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Intangible Property Can Satisfy the Debtor Eligibility Requirement Under Section 109(a)

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Introduction

Section 109(a) of title 11 of the United States Code (the “Bankruptcy Code”) states that “only a person that resides or has a domicile, a place of business, or property in the United States ... may be a debtor under this title.”¹ While a “foreign entity or individual domiciled abroad but owning property or doing business in the United States is eligible to be a debtor under 11 U.S.C. § 109,”² the requirement can be difficult if the foreign entity or individual domiciled abroad has no commercial connection to the US. Consequently, the property component of Section 109(a) has become an important means to satisfy the debtor eligibility requirement. The ability to satisfy the Section 109(a) has been aided by the court’s broad interpretation of the term ‘property,’ highlighted by the use of intangible property to satisfy the requirement. Intangible property is property that lacks a physical existence.³ Intangible property has no intrinsic value but instead its value exists in the rights conveyed to the property. Examples of intangible property include bank accounts, stocks, bonds, and contractual rights. Part I of this memorandum discusses the evolution of the property requirement under Section 109(a) for foreign debtors. Part II of this

¹ 11 U.S.C. § 109(a) (2012).

² *In re Xacur*, 219 B.R. 956, 966 (Bankr. S.D. Tex. 1998).

³ See Black's Law Dictionary (11th ed. 2019).

memorandum focuses on the development of intangible property as a means to satisfy Section 109(a).

I. Courts Broadly Interpret the Property Requirement Under Section 109(A)

A. Chapter 7 and Chapter 11: The Peppercorn Analysis

In *In re McTague*, the court held, since the statute was neither vague nor ambiguous, a reading of the plain meaning of the statute meant there was no minimum amount of property required to satisfy Section 109(a).⁴ The court stated that it had “no discretion to consider whether it was the intent of Congress to permit someone to obtain a bankruptcy discharge solely on the basis of having a dollar, a dime or a peppercorn located in the United States.”⁵ Consequently any property in the U.S., regardless of size, will satisfy the debtor eligibility requirement under Section 109(a).⁶

B. Chapter 15: Cross-Border Insolvencies and Section 109(a)

Chapter 15 has brought new issues to the application of Section 109(a). Considering a central aim of chapter 15 cases is the recognition of foreign proceedings to promote cross-border insolvencies, Section 109(a) has the potential to be a potent obstacle for many foreign debtors. Consequently, there has been disagreement among Circuit Courts whether Section 109(a) applies to chapter 15 cases. In *In re Barnet*, relying on 11 U.S.C. § 103(a) (“Applicability of Chapters”), the Second Circuit held that the eligibility requirement did apply to chapter 15 cases.⁷ In contrast, the United States Bankruptcy Court for the District of Delaware ruled that Section 109(a) did not apply to chapter 15 cases because chapter 15 dealt with *recognition* of a foreign

⁴ *In re McTague*, 198 B.R. 428, 432 (Bankr. W.D.N.Y. 1996).

⁵ *Id.*

⁶ *See e.g., In re Farmer*, 288 B.R. 31, 33 (Bankr. N.D.N.Y. 2002) (recognizing that courts cannot look to the quantity of property in the United States as “being decisive on the issue of eligibility to be a debtor under the Code”); *but see, In re Head*, 223 B.R. 648 (1998) (holding debtors had not met the Section 109(a) standard in their attempts to “manufacture eligibility” by obtaining US postal addresses and opening small bank accounts in US banks).

⁷ *In re Barnet*, 737 F.3d 238, 247 (2d Cir. 2013) (“The straightforward nature of our statutory interpretation bears emphasis. Section 103(a) makes all of Chapter 1 applicable to Chapter 15.”).

proceeding, rather than a U.S. plenary bankruptcy case, and so the applicant was not required to reside, have a domicile, place of business, or property in the United States.⁸ Similarly, the Southern District of Florida has declined to follow *In re Barnet*.⁹

Furthermore, in Circuits that have followed *Barnet*, courts have been liberal in finding the Section 109(a) property requirement satisfied in chapter 15 cases.¹⁰ A notable line of decisions stemming from *In re Barnet* has been the recognition that intangible property can satisfy Section 109(a).

