Chapter 15 Recognition in the United States: Is a Debtor "Presence" Required?

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Abstract

A recent appellate decision in the USA (In re Barnet) confuses the foreign debtor with the foreign insolvency representative. Notwithstanding the focus of US bankruptcy law on a foreign proceeding as the object of an ancillary case under Chapter 15, with the foreign representative as its emissary, the decision dismayed the international insolvency community by ruling that section 109(a) of the Bankruptcy Code applies to recognition under Chapter 15. The result is to require that the debtor in a foreign proceeding has some minimum jurisdictional presence in the USA as a condition of Chapter 15 recognition. Such a presence might include a domicile, a place of business, or property. While there might be a "backdoor" device avoiding this result, the decision creates serious confusion and a potential obstacle to full international recognition.

I. Introduction

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency[1] and its US embodiment, Chapter 15 of

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1. UNCITRAL is the United Nations Commission on International Trade Law. The Model Law and Guide to Enactment ("Model Law", "Guide") can be found at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html. The Guide was updated in 2013 but nearly all of the original text remains, albeit with different paragraph numbering. Citations in this article are to the updated Guide and a "concordance table" is included as an appendix to enable conversion to the original paragraph numbers. Any relevant differences between the updated Guide and the original Guide will be noted by references to the "1997 Guide."

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the Bankruptcy Code[2] (the "Code")[11] are designed to provide assistance to foreign courts or foreign representatives in connection with foreign insolvency proceedings.[3] As a threshold requirement for obtaining judicial assistance in a country that has adopted the Model Law, a foreign representative must obtain an order granting *recognition* of a foreign proceeding.[4] Recognition constitutes a judicial determination that the foreign proceeding falls within the scope of the Model Law or Chapter 15 and entitles *the foreign representative* to seek relief from the host country's courts.[5]

Whether the debtor that is the subject of a foreign proceeding has a domicile, place of business, or property in the United States is not relevant to recognition of the foreign proceeding. The foreign representative is the sole actor for the foreign proceeding in a case under the Model Law or Chapter 15, and the foreign proceeding is the intended beneficiary of the case. The case is not the equivalent of a "full" bankruptcy case: "Cases brought under Chapter 15 are intended to be ancillary to cases brought in a debtor's home country, unless a full US bankruptcy case is brought under another chapter."[6] The debtor cannot commence a Model Law or Chapter 15 case and cannot request or receive relief in such a case; such rights are granted only to the foreign representative.[7] An order recognizing a foreign proceeding "shall be entered" if the foreign proceeding and the foreign representative are within the statutory definitions of those terms and if the foreign proceeding is either a foreign main proceeding or a foreign nonmain proceeding, as those terms are defined.[8] Recognition requires the debtor to be "the subject of a foreign proceeding", but Chapter 15 requires no determination concerning the attributes or financial circumstances of the debtor. If the debtor desires to obtain bankruptcy relief in the United States, it must file a full US bankruptcy.[9]

Nonetheless, the Second Circuit Court of Appeals in a recent case, *In re Barnet*,[10] ruled that section 109(a) of the Bankruptcy Code (the "Code")[11] requires that the debtor in a foreign insolvency proceeding have a presence in the USA as a precondition to recognition of the proceeding in the USA. Section 109(a) governs the

