Constellation: a dazzling success for BVI restructuring

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Executive Summary

In February 2020 the British Virgin Islands Commercial Court (the "**BVI Court**") sanctioned a creditor scheme of arrangement, which was part of a much larger cross-border restructuring. This scheme of arrangement, which as a creditor scheme was itself rare for the BVI, was preceded by the BVI's first ever "soft touch" provisional liquidation (in linked proceedings), which commenced in December 2018.

The proceedings in the BVI utilised provisions of the BVI Business Companies Act 2004 (the "**BC Act**") as well as the BVI Insolvency Act, 2003 (the "**IA**"). In total, 11 BVI companies were restructured, by way of the ground breaking "soft touch" provisional liquidation in the BVI, a simultaneous judicial reorganisation in the Brazilian courts, a BVI Scheme of Arrangement, as well as ancillary relief for recognition and protection under Chapter 15 of the US Bankruptcy Code.

The efficacy of the soft touch provisional liquidation was tested almost immediately. Within approximately one week of the appointment of provisional liquidators, a tropical cyclone hit India, where one of the rigs, the Olinda Star (owned by a BVI company, Olinda Star Ltd ("**Olinda**")) was located. For safety reasons the crew had been evacuated before the cyclone hit. The ensuing damage and severity of the storm left the Olinda Star listing and unattended. The terms of the soft touch liquidation, and in particular the protocol to regulate the conduct of the management, allowed the Group to act quickly to rescue its asset, and ensured that the rig remained operational and the value of the security to creditors preserved.

The case clearly demonstrates that the jurisdiction of the BVI is open and available for the most complex restructurings and has the necessary legislative framework and professional expertise to deliver focused practical legal solutions that achieve both creditor objectives while allowing viable businesses to keep operational and trading. The BVI Court is willing and able to participate

in multi-jurisdictional proceedings in the corporate rescue sphere and is a signatory to the JIN Guidelines (Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters).

Creditors can also take comfort from the ability of the BVI Court to act promptly when presented with an urgent application and appoint provisional liquidators to oversee and monitor a potential restructuring to ensure that creditor interests are adequately protected.

The Constellation Group and its Financial Distress

Constellation Oil Services Holding S.A. (Luxembourg) together with its direct and indirect subsidiaries (collectively, the "**Group**") operates one of the world's leading offshore and onshore oil and gas drilling businesses using its rigs and drillships.

The Group employs over 1,000 individuals in various locations around the globe within a highly integrated and complex corporate structure, comprised of a number of different entities across multiple jurisdictions, including several companies incorporated in the BVI. Although the Group's asset's are deployed worldwide, its principal operations are in Brazil where the Group'smodern fleet of drilling rigs, constructed by some of the world's leading shipyards, is one of the largest fleets in Brazil. The Group has consistently ranked among the safest, highest-performing and most cost-effective offshore drilling companies operating in Brazil and, as a consequence, Petrobras group, Brazil's semi-public, multinational oil & gas group, has historically been the Group's largest customer.

In recent years however, the Group has experienced financial distress attributable to the ongoing recession in the oil and gas sector.

To address the financial strains, the Group began in 2017 to evaluate its options to restructure its debts and during that year, the Group completed a successful exchange offer for some of its corporate bonds. However, this alone was not sufficient to relieve matters and the Group continued to explore restructuring options with its shareholders, lenders and bondholders to resolve the Group's financial difficulties. Critically, due to the the interconnectedness of the Group's debt, a default on certain of the Group's debt obligations would trigger additional defaults across the Group's capital structure and so it was necessary to negotiate with all parties at the same time.

BVI Soft Touch Liquidation

As 2018 progressed the financial position of the Group showed no improvement and it was decided to seek the protection of a court-supervised restructuring in three different jurisdictions: the BVI, Brazil and US.

Ogier had already been working with the Group for many months, exploring a number of different

alternatives for the BVI elements of the Group before a final decision was reached. However, on 7 December 2018, the Group applied to the BVI Court for the appointment of "soft touch" joint provisional liquidators ("**JPLs**") over six of the Group's BVI companies.

Timing was critical to ensure that assets and resources were not depleted through opportunistic individual creditor litigation in the BVI or elsewhere. The Group, together with its legal advisors, worked around the clock to ensure the filing process (across three separate jurisdictions) ran smoothly and entirely to plan. First there was a filing in Brazil to commence a Judicially supervised restructuring, and hours later the BVI filings were made, followed by filings in the US for Chapter 15 recognition. The approach was to facilitate an implementation of a restructuring plan of the Group's debt under the supervision of the Brazilian Court and, at the same time, prevent rogue creditors taking action against the Group in the BVI (primarily being the asset holding entities) or the US (being the governing law of the principal debts).

The approach taken in the BVI was only possible because of the BVI Court's order allowing the BVI Companies to enter into a "soft touch" provisional liquidation. Theorder (which was entirely novel in the BVI) allowed the BVI companies to continue to be managed by their directors, but at the same time required that the restructuring be independently monitored and assisted by the JPLs, as officers of the BVI Court. Therefore, the assistance sought from the BVI Court was of great importance and the process was greatly aided by the appointment of two highly experienced restructuring experts, Paul Pretlove and Eleanor Fisher.

