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Using the Bankruptcy Code For **International Restructuring**

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Distressed non-U.S. business entities should consider Chapter 11 and Chapter 15[1] bankruptcy as a potential restructuring tool. Foreign entities with major creditors that are subject to U.S. jurisdiction can, and in many cases should, use the sophisticated and debtor-friendly U.S. reorganization laws to help resolve their business problems. While it may seem counterintuitive that a foreign entity could avail itself of the same restructuring rules under U.S. law afforded to U.S. companies, as detailed herein, a foreign entity only needs minimal ties to the United States to qualify for relief under U.S. bankruptcy laws. For example, a recent Southern District of New York bankruptcy case, *In re Berau Capital Resources Pte Ltd.*,[2] held that even an indenture with New York as its governing law constituted property to qualify a foreign entity as a debtor under the Bankruptcy Code. That case highlights one of many avenues by which a foreign entity may utilize a U.S. bankruptcy case to financially restructure its business. This creates valuable options for foreign entities. The effectiveness, however, of using the Bankruptcy Code by a foreign entity will need to be measured by looking at, among other things, whether its creditors will be bound by such laws.


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This article will explore (1) who qualifies as a debtor under the Bankruptcy Code; (2) the level of connection to the United States that is required for a foreign entity to be a debtor under the Bankruptcy Code, specifically the amount and types of property (both tangible and intangible) that have been held to satisfy §109; and (3) uses of Chapter 11 and Chapter 15 by foreign debtors.

Who Can Be a Debtor Under the Bankruptcy Code? Section 109 of the Bankruptcy Code, entitled "Who may be a debtor," provides that "only a person[3] that resides or has a domicile, a place of business, or property in the United States, or a municipality may be a debtor"[4] under the Bankruptcy Code. 11 U.S.C. §109(a). The property requirements under §109 are relatively easy to satisfy, which means that filing for bankruptcy protection in the United States—whether under Chapter 11 or Chapter 15—is a viable option for many businesses incorporated outside of the United States, even if such businesses engage in little or no business activities in the United States.

Property in the United States as a Basis for Being a Debtor. Property, even minimal or intangible property, that is located in the United States can serve as a foreign entity's

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"passport" into bankruptcy under U.S. laws. The Bankruptcy Code does not specify a specific minimum amount or threshold of property that is required to be in the United States in order for an entity to be a debtor in a U.S. bankruptcy case. Courts, including in New York, have held that de minimis property in the United States satisfies the eligibility requirements for who can be a debtor under the Bankruptcy Code. For example, "a dollar, a dime or a peppercorn" has been found to be sufficient to satisfy the property requirement of §109(a).[5]

Tangible Property. Bank accounts have historically been a common and simple way to satisfy the Bankruptcy Code's property requirement under §109(a). Retainers paid to professionals (e.g., lawyers and financial advisors) have also been a typical basis for jurisdiction for a foreign debtor under the Bankruptcy Code.

Courts have held that bank accounts, even with small amounts in them, constitute property for purposes of §109(a). For example, in *In re Global Ocean Carriers Ltd.*, the Delaware bankruptcy court held that a relatively small amount of funds (when compared to the debtors' total debt) held in U.S. bank accounts was sufficient to satisfy §109(a) in a Chapter 11 filing for a Greek shipping company and its affiliates, stating "bank accounts constitute property in the United States for purposes of eligibility under section 109 of the Bankruptcy Code, *regardless of how much money was actually in them on the petition date*."[6] When faced with a challenge based on the fact that the bank accounts were only in the name of one of the debtors, the bankruptcy court determined the fact to be irrelevant due to the retainer paid by the debtors prefiling to their bankruptcy counsel, stating, "[t]he retainers were paid on behalf of all the Debtors and, therefore, all the Debtors have an interest in those funds. It is not relevant who paid the retainer, so long as the retainer is meant to cover the fees of the attorneys for all the Debtors, as it clearly was in these cases."[7] As such, the retainer (along with the bank accounts) was deemed sufficient to satisfy the eligibility requirements under §109(a) for all of the debtors.

Even if a foreign corporation is unable to satisfy the minimal requirements under §109(a), it may still be able to achieve the protection it seeks in the United States by filing a petition under Chapter 15.

