled out in Article 51 of the BBL and granting the substantive consolidation requested by the Constellation Group, the RJ Court also confirmed its jurisdiction to proceed with judicial reorganization of the Foreign Companies,[17] since (a) these companies had their COMI in Brazil; and (b) their activities were mainly carried out in the Brazilian territory and for the benefit of a main client – Brazil's state-owned oil and gas company, Petróleo Brasileiro S.A. ("**Petrobrás**").

The Public Prosecutor filed an interlocutory appeal against the Processing Order, seeking, among others, to exclude the Foreign Companies from the

15 As a rule, only the debtor has standing to file for judicial reorganization proceeding (i.e., there is no involuntary filing of judicial reorganization by creditors). Upon filing and provided all relevant supporting documentation is in good order, the court will accept the case and grant the processing order. Typically the debtor itself and related management remains in place and in charge of the debtor's activities during the judicial reorganization, subject to certain restrictions related to selling, transferring or encumbering certain assets. A court-appointed trustee is designated to supervise the process, without any management powers.

16 "Article 52.The documentation required under Article 51 hereof being in order, the judge shall grant processing of the judicial reorganization and, by the same act, shall: I - appoint the trustee, with due regard for the provisions of Article 21 hereof; II - waive the requirement for clearance certificates for the debtor to engage in business, with due regard for the provisions in Article 195, paragraph 3 of the Federal Constitution and in Article 69 of this Law; III - order the suspension of all actions or enforcement proceedings against the debtor pursuant to Article 6 hereof, the respective case records to remain at the court where they are proceeding, except for the actions under Article 6, paragraphs 1, 2 and 7, hereof and those relating to claims excepted under Article 49, paragraphs 3 and 4, hereof; IV - order the debtor to submit monthly statements of account throughout the judicial reorganization term, on pain of dismissal of his officers; V - order the electronic notification of the Public Prosecutor's Office and of the federal Treasury Offices and of the Treasury Office of all states, Federal District and municipalities where the debtor has an establishment, to take cognizance of the judicial reorganization and inform any claims against the debtor, to be disclosed to other interested parties".

17 "Com relação à questão da competência, não há dúvidas no sentido de que o centro das operações atuais das recuperandas se situa na cidade do Rio de Janeiro, levando-se em conta também um fato relevantíssimo: apesar de muitas delas serem sociedades internacionais, a sua atividade direciona-se para a mesma atividade empresarial, com foco em prestação de serviços no Brasil e historicamente predominantemente para um cliente brasileiro, a saber, a Petrobras" (free translation: "Regarding the jurisdiction matter, there is no doubt that the center of the current operations of the companies under reorganization is located in the city of Rio de Janeiro, also taking into account a very relevant fact: despite the fact that many of them are international companies, their activity is directed towards the same business activity, with a focus on providing services in Brazil and historically predominantly for a Brazilian client, namely Petrobras".

RJ Proceeding ("**PP Appeal**"). In short, the Public Prosecutor advocated that (a) the BBL had no specific rules supporting Brazilian jurisdiction over the insolvency proceedings of Foreign Companies; (b) the Foreign Companies did not have branches, creditors or employees located in Brazil; (c) the Foreign Companies were added to the Group only to obtain tax advantages abroad (i.e., to evade the Brazilian legal taxation system); (d) the obligations performed abroad (i.e., issuance of the international bonds) should be addressed abroad; and (e) the COMI of the Constellation Group, as a whole, should not determine the COMI of the Foreign Companies and, instead, the COMI of the Foreign Companies should be analyzed and determined on a case-by-case basis.

After the Constellation Group's response, which emphasized the precedents arising from the OGX, OAS and Oi cases, the 6th Civil Chamber of the Rio de Janeiro State Court of Appeals ("**State Court**") partially granted (by majority of votes) the PP Appeal, establishing that the RJ Court lacked jurisdiction to rule on the RJ Proceeding in relation to three (3) foreign entities: Olinda Star, Arazi, and Lancaster Projects ("**Decision – PP Appeal**").