At the time of the application, there were no reported BVI cases in which the BVI Court had appointed JPLs over a BVI company for the purpose of enabling a "soft touch" provisional liquidation in aid of a foreign restructuring. However, there was nothing that would prevent such an application, and persuasive precedent in jurisdictions with comparable laws suggested that it could be done within the present parameters of the BVI legislation. In order to assist the BVI Court in this respect, comprehensive submissions were made to the BVI Court regarding the approach taken in other jurisdictions to facilitate cross-border restructurings.

The arguments put before the BVI Court succeeded and the judge, Justice Adderley [Ag], adopted the opinions of general principle relating to the flexibility of the BVI Court and the principles to be applied in appointing JPLs. Justice Adderly concluded that the BVI Court had a very wide common law jurisdiction to appoint JPLs in order to preserve and protect the assets of the Group.

In addition, the BVI Court took comfort from the fact that the application for the appointment of the JPLs was supported by creditors holding a substantial amount of the Group's debt. The BVI Court was also satisfied that there was wide support of the majority of the group's creditors in the Brazilian proceedings, which indicated that the restructuring had reasonable prospects of success.

Although, at the time of the application, the Group was balance sheet solvent, the BVI Court was satisfied that the Group was in a sufficiently precarious position that it would not be able to satisfy the upcoming maturities of certain of its debts, which would trigger various cross defaults.

Therefore a restructuring was required to ensure the continued viability of the Group. The BVI Court was also satisfied that the evidence showed that the realisation value of the Group's assets would be significantly higher if measured on a going concern basis as against their breakup value. It was therefore considered to be more beneficial to the creditors of the Group if the going concern value of the Group's assets could be maintained in order to facilitate a restructuring.

In order to assist a distressed but still economically viable Group in restructuring its debts while continuing to operate as a going concern, the BVI Court approved a protocol addressing the allocation of powers of governance over the Group's various BVI companies, as between the JPLs and the sole director of each BVI company, during the term of the JPLs' appointment.

The result was that on 19 December 2018 new precedent was established with the BVI Court making its first ever order appointing "soft touch" JPLs over six of the Group's subsidiaries and placing a protocol in place to regulate the ongoing efficacy of the appointment.

The Brazilian Judicial Restructuring and Ancillary US Restructuring Proceedings

On 6 December 2018, a number of entities within the Group filed a petition for a jointly administered *recuperação judicial* ("**RJ**") in the First Business Court of Rio de Janeiro (the "**Brazilian Court**"). On the same day, the Brazilian Court entered an order formally accepting the Group's entities into the RJ.

Shortly after the RJ proceeding was commenced in Brazil, certain companies within the Group commenced ancillary proceedings in the US for protection under Chapter 15 of the US Bankruptcy Code (the "**Chapter 15**").

The Group elected to commence its centralised restructuring in Brazil because Brazil has historically been and still is the operational centre of the Group's business; Brazil is the principal estabelecimento of the Group for purposes of Brazilian restructuring law; and Brazil was considered to be the "center of main interests" or "COMI" of each debtor for the purposes of U.S. restructuring law (relevant here because of the Group's New York-law governed debt).

As a result, a restructuring plan (*plano de recuperação judicial*) (the "**RJ Plan**") with respect to the BVI companies (with the exception of Olinda, as explained below) was approved at a creditors meeting, by creditors holding approximately 90% in value of the claims present and voting at the meeting affected by the RJ Plan. Although the RJ Plan was eventually approved, the creditors' meeting was held over two days and involved tough negotiations between the Group and the creditors. BVI counsel were heavily involved in advising the Group and JPLs at the creditors meeting.

The BVI Restructuring and Scheme of Arrangement

As mentioned above, shortly after the JPLs were appointed over Olinda, the Olinda Star drilling rig was hit by a cyclone and listed precariously. Following the physical rescue and recovery of the rig, the rig was thankfully restored to operational capacity but unfortunately, Olinda's problems did not end with the stabilising of its rig.

After the Brazilian Court made an order formally accepting the Group's debtors into the RJ, a small number of the Group's stakeholders challenged the jurisdiction of the Brazilian Court to supervise an RJ over foreign entities. As a result, the Brazilian Court of Appeal ultimately decided that, out of the eighteen filing entities in Brazil, three, including Olinda (being the only BVI entity with a rig operating outside of Brazil), should be excluded from the RJ for lack of jurisdiction. Olinda's exclusion from the Brazilian proceedings presented a threat to the success of the overall reorganisation process and a significant headache for the advisors. Olinda had, along with the other five BVI companies in provisional liquidation, guaranteed and secured New York law governed notes issued by the Group due in 2024. The agreed restructuring required all six BVI companies under provisional liquidation to guarantee and secure the new notes that were to be issued in replacement of the old notes. Consequently, it was necessary to consider how to incorporate Olinda into the restructuring, without it being a part of the RJ. Parallel proceedings in the BVI were required that could mirror the RJ.

