

***Octaviar* Revisited – Litigation Claim is Sufficient Basis to Obtain Chapter 15 Recognition of Australian Proceeding**

On June 19, 2014, the U.S. Bankruptcy Court for the Southern District of New York in *In re Octaviar Admin. Pty Ltd*, Case No. 14-10438 (SCC) (Bankr. S.D.N.Y. June 19, 2014), ECF No. 18 (the "Opinion"), granted the Foreign Representatives' petition for recognition of the Australian liquidation proceeding of Octaviar Administration Pty Ltd (in liquidation) ("Octaviar") pursuant to Chapter 15 of the Bankruptcy Code based on the presence of "property in the United States" in the form of: (i) claims and causes of action against U.S. defendants and (ii) a retainer held by Octaviar's U.S. counsel. This Bankruptcy Court decision follows a Second Circuit decision that held that the eligibility standards in § 109 of the Bankruptcy Code – which require a debtor to have "a domicile, a place of business, or property in the United States" – apply to Chapter 15 debtors and vacated the Recognition Order and remanded to the Bankruptcy Court for further proceedings.

Facts and Procedural History

The First Petition for Recognition

Octaviar, a company incorporated in Queensland, Australia, is part of the Octaviar Group which, prior to the current liquidation proceedings had engaged various businesses in the travel and tourism and financial industries. *Id.* at 2. A January 2008 announcement of planned business separations triggered a credit default and ultimately, the sale of certain business assets, and Octaviar's commencement of a voluntary administration in Australia (the "Australian Proceeding") and passage of a resolution to wind up the company. *Id.* at 2-3. In September 2009, the Australian Court appointed Katherine Elizabeth Barnet and William John Fletcher as the liquidators of Octaviar (together, the "Foreign Representatives"). *Id.* at 3.

On August 13, 2012, the Foreign Representatives filed a petition seeking foreign recognition of Octaviar's Australian Proceeding as a "foreign main proceeding" pursuant to Chapter 15 of the Bankruptcy Code. Ch. 15 Pet. Recog. Foreign Proceed., *In re Octaviar Admin. Pty Ltd*, Case No. 12-13443 (SCC), (Bankr. S.D.N.Y. Aug. 13, 2012), ECF No. 1. Octaviar's petition asserted that the Chapter 15 case was filed to ensure that Octaviar would be liquidated in an orderly manner and that any potential claims or causes of action could be fully investigated and, if necessary, prosecuted in order to maximize recoveries to creditors and other parties in interest in the Australian proceeding. Verified Pet. Ch. 15 Recog. Foreign Main Proceed., *In re Octaviar Admin. Pty Ltd*, Case No. 12-13443 (SCC), (Bankr. S.D.N.Y. Aug. 13, 2012), ECF No. 2.

Drawbridge Special Opportunities Fund LP (“Drawbridge”) – a target of discovery and potential claims by Octaviar– opposed the Foreign Representatives’ original petition for Chapter 15 relief primarily on the basis that Octaviar did not meet the eligibility standards for who may be a debtor under Bankruptcy Code § 109, which requires that a debtor have a “domicile, a place of business, or property in the United States” 11 U.S.C. § 109(a). Opinion at 4.

The Bankruptcy Court concluded that § 109 does not require that a debtor in a foreign proceeding have a place of business or property in the United States, and entered an order recognizing Octaviar’s Australian proceeding as a foreign main proceeding. *Id.* at 5. Following a direct appeal of the order to the Court of Appeals for the Second Circuit, the Second Circuit reversed the Bankruptcy Court’s ruling and held that a foreign debtor must satisfy the requirements of § 109 of the Bankruptcy Code in order to obtain Chapter 15 recognition of its foreign insolvency proceeding. *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013) (“*Barnet*”).