According to State Court Justice Eduardo Gusmão Alves de Brito Neto, who concurred with the decision, (a) the BBL contains no specific rules for cross-border insolvency proceedings and (b) COMI must be assessed on an entity-by-entity basis and not a group-wide basis. Nevertheless, the Decision – PP Appeal stated that the mere application of a COMI test is not sufficient to settle jurisdictional issues arising in cases involving complex corporate groups, such as the Constellation Group. Instead, other aspects of the group should be analyzed. Accordingly, the State Court held that the *territoriality principle* should apply to the Constellation Group's case, in pursuit of solutions not provided by a simple COMI analysis.

According to the *territoriality principle*, countries have exclusive jurisdiction over the assets located within their territories.[18] As applied to the

18 "This model is also sometimes depreciatively called "the grab rule," which implies that national courts grasp the assets within their reach. A strictly territorialist system implies as many insolvency proceedings as the countries involved. In the absence of specific regulation governing crossborder insolvencies, territoriality is the applicable rule. After all, the territorial principle, as the absolute authority over a delimited region, derives directly fromthe concept of sovereignty and is a basic principle of international law" - Campana Filho, Paulo Fernando, The Legal Framework for Cross-Border Insolvency in Brazil (July 20, 2009). Houston Journal of International Law, Vol. 32, No. 1, 2010, Available at SSRN: https://ssrn.com/abstract=1436535.

Foreign Companies, the Decision – PP Appeal recognized the jurisdiction of the RJ Court to rule on the RJ Proceeding of certain of the Foreign Companies (*i.e.*, those that owned assets located in Brazil). The State Court held that Brava Star, Amaralina Star, Laguna Star, Alpha Star, Lone Star, Gold Star, Star International Drilling, Constellation Oil Services, and Constellation Overseas were subject to the jurisdiction of the RJ Court because they all had assets located in Brazilian territory. However, because Olinda Star, Arazi and Lancaster Projects lacked Brazilian assets, the RJ Court could not adjudicate on their judicial reorganization. The State Court thus ordered the exclusion of those three Foreign Companies from the RJ Proceeding.[19] State Court Justice Carlos José Martins Gomes casted a dissenting vote on the grounds that no Foreign Company should be excluded from the RJ Proceeding, due to the fact that (a) creditors had consented in the PSA to Brazilian jurisdiction to conduct the RJ Proceeding and (b) Article 22, III of the Brazilian Civil Procedure Code ("**Article 22**"), allows a court to process and adjudicate a case where parties have "explicitly or tacitly submitted to national jurisdiction."[20]

The Decision PP – Appeal was partially by the State Court in June 2019, after ruling on the motion for clarification lodged by the Constellation Group against it ("**Clarification Decision**"). In short, the Clarification Decision acknowledged that Arazi and Lancaster had part of their assets in Brazil and, for that reason, were able to pursue the judicial reorganization before the RJ Court. The Clarification Decision, however, denied the ap-

19 "(...) voto pelo indeferimento da recuperação no Brasil das sociedades Olinda Star, Arazi e Lancaster Projects. A par de não de não funcionarem no pais, não terem aqui um credor trabalhista sequer, nenhuma delas possui ativos em território nacional. A sonda pertencente a Olinda Star, que durante algum tempo prestou serviços no Brasil, acha-se na India. De maneira que engloba-las no processo de recuperação decorreria exclusivamente das garantias por ela prestadas aos financiamentos contraídos pelas empresas do grupo, o que me parece insuficiente" (free translation: ""(…) vote for rejection of the reorganization in Brazil for companies Olinda Star, Arazi and Lancaster Projects. In addition to not carrying out their activities in Brazil nor having a single labor-related creditor here, none of them has assets in the national territory. The drilling belonging to Olinda Star, which temporarily provided services in Brazil, is in India. Therefore, including them in the judicial reorganization proceeding would derive exclusively from the guarantees provided by them to the loans taken by the group companies, which seems to me to be insufficient") - See interlocutory appeal No. 0070417-46.2018.8.19.0000, ruled before the 16th Civil Chamber of the State Court of Justice of Rio de Janeiro (http://www.tjrj.jus.br/).

20 "Article 22. It is also incumbent on the Brazilian judiciary authority to process and adjudicate on: (…) III - a lawsuit whose parties have expressly or tacitly submitted to national jurisdiction".

plication of Article 22 with respect to Olinda Star and affirmed the State Court's decision that this entity was ineligible for the RJ Proceeding.