II. Intangible Property as a Method to Satisfy the Section 109(a) Requirement

A. Chapter 7 and Chapter 11: Bank Accounts, Corporate Documents, and Intellectual Property Used to Gain Access to US Bankruptcy Courts

Bank accounts have been a popular form of intangible property for foreign debtors in chapter 7 and chapter 11 cases.¹¹ In *In re Cenargo Int'l, PLC*, a chapter 11 case, the debtors claimed to have property in joint bank accounts and stock pledged to secure the high yield notes.¹² However, the debtors established this property in anticipation of a chapter 11 restructuring and the creditors claimed this to be either improper or in bad faith because the bank accounts were created in anticipation of the section 109(a) requirement.¹³ The Court disagreed

⁸ See *In re Bemarmara Consulting a.s.* (Case No. 13-13037 (KG) (Bankr. D. Del. Dec. 17, 2013).

⁹ See e.g., *Batista v. Mendes*, No. 17-24308-Civ, 2018 U.S. Dist. LEXIS 56239, at *2 (S.D. Fla. Apr. 2, 2018) (denying a motion to dismiss for failing to meet Section 109(a) by declining to apply the *In re Barnet* approach); see also *In re Viacao Itapemirim, S.A.*, No. 18-24871-BKC-RAM, 2020 Bankr. LEXIS 634, at *3-4 (Bankr. S.D. Fla. Mar. 10, 2020) (“This Court declined to follow *Barnet* in a prior chapter 15 case and continues to reject the Second Circuit’s holding that § 109 applies in chapter 15 cases.”).

¹⁰ See e.g., *In re Octaviar Admin. Pty Ltd*, 511 B.R. 361 (Bankr. S.D.N.Y. 2014) (ruling there were no additional elements necessary to satisfy the property requirement and the court did not have to engage in analysis of the reason why the debtor held that property); *In re B.C.I. Finances Pty Ltd.*, 583 B.R. 288, 294–95 (Bankr. S.D.N.Y. 2018) (stating that the property requirement could be satisfied by maintaining even a nominal amount of property in the United States, applying a similar reasoning to *McTague* in the chapter 15 context); *In re Forge Grp. Power Pty Ltd.*, No. 17-CV-02045-PJH, 2018 WL 827913, at *12 (N.D. Cal. Feb. 12, 2018) (“stating Section 109(a) does not set parameters for how much or what kind of ‘property in the United States’ is required for a person to be eligible as a debtor under Title 11.”).

¹¹ See *In re Glob. Ocean Carriers Ltd.*, 251 B.R. 31, 39 (Bankr. D. Del. 2000) (holding bank accounts in a chapter 11 proceeding constituted property “regardless of how much money was actually in them on the petition date”).

¹² *In re Cenargo Int'l, PLC*, 294 B.R. 571 (Bankr. S.D.N.Y. 2003).

¹³ *Id.* at 603.

with this view and opined that opening bank accounts might be prudent planning because of the creditors' demand for restructuring.¹⁴

Another form of intangible property to satisfy Section 109(a) has been corporate documents in the U.S.¹⁵ Intellectual property has also been viewed as a potential form of property to satisfy Section 109(a) in chapter 7 and 11 cases although this has yet to be used as frequently as other forms of intangible property.¹⁶

B. Chapter 15: Intangible Property a Pivotal Route to US Recognition

Even with bankruptcy courts demonstrating a clear intention to accept a peppercorn to satisfy the property requirement for Section 109(a), the decision in *In re Berau Capital Res. PTE Ltd.* was a significant development.¹⁷ Berau filed an insolvency proceeding in Singapore, where the company had its headquarters.¹⁸ The company was also an obligor on over \$450 million of U.S. dollar denominated debt governed by New York law.¹⁹ While pointing out a retainer would have been adequate for satisfying the property requirement, Judge Glenn concluded “that the presence of the New York choice of law and forum selection clauses in the Berau indenture satisfies the section 109(a) ‘property in the United States’ eligibility requirement.”²⁰ Judge Glenn reasoned that “[c]ontracts create property rights for the parties to the contract. A debtor's contract rights are intangible property of the debtor.”²¹ In foreshadowing the impact this ruling would have on chapter 15 cases, Judge Glenn noted that “[d]ollar denominated debt subject to New

¹⁴ *Id.*

¹⁵ *See In re Paper I Partners, L.P.*, 283 B.R. 661, 674 (Bankr. S.D.N.Y. 2002) (holding original documents in a chapter 7 proceeding “constitutes property in the United States sufficient to satisfy section 109.”).