2. Chapter 15 *Ancillary and Other Cross-Border Cases*, 11 U.S.C.§ § 1501-1532 .
3. Model Law, Article 1(a); 11 U.S.C. § 1501(1)(b).
4. Model Law, Article 15; 11 U.S.C. § 1515.
5. Model Law, Articles 9, 17, 21; 11 U.S.C. § § 1509, 1517, 1521. Limited, urgently needed relief may be granted between the time of the filing of the application for recognition and the decision on recognition. Model Law, Article 19; 11 U.S.C. § 1519.
6. House Report 109-31, pt. 1, 109th Cong., 1st Sess. (2005) ("H.R. Rep.") at 106.
7. Model Law, Articles 2, 15, 19-21, 22; 11 U.S.C. § § 1501, 1515, 1519, 1521, 1522. The debtor can at most oppose recognition of the foreign proceeding (Federal Rule of Bankruptcy Procedure 1011) and can be heard on whether its interests are sufficiently protected in the context of relief sought by or granted to the foreign representative. Model Law, Article 22(1), 11 U.S.C. § 1522(a).
8. Model Law, Articles 2, 17; 11 U.S.C. § § 101(23), 101(24), 1502(4), (5), 1517.
9. The confusion on this point may arise in part because foreign proceedings sometimes involve a debtor-in-possession ("DIP"), an approach that became prominent in Chapter 11 proceedings in the USA but has found favor in some other countries.
10. *In re* Katherine Elizabeth Barnet (Drawbridge Special Opportunities Fund, LP v. Katherine Elizabeth Barnet, Foreign Representative), 737 F. 3d 238 (2d Cir. 2013) ("*Barnet*"). Katherine Elizabeth Barnet and William John Fletcher are the liquidators of Octaviar Administration Pty Ltd. and its foreign representatives. *Id.* at *241. As to the *Barnet* decision dismaying the insolvency community, *see*, e.g., David J. Moulton, *2d Circuit Raises a Drawbridge to Chapter 15*, Law 360, December 20, 2013; *Did the Second Circuit Alter the Chapter 15 Architecture*, Davis Polk Global Distress Signal, Spring 2014; John Kibler, *Barnet Sets Stage for Potential Chapter 15 Circuit Split*, Law 360, February 20, 2014.
11. 11 U.S.C. § § 101, *et seq*.

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eligibility of debtors in cases under other chapters of the Code and states that "only a person that resides or has a domicile, a place of business, or property in the United States may be a debtor under this title." The Court professed to use a plain meaning rule to reach and defend its conclusion, but the plain meaning approach is inappropriate for several reasons: while it is plain that section 103(a) applies Chapter 1 to Chapter 15, the way in which section 109(a) functions in relation to Chapter 15 is not plain and requires a structural analysis that the Court sidestepped; the term "debtor" as used in section 109(a) cannot plainly include "debtor" as used in Chapter 15; the mandate in section 1508 that, in interpreting Chapter 15, courts shall consider its international origin and the need to promote an application that is consistent with the needs of international insolvency practice requires flexibility not literal rigidity.[12] The correct answer to how section 109(a) meshes with Chapter 15 is found in the structure of the Code, including the very specialized function of Chapter 15, the nature of the relief it grants, the facially different definitions of "debtor" and its origin in a Model Law that disregards the nature of the debtor.[13]

There may or may not be a way around *Barnet*. If the device of parachuting some property (e.g., a bank account) into the USA works, then the decision is relatively easily dodged,[14] although the specter of a challenge as a bad faith filing based upon manufactured jurisdiction will remain. If that controversial solution does not work, the *Barnet* decision may create serious barriers to relief for foreign debtors – a result wholly inconsistent with the Congressional purpose in enacting Chapter 15.

This article begins with a summary of the facts and the holding in *Barnet*. Subsequently, it discusses the context and structure of the Model Law and Chapter 15, explaining why section 109(a) does not apply to Chapter 15 and why the decision in *Barnet* came to the wrong conclusion. It also discusses a recent case in which a clear-headed state judge, guided by a perceptive bankruptcy judge, understood the workings of Chapter 15 and its relationship to international insolvency. That case also provides examples of why section 109(a) applies in the context of Chapter 15 even though it does not apply to recognition.

II. Octaviar's Liquidators Seek Recognition

A. Background

In August of 2012, the liquidators of Octaviar Administration Pty Ltd. ("Octaviar"), an Australian company, filed a Verified Petition Under Chapter 15 for Recognition of a Foreign Main Proceeding in the US Bankruptcy Court for

12. Section 1508 provides: "In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."

13. 11 U.S.C. § 101(13) (defining "debtor" with terms repeated in section 109(a), as a person "concerning which a case under this title has been commenced"); 11 U.S.C. § 1502(1) (defining debtor for purposes of Chapter 15 as "an entity that is the subject of a foreign proceeding").

14. See Part VI. Below.

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the Southern District of New York.[15] Prior to its demise, Octaviar provided various services to a large, affiliated corporate group comprised of four business units: a travel and tourism business, a corporate and investment business, a funds management business and a structured finance advisory business.[16] Following an event of default on an AUD $150 million finance facility from an Australian affiliate of Drawbridge Special Opportunities Fund LP ("Drawbridge"), the majority of the travel and tourism business was sold, the finance facility was paid in full and, on 3 October 2008, the directors of Octaviar placed it into voluntary administration.[17] On 9 September 2009, the Australian court appointed Katherine Elizabeth Barnet and William John Fletcher as Liquidators.[18]