Intangible Property. Intangible property has also been found to be a valid basis for jurisdiction under §109(a). For example, claims and/or causes of action against U.S. entities or property have been held to be property of a foreign entity sufficient to satisfy §109(a).[8] Highly speculative claims against U.S. entities or property may not, however, be a sufficient basis for §109(a).[9]

Further, in evaluating §109(a), the Southern District of New York has stated "[c]ontracts create property rights for the parties to the contract,"[10] and held that such intangible property rights satisfy the requirements of §109(a). Specifically, in *In re Berau*, the Southern District of New York, in a Chapter 15 case, held that an indenture with a foreign entity as obligor, but that contained both a New York choice of law provision and New York forum selection clause, constituted intangible property in the United States sufficient to satisfy §109(a).[11] This case highlights the possibility of using indentures or even other types of contracts with U.S. counterparties or governed under U.S. law as a basis for a foreign entity to seek relief under the Bankruptcy Code.[12]

Uses of Chapter 11 and Chapter 15 by Foreign Debtors. Filing for relief under Chapter 11 may therefore be a viable restructuring tool for foreign entities with very minimal connections to the United States. It may be a particularly useful tool if such entities have creditors in the United States, such as secured credit lenders and bondholders, who must comply with orders entered by a U.S. court. Additionally, choosing to file for bankruptcy in the United States may provide several other advantages to a foreign entity (depending on the applicable laws in that entity's host country), including the global reach of the automatic stay, the lack of an insolvency requirement, the ability for existing management to remain in place, and the ability to use a prepackaged or prearranged plan of reorganization to quickly and efficiently complete a balance sheet restructuring. The availability of U.S. bankruptcy filings for foreign corporations may also be an effective means of convincing recalcitrant parties to negotiate an out of court restructuring, even if a Chapter 11 or Chapter 15 filing is never consummated.

It is important to note, however, that in order for a U.S. bankruptcy case to have a valuable impact for a foreign debtor, the orders entered by the U.S. bankruptcy court must either (1) be enforceable against the foreign debtor's creditors and/or (2) be recognized in foreign jurisdictions. An order would be enforceable against a foreign debtor's creditors if those creditors are themselves subject to U.S. jurisdiction, so that such creditors would not want to violate an order of a U.S. court, for fear of sanctions and/or other penalties.[13] In addition, certain foreign jurisdictions may recognize and give effect to U.S. orders in their jurisdictions.[14]

Even if a foreign corporation is unable to satisfy the minimal requirements under §109(a), it may still be able to achieve the protection it seeks in the United States by filing a petition under Chapter 15. A Chapter 15 case is a judicial proceeding in which a U.S. bankruptcy court formally recognizes a foreign proceeding, which can bind creditors in the United States who may argue that a foreign bankruptcy court had no jurisdiction over them.

There is a split in decisions over whether a debtor's "foreign representative" must satisfy §109(a) in order to commence a Chapter 15 case. Specifically, the Second Circuit has held that §109(a)'s eligibility requirements apply to cases filed under both Chapter 11 and Chapter 15, whereas a 2013 ruling by a Delaware bankruptcy judge indicates that §109(a) should not apply to Chapter 15 filings.[15] Therefore, in certain jurisdictions such as Delaware, filing for Chapter 15 may be a viable alternative for foreign entities seeking the protections afforded under U.S. bankruptcy laws but lacking even minimal U.S. connections.

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1. Unless otherwise indicated, all references to Chapters and Sections are to those subdivisions of Title 11 of the United States Code (Bankruptcy Code). References to Chapter 11 (entitled "Reorganization") are to 11 U.S.C. §§1101-1174 and references to Chapter 15 (entitled "Ancillary and Other Cross-Border Cases") are to 11 U.S.C. §§1501-1532.

2. 580 B.R. 80 (Bankr. S.D.N.Y. 2015 (*In re Berau*)).