¹⁶ *See In re Northshore Mainland Servs., Inc.*, 537 B.R. 192, 200 (Bankr. D. Del. 2015) (determining Bahamian debtors' ownership of “several trademarks registered in the United States and has several applications pending for the registration of additional trademarks in the United States” was likely to qualify the debtors under Section 109(a) in a chapter 11 proceeding).

¹⁷ *In re Berau Capital Res. PTE Ltd.*, 540 B.R. 80 (Bankr. S.D.N.Y. 2015)

¹⁸ *Id.* at 82.

¹⁹ *Id.*

²⁰ *Id.* at 84.

²¹ *Id.* at 83.

York governing law and New York forum selection are quite common in international finance” and “are highly desirable attributes for global trade and investment, providing certainty, predictability and respected courts in the event of disputes.”²² However, while conceding the possibility of opening US courts to more foreign proceedings, he also noted that it “would be ironic if a foreign debtor’s creditors could sue to enforce the debt in New York, but in the event of a foreign insolvency proceeding, the foreign representative could not file and obtain protection under chapter 15 from a New York bankruptcy court.”²³

The consequence of *In re Berau* has been plain to see and Judge Glenn has regularly held that indentures governed by New York law meet the eligibility requirements for the recognition of foreign bankruptcy proceedings.²⁴ Furthermore, these debt obligations governed by US law do not need to be between parties in an arms-length bargain but can be negotiated between a parent company and its subsidiary.²⁵

Moreover, intangible property that has satisfied the property requirement has gone beyond indentures governed by US law. In *In re B.C.I. Fins. Pty Ltd.*, Judge Lane held that a New York situs for fiduciary duty claims was sufficient to satisfy the property requirement.²⁶ In *In re U.S. Steel Can. Inc.*, Judge Glenn focused on the party’s contractual obligations, including the requirement that it “purchase all of its iron ore requirements from U.S. Steel through 2021.”²⁷ Judge Lane, possibly an indication of how courts will proceed in the future, adopted Judge

²² *Id.* at 82-83.

²³ *Id.* at 83.

²⁴ See, *In re Avanti Commc'ns Grp. PLC*, 582 B.R. 603 (Bankr. S.D.N.Y. 2018); *In re Ocean Rig UDW Inc.*, 570 B.R. 687, 700 (Bankr. S.D.N.Y. 2017) (“Foreign Debtors have no substantial assets in the United States other than the New York law governed debt.”); *In re Inversora Eléctrica de Buenos Aires S.A.*, 560 B.R. 650, 655 (Bankr. S.D.N.Y. 2016) (holding “New York law-governed debt containing a New York forum selection clause” satisfied the Section 109(a) requirement); *In re Cell C Proprietary Ltd.*, 571 B.R. 542, 549 (Bankr. S.D.N.Y. 2017) (“Cell C has issued the Euro Notes which are governed by New York law and contain a New York forum selection clause” and so is eligible for recognition of its foreign bankruptcy proceeding).

²⁵ See *In re Servicios de Petroleo Constellation S.A.*, 600 B.R. 237, 269 (Bankr. S.D.N.Y. 2019) (“All of the principal documents setting forth Parent/Constellation’s prepetition debt obligations are governed by New York law and generally contemplate New York as a venue for disputes.”).

²⁶ *In re B.C.I. Fins. Pty Ltd.*, 583 B.R. at 297.

²⁷ *In re U.S. Steel Can. Inc.*, 571 B.R. 600, 611 (Bankr. S.D.N.Y. 2017).

Glenn’s reasoning in *In re Berau*, citing the contention that “[c]ontracts create property rights for the parties to the contract” and “[a] debtor's contract rights are intangible property of the debtor.”²⁸

Conclusion

Section 109(a) is a challenging requirement for foreign debtors to satisfy in accessing US bankruptcy courts. Property has been particularly effective in allowing foreign debtors to meet this requirement. Courts have found no minimum amount of property is required to achieve eligibility. Furthermore, property that has satisfied the eligibility requirement has taken many forms, including intangible property, such as contractual rights, bank accounts, and corporate documents.

²⁸ *In re PT Bakrie Telecom Tbk*, 601 B.R. 707, 715 (Bankr. S.D.N.Y. 2019).