As indicated above, even though the State Court recognized the jurisdiction of Brazilian Courts to rule on the RJ Proceeding of the Foreign Companies, the legal grounds supporting the decision were different from the rationale adopted by courts in the OAS, OXG and Oi cases. In those cases, the COMI analysis was fundamental to the courts' determinations to establish jurisdiction. In the Constellation Group's RJ Proceeding, however, the primary rationale applied by the State Court to establish jurisdiction over the reorganization of the Foreign Companies was not COMI, but rather the presence of assets in Brazil, following the *territoriality principle*.

10.6 Rights and Remedies of Noteholders to Discuss and Vote on the Plan of Reorganization

The BBL provides that after filing for judicial reorganization, the debtor must prepare and submit a Plan of Reorganization within sixty (60) days from the Processing Order. The BBL treats a Plan of Reorganization as a contract between the debtor and its creditors. As a rule, the Plan of Reorganization must contemplate all means that will be employed by the debtor to reorganize and restructure its business.

Forllowing presentation of the Plan of Reorganization and proper notice, creditors will have thirty (30) days to file objections against the Plan of Reorganization. If there are objections, the Brazilian court must call a General Meeting of Creditors (the "**GMC**") so that creditors[21] may deliberate and vote on the Plan of Reorganization.

In a GMC, creditors are divided into four (4) classes, as follows: (a) holders of labor-related or occupational accident claims (the "**Labor Class**");

21 As a rule, all claims against the debtor existing on the date of the filing for judicial reorganization ("Pre-Petition Claim" and "Filing Date", respectively), even if not due, are subject to the judicial reorganization. However, there are exceptions to this general rule ("Safe Harbor Claims"), including: (a) tax claims; (b) claims secured by fiduciary liens (alienação/cessão fiduciária); (c) financial leasing; and (d) claims deriving from advance on export exchange contracts (ACCs). The Safe Harbor Claims are not affected by the judicial reorganization and bound by a Plan of Reorganization. As a rule, respective creditors are entitled to continue enforcing their rights and remedies.

(b) holders of secured claims, up to the amount of the respective collateral (the "**Secured Class**"); (c) holders of unsecured claims (special priority, general priority and subordinated claims) (the "**General Class**"); and (d) holders of claims that are small companies and vendors (the "**Vendor Class**"). In order to be approved, the Plan of Reorganization must be approved by a majority vote in number of creditors in each class that are present at the GMC (*i.e.*, vote per head), and with respect to the Secured Class and the General Class, the Plan of Reorganization must also be approved by a majority in amount of claims in the class that are present at the GMC (*i.e.*, a dollar amount vote).

In many complex judicial reorganization proceedings, including the Constellation Group's RJ Proceeding, holders of international bonds (also referred to as notes – *i.e.*, debt raised in international capital markets and frequently governed by New York law) play a particularly important role in judicial reorganization proceedings.

As indicated above, noteholders and other funded debt creditors do not form a distinct class of creditors for purposes of voting at the GMC. Instead, they are usually classified with the Secured Class or General Class depending on whether their claim is secured by collateral. Noteholders therefore have the same rights and remedies of creditors within their class, including the right to deliberate and vote on the Plan of Reorganization. For bondholders, in particular, the voting process raises some notable issues, as described below.

The BBL establishes that only creditors who are listed in the official list of creditors (the "**List of Creditors**") are eligible to vote on a Plan of Reorganization and voice their objections at the GMC. Notes are often widely traded in the secondary market without the issuer knowing who beneficially owns them at any given time. Consequently, and due to the particularities of the indentures governing these instruments, the only creditor that is actually listed on the List of Creditors is the indenture trustee – as a practical matter, even if the debtor wanted to list each beneficial owner of notes on its List of Creditors, the tradable nature of the debt makes tracking its ownership virtually impossible.

In light of the above, a potential issue arises – since noteholders are not listed in the List of Creditors, they do not have the right to participate and vote on the Plan of Reorganization at the GMC. Further, because indentures normally require that any change to payment terms and conditions

require the consent of all noteholders (which is practically impossible to obtain), and because indenture trustees can be subject to certain contractual and legal limitations in carrying out their duties, the indenture trustee usually abstains from voting on the Plan of Reorganization.