B. 2012 Chapter 15 petition

On 13 August 2012, the Liquidators, as Foreign Representatives, filed a verified petition under sections 1504 and 1515 seeking an order recognizing the Australian liquidation proceeding as a foreign main proceeding and granting additional relief.[19] The Foreign Representatives acknowledged that Octaviar had no business in the USA but alleged: "Nevertheless, [Octaviar] may have assets in the United States in the form of claims and causes of action against entities located in the United States. The Petitioners intend to investigate these potential claims or causes of action and have filed this Chapter 15 petition to facilitate this investigation."[20] Drawbridge opposed recognition, asserted that section 109(a) applied and posited that Octaviar did not satisfy its requirements.[21]

The Foreign Representatives countered that section 109(a) did not apply because Octaviar was not seeking to be a debtor under title 11. Instead, the Foreign Representatives were seeking recognition of a foreign proceeding and the Chapter 15 case would be an ancillary proceeding to the foreign proceeding.[22] The Foreign Representatives noted that several bankruptcy courts had concluded that the eligibility standards of section 109(a) did not apply to a debtor in a foreign proceeding.[23]

C. Recognition granted, certified for direct appeal

The Bankruptcy Court found that the Octaviar Australian proceeding met the definitional requirements of a foreign proceeding under section 101(23), that it was a foreign main proceeding under section 1502(4), that the Foreign

15. See ***Foreign Representative*** **Octaviar Administration Pty Ltd**., Case No. 12-13443, United States Bankruptcy Court, Southern District of New York ("Chapter 15 Case"). *See also In re* Barnet, 737 F. 3d 238 at 241.
16. Memorandum Opinion In Support Of Certification Of Direct Appeal To The Court of Appeals For The Second Circuit, Chapter 15 Case, Doc. 47. p.2–3.
17. Id. at 3–4.
18. Id.
19. Verified Petition under Chapter 15 for Recognition of a Foreign Main Proceeding, Chapter 15 Case, docket No. 2.
20. Id. at ¶ ¶ 36, 37.
21. Chapter 15 Case, docket No. 13, p.2.
22. Chapter 15 Case, docket No. 16, p.4.
23. Id. at 6, citing, inter alia, *In re* Toft, 453 B.R. 186, 193 (Bankr. S.D.N.Y. 2011), *In re* Fairfield Sentry Litig., 458 B.R. 665, 682 (S.D.N.Y. 2011) and cases to the same effect under section 304, the predecessor to Chapter 15.

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Representatives were foreign representatives as defined in section 101(24), that the petition complied with section 1515, that there was no public policy violation and that venue was proper under 28 U.S.C. § 1410. On 6 September 2012, the Bankruptcy Court entered an order granting recognition pursuant to section 1517(a).[24]

Drawbridge appealed the Recognition Order, and the Bankruptcy Court granted a joint application for certification of direct appeal to the Second Circuit.[25] The Court of Appeals held that the foreign proceeding could not be recognized because the Liquidators failed to prove that the debtor had assets, domicile, or a place of business in the USA as required by section 109(a).[26] The court held that the application of that section was required by the plain meaning rule of statutory interpretation.[27]

III. Recognition Under the Model Law and Chapter 15

A. The Model Law and Guide to enactment

UNCITRAL began a process in 1994 that culminated in 1997 with the adoption of the Model Law on Cross-Border Insolvency – "a major improvement in dealing with cross-border insolvency cases."[28] Seventy-six countries and thirteen international organizations participated in the UNCITRAL Working Group on Insolvency Law that produced the Model Law and the Guide.[29] The Model Law "is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency."[30] The Guide embodies UNCITRAL's thinking "that the Model Law would be a more effective tool if it were accompanied by background and explanatory information…[that] would also provide useful insight to those charged with interpretation and application of the Model Law, such as judges, and other users of the text such as practitioners and academics."[31] Because Congress explicitly decided to track the language of the Model Law as closely as possible, the history and commentary underlying the Model Law are especially important and the Code and legislative history require that they be considered in interpreting Chapter 15.[32]

24. Chapter 15 Case, docket No. 18 (the "Recognition Order"). The Bankruptcy Court reasoned: "I'm persuaded by the reading and the language in the *Toft* opinion, I'm persuaded by the observations of the courts in *Fairfield Sentry* and frankly I'm persuaded by the plain words of the statute in which I believe congress was looking separately at chapter 15 and notwithstanding your pointing out the various cross references." Transcript of September 6, 2012 hearing, Chapter 15 Case, docket No.20, p. 30.

