

11th Circ. Ruling May Foreshadow Ch. 15 Clashes

By **Luke Barefoot, Thomas Kessler and Madeline Finnegan** (May 15, 2024, 5:01 PM EDT)

The U.S. Court of Appeals for the Eleventh Circuit's April decision in *In re: Talal Qais Abdulmunem Al Zawawi* has introduced a split from the U.S. Court of Appeals for the Second Circuit regarding whether debtors in foreign proceedings must have a domicile, place of business or property in the U.S. in order to be eligible for recognition under Chapter 15.

Divergence on this issue calls attention to the understudied nature of Chapter 15, and provides a preview of potential future clashes over how it operates in conjunction with other provisions of the U.S. Bankruptcy Code, especially as Chapter 15 proceedings become more common.



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The Definition of "Debtor" Under Chapter 15

To obtain recognition of foreign insolvency proceedings under Chapter 15, the foreign proceeding and underlying debtor must meet various requirements under Section 1517.[1]

Under Section 1502(1) of Chapter 15, a "debtor" in a foreign main or ancillary proceeding is defined, for the purposes of Chapter 15, as "an entity that is the subject of a foreign proceeding." [2]



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Outside of Chapter 15, Section 109(a) of Chapter 1 of the Bankruptcy Code requires that a debtor "resides or has a domicile, a place of business, or property in the United States," notwithstanding any other provision of Section 109.[3]

Section 103(a) provides that Chapter 1, which includes Section 109(a), "appl[ies] in a case under Chapter 15." [4]

The Second Circuit Decision

The Second Circuit adopted a plain-text interpretation of the interaction between Sections 103(a), 109(a) and Chapter 15 in *In re: Barnetin* in 2013 to conclude that the definition of "debtor" under Section 109(a) of Chapter 1 applies to debtors in a foreign main proceeding under Chapter 15.



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The court reasoned that because Section 103 provides that Chapter 1 of Title 11 applies generally to Chapter 15, and because Chapter 1 includes the definition of "debtor" as laid out in Section 109(a),

Section 109(a) applies to debtors in a foreign main proceeding under Chapter 15.[5]

Thus, the court found, Chapter 15 requires that foreign debtors have property within the U.S. to obtain recognition in U.S. bankruptcy court.[6]

Although the Second Circuit recognized the stated purpose of Chapter 15 was to incorporate the United Nations Commission on International Trade Law's model law and enhance the ease and efficiency of resolving foreign insolvency proceedings, it noted that the model law provides for adopting states to incorporate additions or revisions to the model law, which the Second Circuit interpreted Congress to have done by incorporating Section 109(a) into the Chapter 15 debtor requirements via Section 103.[7]

The Eleventh Circuit Decision

Faced with that same question in *In re: Talal Qais Abdulmunem Al Zawawi*, the Eleventh Circuit went a different way.

Contrary to the Second Circuit, it found that Section 109(a) is not incorporated into Chapter 15, concluding that foreign debtors "need only be properly subject" to a foreign proceeding to obtain Chapter 15 recognition in U.S. bankruptcy courts.

This affirmed the U.S. Bankruptcy Court for the Middle District of Florida and the U.S. District Court for the Middle District of Florida decisions recognizing an English insolvency proceeding with respect to Omani citizen Talal Al Zawawi, who had no assets in the U.S.

U.S. Circuit Judge Barbara Lagoa's opinion noted that the court's decision reflected fidelity to what the Eleventh Circuit found was binding precedent set in *In re: Goerg*, established by the Eleventh Circuit in 1988.

In *Goerg*, the court concluded that Section 109(a) did not apply to foreign ancillary insolvency proceedings under Section 304 of the Bankruptcy Code, a predecessor to Chapter 15, by relying heavily on the purpose of the statute to "help[] further the efficiency of foreign insolvency proceedings involving worldwide assets." [8]

Finding the language of the relevant provisions of Section 304 to be sufficiently similar to those provisions in Chapter 15,[9] in *Al Zawawi*, Judge Lagoa concluded that the panel was required to follow *Goerg* and affirm the bankruptcy court's recognition of the instant English ancillary proceeding.

In conflicting concurrences, Judge Lagoa and U.S. Circuit Judge Gerald Bard Tjoflat wrestled with whether the court's reasoning in *Goerg* was correct. Judge Lagoa stated that, if not for the binding precedent of *Goerg*, she would reverse the bankruptcy court's decision and follow the Second Circuit's logic, interpreting Chapter 15 under the plain-text reading of Section 103(a) to incorporate Section 109(a)'s debtor requirements.[10]

By contrast, Judge Tjoflat, who penned the *Goerg* decision, reaffirmed the rationale of *In re: Goerg*, noting that the purpose of Chapter 15 — to incorporate the UNCITRAL model law and facilitate efficient resolution of foreign insolvency proceedings — counsels against incorporating the more stringent debtor requirements of 109(a) into foreign ancillary proceedings.

Judge Tjoflat also expressed concern that requiring foreign debtors to have property in the U.S. for

recognition could lead to debtors disposing of U.S.-based assets so as to fall outside of Section 109(a)'s debtor definition and evade recognition. He opined that Congress could have, but did not, write "such a self-defeating statute."^[11]

The Future of Chapter 15 Debtor Interpretation

This circuit split, which took more than a decade to develop, also highlights that Chapter 15 is a relatively underexamined chapter of the Bankruptcy Code.

Chapter 15 cases are far less common than proceedings under other chapters of the Bankruptcy Code — fewer than 160 were filed in 2023 as compared to more than 7,000 corporate Chapter 11 filings.^[12]

As a result, courts have had fewer opportunities to interpret Chapter 15's operative provisions and how they interact with each other as well as other parts of the Bankruptcy Code, particularly where Chapter 15 cases that simply aim to give effect to an already agreed-upon foreign restructuring are often uncontested.

However, many countries throughout Latin America and Asia, including Brazil^[13] and Singapore,^[14] have recently adopted bankruptcy reforms to transition to reorganization-based systems of handling insolvency proceedings, including by adopting the UNCITRAL model law on cross-border insolvency.

As reorganization-based systems become more popular, parties may increasingly seek recognition of foreign bankruptcy proceedings in the U.S., leading courts to further grapple with Chapter 15's relationship with other provisions of the Bankruptcy Code.

Against this backdrop, the Eleventh Circuit's split from the Second Circuit on foreign debtor requirements may serve as a preview of what's to come.

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[1] See 11 U.S.C. § 1517.

[2] See 11 U.S.C. § 1502(1).

[3] See 11 U.S.C. § 109(a).

[4] See 11 U.S.C. § 103(a).

[5] In re: Barnet, 737 F.3d 238, 247 (2d Cir. 2013).

[6] Id.

[7] In re: Barnet, 737 F.3d 238, 251 (2d Cir. 2013).

[8] In re: Goerg, 844 F.2d 1562, 1568 (11th Cir. 1988).

[9] In re: Talal Qais Abdulmunem Al Zawawi, ___, at 20 (11th Cir. 2024).

[10] In re: Talal Qais Abdulmunem Al Zawawi, ___, at 21 (11th Cir. 2024).

[11] In re: Talal Qais Abdulmunem Al Zawawi, ___, at 72 (11th Cir. 2024).

[12] <https://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2023/12/31>.

[13] <https://resourcehub.bakermckenzie.com/en/resources/global-restructuring-and-insolvency-guide/latin-america/brazil/topics/effect-of-process>.

[14] <https://www.engage.hoganlovells.com/knowledgeservices/news/singapore-international-commercial-court-singapores-latest-step-in-becoming-an-international-debt-restructuring-hub>.