In complex Brazilian restructurings, the international notes often represent the largest, or one of the largest sources of claims. For noteholders, it would be highly problematic to face a debt restructuring with no ability to vote on the Plan of Reorganization or speak at the GMC, particularly because the result of the Plan of Reorganization may be to materially restructure and impair the notes, themselves. Uncertainty regarding the noteholders' right to vote on the Plan of Reorganization also creates instability for the judicial reorganization proceeding as a whole, as (a) it becomes difficult for interested parties to predict or facilitate the quorum required for the GMC without involvement of the notes and (b) a lack of clarity about whether the noteholders will (or will be able to) vote makes it harder for the debtor to negotiate the terms and conditions of the Plan of Reorganization with creditors and other stakeholders.

Brazilian courts have thus developed creative solutions to deal with the voting of notes claims at GMCs, and the Constellation Group's RJ Proceeding contributed to these developments.

10.7 The Brazilian Experience With Noteholders and the Constellation Case

In addition to the Constellation Group RJ Proceeding, at least two (2) cases are worth mentioning when it comes to noteholders' voting rights in judicial reorganization proceedings: (a) the judicial reorganization of Centrais Elétricas do Pará S.A. ("**Celpa**"); and (b) the judicial reorganization of OGX.

Celpa was involved in the distribution, commercialization, and generation of electric energy in the Brazilian State of Pará. To raise funds for its activities, Celpa issued U.S.-law notes. On February 2, 2012, facing severe economic and financial problems, Celpa filed for judicial reorganization before the 13th Civil Court of Belém, State of Pará.

During the judicial reorganization, after convening the GMC, one of the noteholders requested the individualization of its right to deliberate and

vote on the Plan of Reorganization, away from the indenture trustee. The Brazilian court recognized the novelty of this request and granted the requested individualization.[22] Celpa filed an interlocutory appeal against this decision on grounds that the noteholder in question was not listed in the List of Creditors and, as such, could not vote on the Plan of Reorganization. The State Court of Pará, however, dismissed the appeal by stating that the individualization would harm neither the proceeding nor the other creditors' or debtor's interests.

Subsequently, in OGX's judicial reorganization, the debtor itself moved for individualization of the noteholders' claims on the basis that they were interested in voting on the terms and conditions of the Plan of Reorganization. The Brazilian court granted this motion and OGX's plan was ultimately approved in June 2014.

The Constellation Group's RJ Proceeding raised a different set of circumstances. In the RJ Proceeding, noteholders had the ability to individualize claims for purposes of voting at the GMC. At the meeting, creditors then rejected the proposed substantive consolidation of the debtors by a headcount majority vote. This majority included individualized noteholder votes – including, in particular, the votes of 89 noteholder entities managed by one large investment institution. After this vote, the Constellation Group then argued that for purposes of counting heads at the GMC, each individualized noteholder should get one vote *per institution*, rather than one vote per legal entity that holds notes. The Judicial Administrator in the RJ Proceeding supported the Constellation Group's arguments, but the affected noteholder opposed.

The RJ Court agreed with the Constellation Group's argument. In a decision that also confirmed the approval of the Constellation Group's plan, the RJ Court held that the asset manager with 89 different noteholder entities should be credited with only one vote.

The objecting institution then filed an interlocutory appeal, citing the decisions rendered in the Celpa and OGX cases. The noteholder-asset manager argued that (a) the 89 noteholder funds and accounts it managed that rejected the RJ Plan were autonomous and independent entities, each

22 See Judicial Reorganization proceedings No. 201202256290462012., ruled before the 13th Civil Chamber of the State Court of Pará (https://www.tjpa.jus.br/PortalExterno/).

with its own regulation, investment policy, and governance; (b) the asset manager was not the creditor to the Constellation Group, but rather the individual noteholder entities were; (c) the manager had to observe all fiduciary duties attaching to its position, and as such, the court should respect the individual interests of each holder entity; and (d) only the vote of the noteholder entities represented by this single asset manager were unified, while creditors represented by other institutions were not.

For its part, the Constellation Group argued in response that (a) the asset manager (i) executed all documents related to the issuance of the bonds and documents related to the debt restructuring and (ii) negotiated the terms of the bonds' issuance; (b) the asset manager failed to demonstrate that it had received individual voting instructions for each entity it was representing; (c) it was rather unlikely that the 89 noteholders would have the same vote orientation to reject the RJ Plan and the substantive consolidation; and (d) finally, asset manager was interested in failure of the RJ Proceeding.

