The Split in the Application of Section 109(a) Requirements to Chapter 15 Cases

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Introduction

Chapter 15 of title 11 of the United States Code (the “Bankruptcy Code”) governs recognition of foreign bankruptcy, insolvency, and debt-restructuring proceedings.¹ Section 1517 of the Bankruptcy Code generally sets forth the requirements for recognition. In addition to those requirements, some courts have held that a foreign debtor must satisfy traditional debtor eligibility requirements for a debtor’s foreign proceeding to be recognized under Chapter 15.² Other courts disagree and hold that a foreign debtor does not need to meet the traditional requirements for its foreign proceeding to be recognized under Chapter 15.³

This memorandum explores the applicability of the traditional debtor eligibility requirements set forth in section 109(a) of the Bankruptcy Code to Chapter 15 cases. Part I describes section 1517 and section 109(a). Part II examines the cases that apply section 109(a) in

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² See In re Bernet, 737 F.3d 238, 241 (2d Cir. 2013) (holding a foreign debtor must satisfy the traditional eligibility requirements under section 109(a) for a foreign proceeding to be recognized).
³ See In re Al Zawawi, No: 6:21-cv-894-GAP, 2022 WL 596836, at *6 (M.D. Fla. Feb. 28, 2022) (finding foreign debtors do not need to meet the traditional requirements to be recognized under Chapter 15).
their Chapter 15 cross-border insolvency proceedings. Part III explores the cases that hold section 109(a) inapplicable to Chapter 15 foreign insolvency issues.

Discussion

I. The Applicable Bankruptcy Statutes

Chapter 15 provides that a US court may grant recognition to a “foreign proceeding,” which would generally include foreign bankruptcy, insolvency, and debt restructuring proceedings. Section 1517 of the Bankruptcy Code mandates recognition of a foreign proceeding after certain elements are met. Specifically, a foreign proceeding shall be recognized if “(1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of Section 1502; (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements of Section 1515.” The Section 1517 requirements are largely not at issue, the conflict instead being how the section is used in conjunction with Section 109(a). The issue courts have with Section 1517 centers around if Section 109(a) also applies.

II. The Application of Section 109(a)

Section 109(a) provides that “only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.” This section clearly applies to a traditional case under the Bankruptcy Code, such as a Chapter 7 or Chapter 11 case. However, some courts have also found that Section 109(a) applies to Chapter

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6 Id.
7 See In re Al Zawawi at *4 (noting the parties did not dispute that the Section 1517 elements were met).
8 See In re Barnet at 251 (finding Section 109(a) applies); In re Al Zawawi at *7 (finding section 109(a) does not apply).
15. Thus, according to those courts, a foreign debtor must satisfy traditional debtor eligibility requirements for a debtor’s foreign proceeding to be recognized under Chapter 15. In *In re Barnet*, the United States Court of Appeals for the Second Circuit was the first court to hold that section 109(a) requirements must be applied to foreign insolvency proceedings.\textsuperscript{10} The *Barnet* court emphasized the need to look at the entirety of the Bankruptcy Code, which applies section 109(a) to every section of the Bankruptcy Code.\textsuperscript{11} The Second Circuit explained that this interpretation was straightforward and applied the plain language of the statute, despite the statute not being explicitly stated in section 1517.\textsuperscript{12} The Second Circuit further explained that the definition of “debtor” in Chapter 15 does not replace section 109(a), but instead adds additional requirements for who may be a debtor.\textsuperscript{13}

In *In re Forge Group Power Party, Ltd.*, the Northern District of California also found that section 109(a) applies in Chapter 15 proceedings.\textsuperscript{14} There, the court relied on *In re Barnet* and found Section 109(a) to be clear and unambiguous in its application to the Bankruptcy Code as a whole and therefore foreign debtors must meet the section 109(a) requirements.\textsuperscript{15} The court further found that because the Australian foreign debtor had property in the U.S., the debtor satisfied section 109(a) and its foreign proceeding could be recognized under Chapter 15.\textsuperscript{16}

\textsuperscript{10} *In re Barnet* at 24.
\textsuperscript{11} *Id.* at 247 (“Section 103(a) of Title 11 provides that, other than for an exception not relevant here, Chapter 1 ‘of this title ... appl[ies] in a case under chapter 15.’”).
\textsuperscript{12} *See id.* (“The straightforward nature of our statutory interpretation bears emphasis.”).
\textsuperscript{13} *Id.* at 249.
\textsuperscript{15} *Id.*
\textsuperscript{16} *See id.* at *13 (“[D]ebtor eligibility requirements of 11 U.S.C. § 109(a) apply in Chapter 15 cases and that the requirement of ‘property in the United States’ is satisfied by a security retainer that remains the property of the debtor until the funds are applied by the attorney for services actually rendered.”).
III. The Rejection of Section 109(a)

Six days after In re Barnet was decided, a Delaware bankruptcy court held that section 109(a) did not apply because Chapter 15’s definitions in section 1502 do not require a debtor to have assets, unlike Section 109(a). In In re Al Zawawi, the United States Bankruptcy Court for the Middle District of Florida held that section 1517 is unambiguous and governs recognition. Consequently, because section 1517 does not refer to section 109, section 109(a) does not apply to recognition. There, the Florida Bankruptcy Court rejected the foreign debtor’s argument that they should follow Barnet, explaining that the United States Court of Appeals for the Eleventh Circuit, which has binding authority over the Florida bankruptcy court, had already considered and rejected that proposition in a previous case under Chapter 15’s predecessor. With this holding, the Florida District Court joins the Delaware Bankruptcy Court in rejecting the applicability of section 109(a) to foreign insolvency proceedings.

18 In re Al Zawawi at *3.
19 See id. at *5–6 (explaining in In re Goerg, 844 F.2d 1562, 1568 (11th Cir. 1988), the court held that foreign insolvency proceedings could commence when the Foreign Debtor did not meet the requirements from other sections because applying the section 109(a) requirements to foreign debtors would not make sense).
20 See Roovers & Schneider, supra note 17 (citing In re Bemarmara Consulting A.S., (Dec. 17, 2013)).
Conclusion

The Second Circuit imposes the debtor eligibility requirements of section 109(a) in Chapter 15 cases and requires foreign debtors to meet those requirements to be recognized in the U.S. A Florida bankruptcy court rejected that holding, relying on the Eleventh Circuit to find section 109(a) inapplicable and demand recognition of the Chapter 15 foreign preceding. With so few circuit courts and a handful of bankruptcy courts, predominantly within the Second Circuit’s jurisdiction, deciding this issue, there is no definitive answer to whether a foreign debtor must satisfy section 109(a) eligibility requirements to be recognized by American bankruptcy courts. However, the more recent cases have rejected the imposition of section 109(a) requirements, which may continue to spread throughout the courts.