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Al Zawawi and § 109(a): Parsing What It Means to Be a "Debtor" Under Chapter 15

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What does it mean for an entity to be a "debtor" under chapter 15, and does it matter whether the entity is a "debtor" under that chapter of the Bankruptcy Code? While these may seem like strange questions with obvious answers, recent case law challenges those notions.

Section 1502(1) of the Bankruptcy Code defines the term "debtor," for purposes of chapter 15, as "an entity that is the subject of a foreign proceeding." That somewhat circular definition is not expressly in sync with the requirements to qualify as a "debtor" under § 109(a) of the Bankruptcy Code — that is, whether the entity has a domicile, place of business or property in the U.S. In *In re Al Zawawi*,[1] the U.S. Bankruptcy Court for the Middle District of Florida referenced and expanded the split of authority as to whether a foreign "debtor" under chapter 15 must, in addition to satisfying the requirements of § 1502(1), meet the § 109(a) requirements applicable to other Code chapters.

While the Second Circuit and other courts have answered that question affirmatively, imposing effectively a two-tier standard for chapter 15 debtors, the bankruptcy court in *Al Zawawi* disagreed. It held that to qualify for chapter 15 relief, a debtor must meet only the narrower requirements of § 1502(1)'s definition of "debtor." The *Al Zawawi* court was considering whether the § 109(a) requirements would limit recognition of foreign proceedings under chapter 15, but the separation of the § 109(a) and 1502(1) standards may also have other implications in chapter 15 cases. If "debtor" can mean two different things under the Bankruptcy Code, then a chapter 15 case for an entity that is a "debtor" only under chapter 15 may not proceed in the same manner as a chapter 15 case for an entity that meets both "debtor" definitions.

The Bankruptcy Court's Decision in *Al Zawawi*

In *Al Zawawi*, the foreign representatives of the estate of Talal Qais Abdulmunem Al Zawawi, a foreign individual, moved the bankruptcy court for recognition under chapter 15 of insolvency proceedings pending in the U.K. The foreign representatives sought recognition for the purposes of obtaining documents and evidence in the U.S. to assist with asset recoveries in the U.K. proceedings, as well as recover any property of the debtor that may be located in the U.S., including by potentially bringing claims against third parties.

Al Zawawi opposed recognition of the U.K. proceedings in the U.S. on the grounds that § 109 applies to chapter 15 proceedings, such that a foreign individual or entity must have a domicile, business or property in the U.S. in order to support a chapter 15 case. He asserted that he had none of these.

The court examined the relationship among §§ 103, 109 and 1502 of the Bankruptcy Code and reasoned that the proper statutory construction of these sections is that "the subject of a foreign proceeding is only a 'debtor' as that term is used in chapter 15 and is not a debtor as that term is used in § 109."[2] To conclude otherwise would render § 1502(1)'s definition of "debtor" superfluous. Moreover, the court found compelling the absence of a reference to § 109's requirements in § 1517, which provides that the court "shall" grant recognition if certain requirements are met. The court further opined that its interpretation gives full effect to chapter 15's purpose of facilitating uniformity of administration in cross-border cases.

In reaching this conclusion, the court joined other courts that have explicitly rejected the Second Circuit's holding in *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*.[3] In this case, the Second Circuit reasoned that § 103(a) makes all of chapter 1, including § 109(a), applicable to chapter 15.[4] Beyond disagreeing with this reasoning outright as a matter of statutory construction, the *Al Zawawi* court also looked to Eleventh Circuit precedent interpreting former § 304 in *Goerg v. Parungao (In re Goerg)*,[5] finding it likely that the Eleventh Circuit would agree that § 109 does not apply. The Eleventh Circuit in *Goerg* noted that the

1 634 B.R. 11 (Bankr. M.D. Fla. 2021).

2 634 B.R. at 19.

3 737 F.3d 238 (2d Cir. 2013).

4 737 F.3d at 247. Courts following *Barnet* have considered subsidiary questions of whether U.S. property existing only after the date of a chapter 15 petition and U.S. property that is inchoate or contingent as of the petition date may qualify for purposes of § 109(a). *See, e.g., In re Octaviar Admin. Pty Ltd.*, 511 B.R. 370 (Bankr. S.D.N.Y. 2014). These issues are not relevant for courts not imposing a § 109(a) requirement in chapter 15.

5 844 F.2d 1562 (11th Cir. 1988).

purpose of recognizing foreign proceedings is to "help further the efficiency of foreign insolvency proceedings involving worldwide assets."[6]

On this basis, the bankruptcy court recognized Al Zawawi's U.K. insolvency proceeding as a foreign main proceeding and granted his foreign representatives relief under §§ 1520 and 1521(a)(1)-(6). Although the court concluded that the foreign representatives were not required to demonstrate that Al Zawawi satisfied the eligibility requirements of § 109, the court alternatively concluded that the debtor would meet those requirements based on his indirect interests in certain U.S. entities and possibly also based on potential claims against third parties in the U.S. — any of which could qualify as property located in the U.S.