On October 22, 2019, the State Court of Appeals, however, granted the asset manager's appeal, eventually establishing that every entity should be considered as a single creditor for purposes of determining whether the legal quorum and requisites for plan approval (notably the "head count" criteria) are met in judicial reorganizations. While the parties ultimately settled, the State Court of Appeals' decision remains an important decision for establishing the rules and criteria for counting of noteholder votes in judicial reorganizations, particularly when debt is held by numerous distinct legal entities represented by a single asset manager.

CHAPTER 15 – CERTAIN LEGAL ISSUES

10.8 Center of Main Interest (COMI) and Foreign Main or Nonmain Proceeding Inquiries

When a foreign representative files an ancillary Chapter 15 proceeding, a gating question to recognition of the plenary foreign proceeding is whether or not the entity that is subject to the foreign proceeding has its COMI in the jurisdiction where the plenary proceeding is occurring or has occurred. For example, when a Brazilian company seeks recognition in the United States of a Brazilian judicial reorganization, the gating question is whether that company has its COMI in Brazil. If it does, then the U.S. bankruptcy court can formally recognize the Brazilian proceed-

ing as a foreign main proceeding, but if the debtor company does not have COMI in Brazil, then the judicial reorganization is not eligible to be recognized as a foreign main proceeding. Instead, the U.S. bankruptcy court can either recognize the Brazilian proceeding as a foreign nonmain proceeding or not recognize the foreign proceeding at all. Importantly, for multinational companies, COMI is determined on an entity-by-entity basis, not on an enterprise or group-wide basis.[23] This nuance proved critical in the Constellation Group's Chapter 15 cases. Indeed, one of the most notable aspects of the Constellation Group's Chapter 15 cases was the reasoned approach the U.S. bankruptcy court undertook to apply COMI standards in a "highly interrelated enterprise whose management and operations are increasingly becoming detached from any specific locale as the business aims towards increased globalization."[24]

The question of whether the RJ Proceeding would be recognized in the United States was contested in the Chapter 15 cases by Alperton Capital. In determining whether and how to grant recognition, Judge Martin Glenn analyzed each debtor's COMI. First, in accordance with section 1516(c) of the U.S. Bankruptcy Code, Judge Glenn recognized the "rebuttable presumption that COMI is where the debtor has its 'registered office.'"[25] Judge Glenn also examined, among other things, "(1) the *SPhinX* factors [, which include, among other things and outside of those listed in (2) – (5) below, (a) the location of those who actually manage the debtor, (b) the location of the debtor's primary assets, (c) the location of the majority of the debtor's creditors or a majority of the creditors who would be affected by the case, and/or (d) the jurisdiction whose law would apply to most disputes], (2) international interpretation of COMI, (3) the reasonable expectations of interested third parties, (4) the expectations or support of creditors, and (5) interpretations of a corporation's 'principal place of business' as the 'nerve center' of a corporation."[26] The bankruptcy court did not view any single factor to be dispositive, but instead applied a balancing test.[27] As a result of that examination, Judge Glenn held that (a) seven of the Constellation Group debtors had their COMI in Brazil and

23 See In re Serviços de Petróleo Constellation S.A., 600 B.R. 237, 244 (Bankr. S.D.N.Y. 2019) ("[I]t is important to bear in mind that the Court's recognition is granted on an individual debtor by debtor basis.").

24 See id. at 246.

25 See id. at 272.

26 Id. at 279. See also In re SPhinX Ltd., 351, B.R. 103, 117 (Bankr. S.D.N.Y. 2006).

27 See In re Serviços de Petróleo Constellation S.A., 600 B.R. at 278 ("COMI is a flexible determination and not a rigid applikation of factors").

their RJ proceedings should be recognized as foreign main proceedings and (b) one of the debtors had its COMI in Luxembourg.[28]

Notably, the U.S. bankruptcy court held that Constellation Oil Services Holding S.A. ("**Holding S.A.**") had its COMI in Luxembourg because, among other things, it was headquartered there, its board of directors managed it from there, and third parties and creditors had a reasonable expectation that Luxembourg was Holding S.A.'s COMI since, among other things, Holding S.A. issued press releases from Luxembourg and it publicized to taxing authorities and through its offering memorandum that Holding S.A. was a Luxembourg company.[29]