3. A "person" is defined under the Bankruptcy Code to include a/an "individual, partnership, and corporation, but does not include governmental unit" except with certain exceptions. 11 U.S.C. §101(41). A "corporation" is defined under the Bankruptcy Code to include a/an "(i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses; (ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association; (iii) joint-stock company; (iv) unincorporated company or association; or (v) business trust; but (B) does not include limited partnership." 11 U.S.C. §101(9). See also *In re 4 WHIP, LLC*, 332 B.R. 670, 672 (Bankr. D. Conn. 2005) ("In view of the use of the non-exclusive term, 'includes', and the absence of specific exclusion, the Court concludes that the Bankruptcy Code's qualification criteria are sufficiently liberal to permit an inchoate or de facto limited liability company such as 4–Whip to be a debtor, so long as that entity had a bona fide business existence prior to the Petition Date.").

4. 11 U.S.C. §109(a).

5. *In re McTague*, 198 B.R. 428, 431-32 (Bankr. W.D.N.Y. 1996). This decision also cautions, however, "[i]f property has been specifically placed or left in the United States for the sole purpose of creating eligibility that would not otherwise exist, then dismissal might be appropriate on other grounds, such as a bad faith filing." Id. at 432. See also *In re Yukos Oil Co.*, 321 B.R. 396, 411 (Bankr. S.D. Tex. 2005) (holding that although §109(a) was satisfied, based on a "totality of the circumstances" the Chapter 11 case was dismissed).

6. 251 B.R. 31, 39 (Bankr. D. Del. 2000) (emphasis added). See also *In re McTague*, 198 B.R. at 431 (holding that $194 in a bank account was sufficient property to satisfy §109(a) of the Bankruptcy Code for an individual debtor); *In re Iglesias*, 226 B.R. 721 (Bankr. S.D. Fla. 1998) (holding that $522 in the bank account of an individual Argentinian debtor was sufficient).

7. *In re Glob. Ocean Carriers Ltd.*, 251 B.R. at 39.

8. *In re Octaviar Admin. Pty Ltd.*, 511 B.R. 361 (Bankr. S.D.N.Y. 2014).

9. *In re Head*, 223 B.R. 648, 652 (Bankr. W.D.N.Y. 1998).

10. *In re Berau*, 540 B.R. at 83; see, e.g., *Wallach v. Nowak (In re Sherlock Homes of W.N.Y., Inc.)*, 246 B.R. 19, 24-25 (Bankr. W.D.N.Y. 2000) ("Contract rights are assets of the estate, even when those contract rights would have had limited or even no value to the debtor itself.").

11. *In re Berau*, 540 B.R. at 80, 83.

12. But see Id., 540 B.R. at 84, fn. 5 ("Other types of contracts—such as patents, trademark or intellectual property licensing agreements—entered into by a foreign debtor that include New York choice of law and foreign selection clauses may satisfy the requirements of N.Y. General Obligation Law §§5-1401 and 5-1402. The Court does not decide whether such contracts satisfy the section 109(a) 'property in the United States' eligibility requirement.").

13. See, e.g., *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 474 B.R. 76, 82 (S.D.N.Y. 2012) ("[A] bankruptcy court can enforce the automatic stay extraterritorially only against entities over which it has in personam jurisdiction.").

14. An example of a jurisdiction that has historically given such treatment to certain U.S. bankruptcy orders is Canada. See, e.g., *Microbiz Corp. v. Classic Software Sys. Inc.* (1996) 45 C.B.R. (3d) 40 (Ont. Ct. J. (Gen. Div.)) (explaining the importance of comity between certain countries to justify recognizing and enforcing U.S. bankruptcy proceedings for a New Jersey debtor in Canada, as long as the "substantial connection" test set forth in *Morguard Investments v. De Savoye*, (1990) 3 S.C.R. 1077, 1990 CanLII 29 (S.C.C.) is satisfied). See also *In re McTague*, 198 B.R. at 430 ("[I]t is fundamental that those orders can be enforced in a foreign nation only to the extent that the foreign nation grants those orders 'full faith and credit' as a matter of comity, treaty or convention.").

15. See *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 247 (2d Cir. 2013) (holding that Bankruptcy Code §109(a) requirements must be satisfied before a bankruptcy court can grant recognition of foreign proceeding); cf. *In re Bemarmara Consulting A.S.*, Case No. 13-13037 (KG), Docket No. 38 (Bankr. D. Del. Dec. 17, 2013) (holding that Bankruptcy Code §109(a) does not apply to foreign representatives filing Chapter 15 petitions).