Al Zawawi appealed the bankruptcy court's ruling, and the appeal remains pending before the U.S. District Court for the Middle District of Florida. In the appeal, *In re Al Zawawi*,[7] **Daniel M. Glosband** of Goodwin Procter LLP (Boston) and Prof. **Jay L. Westbrook** of the University of Texas School of Law (Austin, Texas), primary drafters of chapter 15, sought leave to file an *amicus* brief in support of the appellees, the foreign representatives, arguing that the bankruptcy court's decision was correct and consistent with the purposes of chapter 15 and the UNCITRAL Model Law on Cross-Border Insolvency underlying chapter 15. The proposed *amici* argued that the Second Circuit's decision in *Barnet* was incorrect and thus should not be followed. The district court declined to consider the *amici*'s brief on the basis that the foreign representatives were sufficiently represented by their own counsel and no *amicus* brief was necessary.

Potential Implications of *Al Zawawi*

Given the low bar set by § 109(a) and the traditional, minimalist satisfaction of § 109(a)'s requirements through the opening of a bank account in the U.S., one may wonder why it matters whether a foreign, § 1502(1) "debtor" must also be a § 109(a) "debtor" in order to sustain a chapter 15 case. For purposes of recognition of a foreign proceeding under chapter 15, the difference may be marginal at best, as underlined by the *Al Zawawi* court's alternative holding that the debtor had sufficient property in the U.S. to satisfy § 109(a).

However, the distinction between a § 109 "debtor" of the type that could file a chapter 7 or 11 case and a chapter 15 foreign "debtor" may have implications that go beyond § 1517 recognition. Specifically, the relief available under chapter 15 — automatically upon recognition under § 1520 or at the discretion of the bankruptcy court under §§ 1521 or 1507 — may be limited, or possibly even expanded, where a chapter 15 "debtor" is not also a § 109 "debtor."

Section 1520(a) Relief

A foreign "debtor" under chapter 15 that does not satisfy § 109(a) necessarily does not have any U.S. assets. Accordingly, most of the provisions of § 1520(a), which apply automatically upon recognition of a foreign proceeding and are focused on U.S. assets, cannot as a practical matter attach where the foreign "debtor" is not a § 109(a) "debtor" with assets in the U.S.

Section 1521(a)(7) Relief

Courts have broad authority under § 1521(a)(7), following recognition of a foreign proceeding, to grant "any additional relief that may be available to a trustee," subject to limited exceptions. Section 1502(6) defines "trustee" for purposes of chapter 15 to include "a trustee" or "a debtor in possession in a case under any chapter of this title." However, no relief at all would be available to a purported chapter 11 debtor in possession, for example, if that entity did not qualify as a § 109(a) debtor. As such, under a tight reading of § 1521(a)(7), no relief under that section would be available where a chapter 15 "debtor" is not a § 109(a) "debtor," even if, as under *Al Zawawi*, the entity in question can nonetheless sustain a chapter 15 case.[8]

Specifically, because § 1521(a)(7) has been the basis for some of the more creative relief granted in chapter 15 cases (*e.g.*, the extension of § 365(n) protections in *Jaffé v. Samsung Elecs. Co.*[9]), there is a prospect, even if a foreign proceeding is recognized, that the scope of relief in the foreign proceeding may be limited if the entity at issue is not a proper § 109(a) "debtor." In *Jaffé*, the court fashioned relief to protect patent licensees' rights under licenses of U.S. patents when the foreign representative for a debtor in a German insolvency proceeding sought to reject and effectively unilaterally terminate the licensees' rights.

The *Jaffé* court determined that in order to grant the foreign representative the relief sought under § 1521(a)(7), it would have to tailor the relief to "sufficiently protect" the licensees, as required by § 1522(a), by affording the same protections that § 365(n) provides to licensees in a chapter 7 or 11 proceeding. If the chapter 15 "debtor" is not equivalent to a chapter 7 or 11 debtor — whether because the entity cannot qualify as such factually or because a court declines to consider § 109(a) "debtor" qualifications in the chapter 15 context — that could undermine the basis for *Jaffé*-type relief.

Section 1507 "Additional Assistance"

By contrast, there are other chapter 15 provisions that, unlike § 1521(a)(7), apply, assuming recognition of the applicable foreign proceeding, without either express or implied reference to whether the foreign "debtor" meets § 109(a)'s "debtor" requirements. The "additional assistance" permitted under § 1507 is an example of relief under such a provision.

Section 1507 permits the court to provide such assistance under the Bankruptcy Code or other U.S. law consistent with principles of comity that will reasonably assure just treatment of parties in interest.[10] A bankruptcy court has broad discretion to fashion relief in line with affording comity to a recog-

6 634 B.R. at 20 (citing 844 F.2d at 1568).