Still, notwithstanding the fact that its COMI was Luxembourg, Holding S.A. was still able to obtain recognition of its RJ proceeding in the United States. As noted above, even when a foreign debtor does not have COMI in the jurisdiction of its plenary insolvency proceeding, the U.S. Bankruptcy Code still allows a U.S. bankruptcy court discretion to recognize the plenary proceeding as a "foreign nonmain proceeding."[30] Indeed, a foreign representative of a debtor in a foreign nonmain proceeding "can

28 The bankruptcy court also declined to reach a decision with respect to two debtors, Olinda Star Ltd. and Arazi S.à.r.l. "since the Brazil courts have ordered the Brazilian RJ Proceeding dismissed as to those two entities." Id. at 294. However, the U.S. bankruptcy court did ultimately grant recognition of Arazi's RJ proceeding as a foreign nonmain proceeding after the Brazilian appeals court reversed the decision of the lower court, "concluding that Arazi was properly a party to the Brazilian RJ Proceeding, but that Olinda Star was not a property party." In re Serviços de Petróleo Constellation S.A., 613 B.R. 497, 499 (Bankr. S.D.N.Y. 2020). Olinda Star ultimately filed an alternative Chapter 15 case on March 6, 2020, pursuant to which the U.S. bankruptcy court recognized Olinda Star's BVI proceeding and ordered the enforcement of the plan approved therein. See Memorandum Opinion Granting the Foreign Representative's Verified Petition of Olinda Star Ltd for Recognition of BVI Proceeding and Motion Requesting Additional Relief, In re Olinda Star Ltd., (In Provisional Liquidation), No. 20-10712 (MG) (Bankr. S.D.N.Y. Apr. 3, 2020) (ECF No. 22).

29 See id. at 280-282.

30 11 U.S.C. §1517(a).

be granted nearly identical relief as the relief provided to a [foreign] main proceeding."[31]

To this end, the U.S. bankruptcy court granted recognition of the RJ Proceeding with respect to Holding S.A.'s RJ proceeding as a foreign nonmain proceeding, and ultimately granted nearly identical relief as that afforded to the Constellation Group debtors whose COMI was in Brazil.[32] This relief included, among other things, extension of the stay imposed in Holding S.A.'s RJ proceeding within the territorial jurisdiction of the United States.[33] Judge Glenn determined that recognition as a foreign nonmain proceeding was appropriate because, among other things, all of Holding S.A.'s "subsidiaries have substantial and ongoing business connections in Brazil."[34]

Judge Glenn's holding that Holding S.A. did not have its COMI in Brazil, but that its RJ proceeding could still be recognized in the United States as a foreign nonmain proceeding – and with relief substantially similar to what would have been granted with respect to a foreign main proceeding – has important practical implications for foreign debtors with corporate entities spread around the globe. For Holding S.A., recognition as a foreign nonmain versus foreign main proceeding presented a distinction without a difference, and despite its lack of COMI in Brazil, the entity received treatment in the Constellation Group Chapter 15 cases that was almost identical to the treatment of its Brazil-COMI'd affiliates. The Constellation Group cases illustrate that lack of COMI for one or more debtors within a corporate group is not necessarily fatal, and these entities may still be able to obtain equivalent relief under Chapter 15, particularly if it is established that they are part of an integrated enterprise with operational or other connections to the jurisdiction where the plenary proceeding is occurring or has occurred.

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31 See In re Serviços de Petróleo Constellation S.A., 600 B.R. at 272. Notwithstanding the nearly identical relief, the principal difference between a foreign main proceeding and a foreign nonmain proceeding is that, if the bankruptcy court recognizes a foreign proceeding as a main proceeding, then the stay is triggered automatically. By contrast, if the bankruptcy court recognizes the foreign proceeding as a nonmain proceeding, then the foreign representative must request any specific additional relief, which may include a stay of litigation and enforcement efforts in the United States. See 11 U.S.C. §§1520, 1521.