25. Barnet, 737 F.3d at 241.

26. Id. at 247.

27. Id. at 246.

28. Guide, at 12–16.

29. Id. at 16. To date, twenty-one countries have adopted the Model Law. http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html

30. Id. at 1.

31. Id. at 17.

32. See text at Section III.D., infra

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B. Recognition under the Model Law

When deliberations began at UNCITRAL in 1995, there were no relevant international agreements or model laws, except a handful of regional treaties (e.g., in Scandinavia). At that time, obtaining judicial recognition of a foreign bankruptcy quickly and cheaply enough to capture assets and prevent waste was quite difficult in many countries. Consequently, defining an efficient process for recognition was first and foremost in the negotiators' minds.

While the Model Law "does not attempt a substantive unification of insolvency law… it offers solutions that help in several modest but significant ways."[33] Among those solutions are "[d]etermining when a foreign insolvency proceeding should be accorded 'recognition'…"[34] Because the focus of the Model Law is on providing judicial assistance to eligible foreign proceedings, through their foreign representatives, "recognition" constitutes the eligibility determination; that is, that the foreign proceeding is within the scope of the Model Law and eligible for such judicial assistance.[35] Recognition is a gateway requirement that must be satisfied by a foreign representative of a foreign proceeding before the foreign representative can seek assistance from such country's courts.[36] Without recognition, court access or assistance is generally unavailable to a foreign representative.[37] A foreign representative applies to a court in a Model Law-enacting country for recognition of a foreign proceeding by submitting specified documents.[38]

Because the Model Law "is a legislative text that is recommended to countries for incorporation into their national law," UNCITRAL recognized that a "State [country] may modify …some of its provisions."[39] However, it admonished that "to achieve a satisfactory degree of harmonization and certainty…[countries] make as few changes as possible…"[40] Further, "[t]he flexibility to adapt the Model Law to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation … Thus it is advisable to limit deviations from the uniform text to a minimum."[41]

The goal of uniformity is advanced by Article 8 of the Model Law, which provides: "In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith." The Guide explains that "such a provision would also be useful in…a model law on the basis that a State enacting a model law would have an interest in its harmonized interpretation."[42]

33. *Guide* at 3(b).
34. *Id.*
35. *Id. at 23*.
36. Model Law, Articles 20, 21; Guide 34, 176, 189.
37. Provisional relief can be granted pre-recognition, from the time the application for recognition is filed until it is decided upon if it is urgently required. Model Law, Article 19; Guide 36. In addition, the Model Law contemplates the possibility that relief may be available, on the basis of judicial cooperation or comity, in connection with a foreign proceeding that is not eligible for recognition. Guide at 212. *See also Barclay's Bank PLC v. Kemsley*, 992 N.Y.S. 2d 602 at 606 N.Y. Sup. Ct. 2014 ("*Kemsley*").
38. Model Law, Articles 9, 15.
39. Guide at 19, 20.
40. Id. at 20.
41. Guide at 22.
42. Guide at 106–107.

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As the late Judge Lifland recognized in the foundational case *In re* Bear Stearns,[43] the Model Law and Chapter 15 created a very simple and definite structure.[44] A foreign proceeding *shall* be recognized if the foreign proceeding is within the meaning of Article 2(a), the foreign representative is a person or body within the meaning of Article 2(b), and the foreign proceeding is either a foreign main proceeding or a foreign nonmain proceeding.[45]

Article 2 defines "foreign proceeding" by listing the attributes of the foreign proceeding necessary to fall within its scope: "basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding (article 2, subparagraph (a))."[46] "Foreign representative" is defined as "a person or body… authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets or affairs or to act as representative of the foreign proceeding."[47]

The definitions of "foreign main proceeding" and "foreign nonmain proceeding" are also set forth in Article 2. A foreign main proceeding takes place in the country where the debtor has its center of main interests while a foreign nonmain proceeding takes place in a country where the debtor has an establishment.[48]

Recognition turns primarily on whether the foreign proceeding and the foreign representative meet the definitional requirements of Article 2. Article 17 provides specifically that:

> "[s]ubject to article 6 [public policy exception], a foreign proceeding shall be recognized if: (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2; (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2…"

A foreign proceeding shall be recognized as either a foreign main proceeding or a foreign nonmain proceeding; that is, it must meet one or the other of those definitional requirements as well.[49] If the definitional requirements are satisfied, an order recognizing the foreign proceeding must be entered unless to do so would manifestly violate public policy.[50]

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43. *In re* Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122 (Bankr. S.D.N.Y. 2007); aff'd. 389 B.R. 325 (S.D.N.Y. 2008).

