

Cliente: Felsberg Advogados
Veículo: Latin Lawyer
Cidade: Londres
Data: 18/08/2015

São Paulo court blocks ruling on mortgage over contested OSX vessel

Tuesday, 18 August 2015 (1 hour ago) by Toby Luckhurst

A São Paulo court has suspended a lower court decision declaring the mortgage on an oil production and storage vessel formerly owned by OSX invalid, in the latest clash between the ship's bondholders and creditors.



The mortgage on the ship is covered by Liberian rather than Brazilian law (*Credit: tigristiara*)

Justice Nelson Jorge Jr of the São Paulo Tribunal de Justiça granted an injunction suspending the lower court decision on 8 August. The decision comes four months after Brazilian bank BTG Pactual, a creditor of the owner of the ship, OSX subsidiary OSX Leasing, filed a claim to declare the mortgage invalid on the grounds that it is covered by Liberian rather than Brazilian law.

BTG Pactual argues there is no connection between Liberia and the vessel, making the mortgage invalid. It cited Article 91 of the United Nations Convention on the Law of the Sea, which states that there must be a genuine link between the ship and the state in which it is registered. However, bondholders, which hold the mortgage as collateral, countered that there are around 200 Liberian-flagged ships operating in Brazil's offshore oil fields and of these only 42 have mortgages registered in Brazil. "Not recognising them would be a major blow to Brazil's oil industry," says Felsberg Advogados partner Thomas Felsberg. "It doesn't make sense to register a mortgage in every port a ship could visit and Brazil does not allow the registration of foreign ships," he explains. Ships are often registered in foreign jurisdictions with lower tax rates and simpler regulatory regimes than the country in which the ship operates. BTG Pactual must present its response to the appeal by 21 August and a final decision on the validity of the mortgage over OSX3 will come from the São Paulo Tribunal de Justiça in the next three or four months.

In June, the 29th Civil Court of São Paulo ruled in favour of BTG Pactual, which filed its claim to recoup US\$27 million it had lent OSX Leasing, which owns the ship and is a subsidiary of beleaguered Brazilian shipbuilder OSX. The civil court ordered the ship, called OSX3, to be sold to pay back creditors following BTG Pactual's claim. However, bondholders of the vessel challenged the order, arguing that because OSX Leasing gave the mortgage as collateral for the bondholders' debt, they should receive proceeds from the sale of the ship if it is sold.

Felsberg Advogados in São Paulo, Akin Gump Strauss Hauer & Feld LLP in London, NautaDutilh in Amsterdam and Holland & Knight LLP in New York advised the bondholders. Scandinavian investor services company Nordic Trustee filed the appeal as representative of the bondholders. BTG Pactual hired Tepedino, Migliore, Berezowski Advogados.

Two appraisals carried out by the bondholders value the ship at between US\$400 and US\$900 million. OSX Leasing owes the ship's bondholders US\$560 million in unpaid interest payments. If the mortgage is determined to be valid and the ship is sold for less than the amount OSX Leasing owes the bondholders, BTG Pactual will not recoup anything from the sale, making the validity of the mortgage crucial, explains Felsberg partner Thomas Felsberg.

OSX3 produces oil in the Tubarão Martelo offshore field off the coast of Rio de Janeiro. It is chartered by oil explorer OGpar, the successor company of Eike Batista's OGX, which filed for bankruptcy in 2013. OGX was renamed OGpar following a US\$5 billion restructuring plan, which was approved by its creditors in June 2014. Also that month, OSX, which built the vessel, restructured US\$500 million in bonds backing the platform and renegotiated a charter contract between OGpar and OSX to allow OGpar to continue using the vessel following its bankruptcy. OGpar's restructuring plan hinged on expected oil production by OSX3 and using the ship allowed OGpar to continue oil extraction uninterrupted, as contracting a new vessel would have taken at least 12 to 18 months.

The charter agreement with OGpar stipulates the oil company pay OSX Leasing US\$265,000 a day to operate the ship, but OGpar has not paid the rates since December, arguing it cannot afford to do so as it would make oil extraction unprofitable. OGpar blames low oil prices, high administrative costs and costs associated with its ongoing exploration of the BS-4 pre-salt oil block off the Brazilian coast as factors. It is still using the vessel to pump 11,000 barrels of oil worth US\$500,000 per day. Its debt from the defaulted payments now totals US\$70 million.

OSX, which was created primarily to service OGX's exploratory activities, filed for bankruptcy almost immediately after the oil explorer did, in November 2013. It agreed its own restructuring plan with creditors more than a year later, in December 2014.

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