32 See In re Serviços de Petróleo Constellation S.A., 600 B.R. at 293-294.

33 Id.

34 Id. at 282-83.

10.9 Enforcing a Foreign Plan in the United States

In many Chapter 15 cases, the process focuses on two critical steps. The first is recognition of the plenary proceeding. Sometimes this occurs after the foreign proceeding is in its late stages or has substantially concluded. In other cases (such as the Constellation Group Chapter 15 cases), this initial step occurs shortly after the commencement of the foreign proceeding. Regardless of when recognition occurs, the second critical step in many Chapter 15 cases is a request to the U.S. bankruptcy court to enforce the provisions of a foreign restructuring or liquidation plan in the United States. For the Constellation Group, the request to grant full force and effect of the RJ plan in the United States also presented notable legal issues.

On July 1, 2019, less than seven months after commencing the RJ Proceeding, the Constellation Group obtained approval of its restructuring plan (the "**RJ Plan**"). Shortly thereafter, on July 17, 2019, the Constellation Group's foreign representative filed a motion seeking to enforce the provisions of the RJ Plan within the United States (the "**Enforcement Motion**").[35] Two creditors that had opposed approval of the RJ Plan and/or RJ proceeding also objected to the Enforcement Motion. For these creditors, the arguments before the U.S. bankruptcy court included that they would be deprived of their due process and have appellate rights in Brazil effectively cut off if the U.S. bankruptcy court approved the enforcement order.[36]

During a status conference on August 1, 2019, Judge Glenn expressed reservations about recognizing and enforcing a foreign plan that was subject to ongoing appeals in Brazil – even though no injunction or stay of the plan had been granted in Brazil.[37] In particular, Judge Glenn expressed

35 Motion for Order Pursuant to 11 U.S.C. 105(a), 1145, 1507(a), 1521(a), and 1525(a) (I) Enforcing the Brazilian Reorganization Plan and (II) Granting Related Relief, In re Serviços de Petróleo Constellation S.A., No. 18-13952 (MG) (Bankr. S.D.N.Y. July 17, 2019) (ECF No. 100).

36 Objection and Reservation of Rights of Alperton to Motion for (I) Order Enforcing Brazilian Reorganization Plan and (II) Granting Related Relief, In re Serviços de Petróleo Constellation S.A., No. 18-13952 (MG) (Bankr. S.D.N.Y. July 30, 2019) (ECF No. 111); Objection of Pimco Entities to Motion for Order (I) Enforcing the Brazilian Reorganization Plan and (II) Granting Related Relief, In re Serviços de Petróleo Constellation S.A., No. 18-13952 (MG) (Bankr. S.D.N.Y. July 30, 2019) (ECF No. 112).

37 See In re Serviços de Petróleo Constellation S.A., No. 18-13952 (MG) (Bankr. S.D.N.Y. Aug. 1, 2019) (ECF No. 127), Aug. 1, 2019 Hr'g Tr. at 7 (the "**Enforcement Hearing Transcript**").

concern that a decision from the U.S. bankruptcy court might amount to an advisory opinion on matters of Brazilian law before the Brazilian appellate process was able to run its course.[38] The Constellation Group advocated for a hearing on the Enforcement Motion to nevertheless go forward and cited, among other things, the obligation of the Constellation Group to meet plan support agreement milestones, which milestones were "underlined by liquidity concerns of the company [and] get[ting] that liquidity into the business".[39] Despite these arguments, Judge Glenn still declined to move ahead with considering the Enforcement Motion until at least the first level of appeals in Brazil had been decided, and reasoned that this was appropriate because the objecting creditors raised issues that, if true, could pose material due process and voting concerns.[40]

Notably, Judge Glenn's decision to delay consideration of the Enforcement Motion ran at least somewhat counter to a 2018 decision in the Chapter 15 cases of Oi S.A. and its affiliates, in which another judge of the United States Bankruptcy Court for the Southern District of New York granted the foreign representative's request for enforcement of an unstayed RJ plan in the United States over the objection of a shareholder that was appealing and otherwise continuing to litigate the approved RJ plan in Brazil.[41] As a result of Judge Glenn's determination to delay consideration of the Enforcement Motion, the U.S. bankruptcy court granted relief enforcing the Constellation Group's RJ plan in the United States only on December 5, 2019 after the first level of the Brazilian appellate process had fully run its course.[42] And while one of the two objecting creditors eventually settled its objection, Judge Glenn overruled the other, finding that the creditor, Alperton Capital (the same entity that had initially opposed

38 See id. at 9-10 ("You'd better go back and renegotiate, but I am not giving an advisory opinion, and until the issues in Brazil are resolved, those issues, at least from what I read, go to the very heart of the challenge that [one of the objecting creditors] has raised here.").