It was decided that Olinda's restructuring in the BVI would be conducted separately from the RJ restructuring, to commence immediately upon the completion of the RJ and Chapter 15 restructuring the other entities. It would mirror the terms of the RJ restructuring so far as Olinda was concerned, so that the end result would have Olinda adopt the same position in relation to the new notes and old notes as the other five BVI companies that had restructured through the RJ.

Initially a BVI plan of arrangement was the preferred method of corporate restructuring for Olinda as there was a concern the Group would not meet the higher threshold of creditor support required by a scheme of arrangement. A BVI plan of arrangement can be approved by a director of a company and then applied to the BVI Court for approval, however, the application can be challenged by dissenting creditors during the court application and there is a dissenting creditor framework to be followed.

Happily though one of the major creditors of Olinda agreed to the proposed restructuring, ensuring the higher threshold of creditor support required by a scheme of arrangement could be met. It was swiftly decided to utilise a BVI scheme of arrangement pursuant to section 179A of the BC Act (the "**Olinda Scheme**"), though to do so for a pure debt restructuring was a further rare procedure for the BVI.

To commence the Olinda Scheme, Olinda was required to apply to the BVI Court for permission to convene the meeting of Olinda's creditors at which their approval of the Olinda Scheme would be sought. Given it was just before Christmas and availability during that time is always a challenge, the timing could not have been worse. Yet, the BVI Court made arrangements to hear the

application on short notice and saw fit to order the convening of the creditors' meeting.

The meeting of Olinda's creditors resulted in the Olinda Scheme being approved by all scheme creditors who attended the meeting (either in person or by proxy), constituting a 100% vote in favour both as to number and value of those attending (thus exceeding the required majority in number, representing over 75% in value of the scheme creditors present and voting). The BVI Court was then asked to sanction the Olinda Scheme pursuant to section 179A of the Act.

The novel aspect of the Olinda Scheme for the BVI was that it was a pure "creditor scheme", an arrangement between the company and its creditors in relation to debt, rather than the more common "members scheme", an arrangement between members in relation to their equity.

Following the leading authorities on English creditor schemes of arrangement sanctioned by the High Court in London, at the sanction hearing, in exercising its discretion, the BVI Court considered whether:

1. the relevant statutory requirements have been complied with;
2. the classes of creditors were properly identified;
3. each class was fairly represented by those attending the court ordered meeting;
4. the statutory majority was acting bona fide in the interests of the class; and
5. an honest and intelligent member of the class could have voted in favour of the Olinda Scheme.

The BVI Court, in its assessment of the fairness of the Olinda Scheme, was also invited to take considerable comfort from the extensive work which had already been carried out in the RJ in order to agree and implement a fair, carefully negotiated compromise between the Group and its creditors. The RJ Plan (as reflected in the terms of the Olinda Scheme) had already been subject to a robust approval process under the supervision of the Brazilian and US courts, which required significant consensus among each class of the Group’s secured and unsecured creditors.

Having taken everything under consideration, the BVI court sanctioned the Olinda Scheme allowing the restructuring of over US$600 million secured notes to effectively proceed. This, as intended, brought Olinda into the same position as the other BVI companies that were restructured pursuant to the RJ.

The Olinda Scheme also required a new recognition order to ensure that Olinda's prior obligations under the notes were compromised under New York law. Consequently, upon reading evidence from the BVI Counsel on the matters of the BVI law, the US court granted recognition to the JPLs of Olinda and gave full force and effect to the Olinda Scheme which became effective upon filing with the Registrar of Corporate Affairs in the BVI (the "**BVI Registrar**"). As an added complication, at the time the filing was to be made the BVI was under an absolute lockdown due to the COVID-19

pandemic, however the continuity measures implemented by the BVI Registrar and the BVI Financial Serivces Commission ensured that the ability of the BVI Registry to accept and process filings was not impaired.

Conclusion

The Constellation restructuring demonstrates that the BVI is at the forefront of global legal developments in insolvency and restructuring. By granting its first ever "soft touch' provisional liquidation and sanctioning a rare creditor scheme of arrangement, the BVI continues to prove that it will constantly evolve to keep pace with global developments.

The availability of soft-touch provisional liquidation in the BVI is a significant development for the BVI, making it an attractive jurisdiction to conduct cross-border corporate restructurings. With over 400,000 companies incorporated in the BVI, coupled with the current global economic position, it is highly likely that the BVI courts will see many more restructuring matters in the coming months and years.

The BVI Court has shown throughout this process that it is willing to hear matters on an urgent basis and grant assistance, consider the position and be prepared to cooperate with international courts to put in place the necessary protections in order to act in the best interests of the parties involved.

Once again the BVI has shown that the BVI Court and its approach to the Territory's corporate and insolvency laws offers a truly modern and adaptable forum for dealing with the largest and most complex corporate restructurings – whatever outside circumstances may prevail.

About Ogier

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