44. Id. at 127 ("…the process of recognition of a foreign proceeding is a simple single step process incorporating the definitions in sections 101(23) and (24) to determine recognition as either a main or nonmain proceeding or nonrecognition …The determination is a formulaic one.")

45. Model Law, Article 17.

46. *Id. at 66*, Model Law, Article 2((a).

47. Model Law, Article 2(d).

48. Model Law, Article 2(b), (c). "Establishment" is also defined, in Article 2(f), as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."

49. Model Law, Article 17(2). The Guide to Enactment emphasizes this reasoning: "The purpose of article 17 is to establish that, if recognition is not contrary to the public policy of the enacting State (see article 6) and if the application meets the requirements set out in the article, recognition will be granted as a matter of course." Guide at 150.

50. Article 6 of the Model Law, *Public policy exception*, provides: "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State."

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The Guide emphasizes that "[o]ne of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings… when the specified requirements of article 2 concerning the nature of the foreign proceeding … and the foreign representative are met and the evidence required by article 15 has been provided, the court should recognize the foreign proceeding without further requirement."[51]

C. Nature of debtor is extraneous to recognition under the Model Law

The reader searches the Model Law and the Guide in vain to find any provision granting relief to *debtors*. The Model Law was designed to aid trustees and administrators to cooperate in international insolvency cases. Debtors' rights were (and in most countries remain) of little interest to most of the UNCITRAL delegates. The Model Law is exclusively designed to aid foreign representatives and ultimately creditors.[52]

Therefore it is unsurprising that, with very narrow exceptions, the issue of whether a foreign proceeding is within the scope of the Model Law is not tied to the characteristics of the debtor in that foreign proceeding. The Model Law excepts only those proceedings designated by Article 1, 2: "2. This Law does not apply to a proceeding concerning [*designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*]."[53] The 1997 Guide stated that "[a]n inclusive approach is used also as regards the type of debtors covered by the Model Law. Nevertheless, the Model Law refers to the possibility of excluding certain types of entities…specially regulated with regard to insolvency…"[54] While this language was omitted from the updated Guide, the Guide retained the theme that all types of debtors in foreign proceedings, other than those subject to special regulation, should be within its scope:

> In principle, the Model Law was formulated to apply to any proceeding that meets the requirements of article 2, subparagraph (*a*), *independently of the nature of the debtor* or its particular status under national law. The only possible exceptions contemplated in the text of the Model Law itself are indicated in paragraph 2 (see, however, para. 61 below, for considerations regarding "consumers").[55] (emphasis supplied).

While the text of the Model Law does not contain a similar placeholder for the exclusion of foreign proceedings of non-traders/consumers, the Guide anticipates this additional exclusion:

51. Guide at 29. Article 15 requires that the petition be accompanied by evidence of the existence of the foreign proceeding and of the appointment of the foreign representative. It must include a statement identifying all foreign proceedings concerning the debtor. Model Law, Article 15.

52. See Kemsley, 992 N.Y.S. 2d 602, 606 (relying on comments of Bankruptcy Judge Peck at a hearing following denial of a petition for recognition by the foreign representatives of Mr. Kemsley's UK bankruptcy). *See infra* text at note 113.

53. Note these kinds of *debtors* are not excluded, only foreign proceedings involving those types of debtors. There is no need to exclude the debtors because they are never included in Chapter 15 in the first place.

54. 1997 Guide at 25.

55. Guide at 55.

DOI: 10.1002/iir

> …the enacting State might wish to exclude from the scope of application of the Model Law insolvencies that relate to natural persons residing in the enacting State whose debts have been incurred predominantly for personal or household purposes, rather than for commercial or business purposes, or insolvencies that relate to non-traders.[56]

In sum, the Model Law applies to foreign proceedings of all types of debtors except for the few regulated entities and consumers whose proceedings may be specifically excluded. The debtor in the foreign proceeding need not possess any qualifying attributes for the foreign representative to obtain recognition of the foreign proceeding.