7 No. 6:21-cv-00894 (M.D. Fla.).

8 Under a broader reading of § 1521(a)(7), a court could instead conclude that it may grant relief to a foreign representative as long as that relief would be available to a hypothetical debtor under chapter 7 or 11, even if the particular debtor represented by the foreign representative would not qualify as a debtor under § 109(a).

9 737 F.3d 14 (4th Cir. 2013).

10 *See* 11 U.S.C. § 1507.

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nized foreign proceeding, limited by § 1506's narrow public policy exception. In other words, § 1507 relief can be afforded to a foreign representative to facilitate how they handle a chapter 15 debtor's interests in the U.S. related to the foreign proceeding, irrespective of any U.S. assets or operations.

In this way, a chapter 15 case may have advantages over a plenary chapter 11 case for a foreign debtor, using the separation between the § 109(a) standard and the § 1502(1) standard as a sword rather than a shield. For example, if a chapter 15 court is asked to employ § 1507 to affirm foreign third-party releases that might not be available in a chapter 11 case, as in *In re Metcalfe & Mansfield Alt. Invs.*,[11] the fact that the chapter 15 foreign "debtor" is not a § 109(a) "debtor" may be helpful in distinguishing the chapter 15 context from the chapter 11 context and in advocating for the releases to be affirmed.

In *Metcalfe*, the court considered both recognition of a Canadian insolvency proceeding and whether to enforce the Canadian court's orders implementing the foreign debtor's plan approved by the Canadian court. The key issue was that these orders included "a very broad third-party nondebtor release and injunction."[12] The bankruptcy court, using § 1507, considered whether the Canadian proceedings and orders granting this relief should be enforced in the U.S. under principles of comity notwithstanding the high bar that U.S. bankruptcy courts typically set for such releases to be granted. Stated differently, the bankruptcy court did not evaluate the merits of the releases under U.S. law, but rather evaluated only whether the Canadian proceedings were sufficiently fair to warrant comity in the U.S. Although the bankruptcy court did not evaluate the merits, its enforcement of the Canadian orders bears the same *res judicata* effect as if it had.[13]

In the scenario where a foreign debtor does not meet § 109(a)'s requirements, this sort of relief might be more palatable. For example, a foreign debtor that does not qualify under § 109(a) would not have to countenance opposition to seeking this relief on the basis that it would be more appropriate or equitable to seek that relief in the context of a plenary chapter 11 case, because no such case could be commenced. Similarly, authorizing these types of releases in a chapter 15 case not involving a § 109(a) "debtor" would not risk that authorization being used later as precedent for granting analogous releases in the chapter 11 context, where these releases are highly controversial.

In this way, the *Al Zawawi* approach may make some relief under chapter 15 more available to individuals or entities that are not § 109(a) "debtors." Practically speaking, this sort of relief might be less valuable to a debtor with no U.S. assets. Moreover, while a foreign debtor's more attenuated connections to the U.S. may in some contexts make the granting of certain relief more likely, the U.S. court may nevertheless consider, when deciding whether to grant the relief, the effect that such relief would have on third parties that have stronger connections with the U.S. In other words, whether the entity is a § 109(a) "debtor" is just one piece of a complex puzzle in determining the legal availability and practical utility of chapter 15 relief.

The *Al Zawawi* approach seems focused on making "baseline" chapter 15 relief available where individuals or entities cannot satisfy § 109(a). In its application, the approach might both fall shorter, and extend further, than its intentions.

Conclusion

The *Al Zawawi* approach seems focused on making "baseline" chapter 15 relief available where individuals or entities cannot satisfy § 109(a). In its application, the approach might both fall shorter, and extend further, than its intentions. On the one hand, the approach may limit the "baseline" relief available under chapter 15, where the requirements of § 109(a) cannot be met. On the other hand, the separation of § 109(a) and 1502(1) standards may open the door to more expansive chapter 15 relief in cases where § 109(a) requirements are unsatisfied.

Fundamentally, the distinction between a § 109(a) "debtor" and a chapter 15 foreign "debtor," whether largely academic or having substantive effect, aligns with the broader distinction between chapter 15 on the one hand, and chapters 7 and 11 on the other hand. Chapter 15 is often most useful when the applicable entity owns assets in the U.S. and where § 109(a) would be satisfied. Yet the existence of a chapter 15 case may not be, in the first instance, derivative of U.S. assets but rather of a pending foreign insolvency proceeding that affects U.S. creditors.

Courts approaching these issues, like *Al Zawawi*, and looking past § 109(a) may be thinking about chapter 15 in a manner more consistent with its intended purpose as a vehicle to support non-U.S. insolvency proceedings. In any event, the precarious balance of chapter 15, being both part of the U.S. Bankruptcy Code and in a sense apart from it, remains alive in decisions like *Al Zawawi*, and that balance could influence outcomes in chapter 15 proceedings. abi

11 421 B.R. 685 (Bankr. S.D.N.Y. 2010).
12 *Id.* at 688.
13 *Id.* at 699.