The Second Petition for Recognition

Shortly after the Second Circuit announced its decision, in February 2014, the Foreign Representatives of Octaviar filed a new petition for recognition of its Australian proceeding as a foreign main proceeding. Ch. 15 Pet. Recog. Foreign Proceed., *In re Octaviar Admin. Pty Ltd*, Case No. 14-10438 (SCC), (Bankr. S.D.N.Y. Feb. 27, 2014), ECF No. 1. By that time, the Foreign Representatives had commenced actions against Drawbridge and certain related entities in federal and state courts in New York, seeking over \$200 million in clawback claims related to an alleged scheme by Drawbridge to siphon off the proceeds from Octaviar’s sale of a group of subsidiary companies in an effort to gain full recovery on prior loans made to Octaviar by a Drawbridge affiliate. See *Katherine Elizabeth Barnet and William John Fletcher, as Liquidators of Octaviar Administration Pty Ltd (in Liquidation) v. Drawbridge Special Opportunities Fund LP, et al.*, Civ. No. 14-1376 (S.D.N.Y. Feb. 27, 2014) and *Katherine Elizabeth Barnet and William John Fletcher, as Liquidators of Octaviar Administration Pty Ltd (in Liquidation) v. Drawbridge Special Opportunities Fund LP, et al.*, Index No. 650656/2014 (N.Y. Sup. Ct. Feb. 28, 2014). Octaviar’s counsel also held a retainer of \$ 10,000 at the time the second petition was filed. Opinion at 14.

Drawbridge again objected to the Chapter 15 petition, arguing that neither the litigation claims nor the retainer constituted adequate property for purposes of § 109(a). *Id.* at 7–8. The Bankruptcy Court disagreed, and granted the petition for recognition. *Id.* at 1-2.

The Court's Decision

The Bankruptcy Court concluded that Octaviar has property in the United States in the form of claims or causes of action against Drawbridge and other U.S. entities. The Bankruptcy Court stated that it is well established that claims and causes of action, though intangible, constitute “property.” *Id.* at 10. The Bankruptcy Court rejected Drawbridge’s argument that it should consider that Octaviar had only “potential future causes of action” at the time Octaviar’s original petition was filed, instead relying on the fact that, at least as of the filing of the second petition, complaints had already been filed in Federal and State Court. *Id.* at 11-12. The Bankruptcy Court considered various legal arguments whether the claims were “located” in the United States, and ultimately concluded it could find them to constitute U.S. property. *Id.* at 12.

The Bankruptcy Court further concluded that Octaviar also has property in the United States in the form of an undrawn retainer in the possession of the Foreign Representatives’ counsel. Drawbridge argued that payment of the retainer constituted an improper attempt to “manufacture eligibility” to file for recognition under Chapter 15 and thus should be excluded. *Id.* at 15. The Bankruptcy Court rejected this argument, applying the plain words of § 109 as advised by the Second Circuit in *Barnet* and noting that § 109 does not require a debtor to have “substantial” property in the United States or require any inquiry into the circumstances surrounding the debtor’s acquisition of the property.¹ *Id.* at 16.

Finally, the Bankruptcy Court stated that the policy and purposes of Chapter 15 would be undermined if the Foreign Representatives were deprived of an opportunity to bring causes of action on behalf of Octaviar for the benefit of its creditors. *Id.* at 17. The Bankruptcy Court rejected Drawbridge’s arguments that the Australian litigation was the proper forum for all of Octaviar’s claims, noting that Drawbridge refused to consent to jurisdiction in Australia. *Id.* at 17. The Bankruptcy Court concluded that granting recognition of the Australian proceeding would further the goals of Chapter 15 by ensuring that the Foreign Representatives have the ability to pursue properly identified claims and causes of action against Drawbridge and other U.S. entities in the United States. *Id.* at 19.

Conclusion

By applying the statute as written, reading the types of assets that can constitute property in the United States broadly, the Bankruptcy Court’s decision provides a broad basis for foreign debtors seeking to qualify for recognition of a foreign proceeding under Chapter 15. While consistent with the Second Circuit’s plain meaning approach from

¹ The Bankruptcy Court noted that in appropriate circumstances, not found in this case, a court could abstain or dismiss a case even if a debtor had minimal property located in the United States. *Id.* at 17.

Barnet, the Bankruptcy Court's decision reflects a liberal reading of "property in the United States" in § 109 as it applies to Chapter 15, thereby somewhat reversing the chilling effect that the *Barnet* decision may have had on foreign debtors' willingness to seek Chapter 15 relief in the Southern District of New York, or in the United States.

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