39 See id. at 11.

40 See id. at 32.

41 See In re Oi S.A., 527 B.R. 253 (Bankr. S.D.N.Y. 2018).

42 See Order (I) Granting Full Force and Effect In the United States to the Brazilian Reorganization Plan and (II) Granting Related Relief, In re Serviços de Petróleo Constellation S.A., No. 18-13952 (MG) (Bankr. S.D.N.Y. Dec. 5, 2019) (ECF No. 192) (the "**Enforcement Order**"). Given that PIMCO withdrew their objection, see supra note 25, the Enforcement Order only focuses on the appeals regarding Alperton Capital's objections, which were "subsequently appealed to the [Brazilian] Court of Appeals which upheld the RJ Court's decision finding that Alperton is neither a shareholder nor a creditor of the RJ Debtors." See id.

recognition) "was provided 'an opportunity to be heard in a meaningful manner,' which satisfies … due process".[43]

As with the earlier decision regarding recognition of the RJ Proceeding and Holding S.A.'s COMI, the proceedings around the Constellation Group's Enforcement Motion highlight the practical considerations that foreign debtors may need to weigh when seeking to enforce a foreign plan in the United States in the face of continued litigation in the home jurisdiction. To the extent that due process or other important policy issues remain on appeal with respect to a confirmed foreign plan, a Chapter 15 court may refrain from enforcing a plan.

CONSTELLATION'S CHAPTER 15 CASES IN 2021 AND BEYOND

Unfortunately for the Constellation Group, its restructuring efforts did not end in 2019 with the enforcement of its plan in the United States. Instead, because "depressed oil and gas prices and the impact of the COVID-19 pandemic on its business," the Constellation Group sought "to negotiate a more comprehensive amendment to its RJ Plan to facilitate the implementation of a capital structure that is sustainable in the new reality."[44] To this end, the Constellation Group sought further relief from creditors, including a further one-year stay in Brazil to propose an amendment to its RJ plan. And in parallel, the Constellation Group's foreign representative filed a motion with the U.S. bankruptcy court on April 6, 2021 seeking to stay certain creditor actions,[45] and obtained certain of the requested relief.[46]

43 Enforcement Order at 6.

44 Motion of the Foreign Representative for a Stay in Support of Brazilian RJ Proceeding Pursuant to 11 U.S.C. §§105(a), 1507(a), 1521(a), and 1525(a), In re Serviços de Petróleo Constellation S.A., No. 18-13952 (MG) (Bankr. S.D.N.Y. Apr. 6, 2021) (ECF No. 211).

45 Id.

46 See Interim Order Granting Stay in Support of Brazilian RJ Proceeding Pursuant to 11 U.S.C. §§105(a), 1507(a), 1521(a), and 1525(a) (ECF No. 219), In re Serviços de Petróleo Constellation S.A., No. 18-13952 (MG) (Bankr. S.D.N.Y. Apr. 9, 2021); Second Interim Order Granting Stay in Support of Brazilian RJ Proceeding Pursuant to 11 U.S.C. §§105(a), 1507(a), 1521(a), and 1525(a) (ECF No. 234), In re Serviços de Petróleo Constellation S.A., No. 18-13952 (MG) (Bankr. S.D.N.Y. May 7, 2021); Order Granting Stay in Support of Brazilian RJ Proceeding Pursuant to 11 U.S.C. §§105(a), 1507(a), 1521(a), and 1525(a) (ECF No. 243), In re Serviços de Petróleo Constellation S.A., No. 18-13952 (MG) (Bankr. S.D.N.Y. May 25, 2021).

The Constellation Group ultimately obtained approval of an amended RJ plan in Brazil on March 28, 2022, and the U.S. bankruptcy court entered an uncontested order enforcing the amended plan in the United States on May 3, 2022.[47]

47 Order (I) Granting Full Force and Effect in the United States to the Brazilian Reorganization Plan Amendment and (II) Granting Related Relief, In re Serviços de Petróleo Constellation S.A., No. 18-13952 (MG) (Bankr. S.D.N.Y. May 3, 2022), at 2-3 (ECF No. 288).