D. Chapter 15 and House Report 109-31

Chapter 15, Ancillary and Other Cross-Border Cases, was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[57] Section 801 of BAPCPA "introduces Chapter 15 to the Bankruptcy Code, which is the Model Law …"[58] While the Model Law sets forth its purpose in the Preamble and its scope in Article 1, Chapter 15 combines these two sections into section 1501, "Purpose and scope of application."[59] Both the Model Law and Chapter 15 are designed "to provide effective mechanisms for dealing with cases of cross-border insolvency" and apply to cases "where assistance is sought…by a foreign court or a foreign representative in connection with a foreign proceeding."[60]

House Report 109-31 was the Judiciary Committee report that accompanied S. 256, the legislation embodying BAPCPA in both the House of Representatives and the Senate.[61] Title VIII of BAPCPA comprised the addition of Chapter 15 and related amendments to the Code.[62] The House report serves as the legislative history for Chapter 15 and recurrently refers to the Model Law and the Guide to further explain the provisions of Chapter 15.[63] Replicating Article 8 of the Model Law, section 1508 of the Code promotes uniform application of Chapter 15 with the Model Law as adopted in other countries.[64] The Legislative History of section 1508 explains that "[i]nterpretation of this Chapter on a uniform basis will be aided by reference to the Guide and the Reports cited therein, which explain the reasons for the terms used and often cite their origins as well."[65]

Unlike the Model Law, Chapter 15 contains a definition of "debtor." Section 1502 begins "[f]or the purposes of this chapter, the term – (1) 'debtor' means an entity that is the subject of a foreign proceeding;". The legislative history notes: "Sec. 1502. Definitions. 'Debtor' *is given a special definition for this chapter*. This definition does not come from the Model Law, but is necessary to eliminate the need

56. Guide at 61.
57. Pub. L. 109–8, 119 Stat. 23, Title VIII, enacted April 20, 2005.
58. House Report 109-31, pt. 1, 109th Cong., 1st Sess. (2005) ("H.R. Rep.") 105-106.
59. 11 U.S.C. § 1501.
60. Model Law, Preamble; 11 U.S.C. § 1501 (a).
61. H.R. Rep. 1, *et seq*.
62. H.R. Rep. 105.
63. H.R. Rep. 105-119.
64. 11 U.S.C. § 1508, text at note 113 *supra*.
65. H.R. Rep. at 109.

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to refer repeatedly to 'the same debtor as in the foreign proceeding.' "[66] (emphasis supplied). The definitions contained in Chapter 1, "General Provisions," of the Code include a different definition of debtor: "The term 'debtor' means person or municipality concerning which a case under this title has been commenced."[67] As discussed in the succeeding paragraphs, the filing of a petition for recognition of a foreign proceeding will not commence a case that will convert the debtor subject to the foreign proceeding into a debtor concerning which a case under title 11 has been commenced.

E. Recognition under Chapter 15

Chapter 15 tracks the "simple and expedient" recognition process[68] set forth in the Model Law, as described earlier, from the definitional elements of "foreign proceeding" and "foreign representative"[69] right through the definitions of foreign main proceeding, foreign nonmain proceeding and establishment,[70] all "taken from Model Law article 2, with only minor language variations necessary to comport with United States terminology."[71] As under the Model Law, recognition under Chapter 15 is a gateway requirement for access by a foreign proceeding to US courts.[72]

Under Chapter 15, as under the Model Law, an ancillary case is commenced by the filing of a petition for recognition by the foreign representative:

> A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.[73]

66. H.R. Rep. at 107.
67. 11 U.S.C.§ 101(13).
68. H.R. Rep. at 112.
69. Because the pre-BAPCPA Code contained definitions of those terms in sections 101(23) and 101(24), the definitions were amended to conform to the Model Law and were not relocated to Chapter 15. As amended, the definitions provide as follows: "(**23**)The term 'foreign proceeding' means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. (**24**)The term 'foreign representative' means a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 1502(2), (4), (5); H.R. Rep. at 107.
70. Section 1502 states: "(**4**)'foreign main proceeding' means a foreign proceeding pending in the country where the debtor has the center of its main interests; (**5**)'foreign nonmain proceeding' means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."
71. H.R. Rep. at 107.
72. 11 U.S.C. § 1509. See, e.g., United States v. J.A. Jones Construction Group, LLC, 333 B.R. 637, (E.D. N.Y. 2005) (In denying a stay requested by a Canadian receiver, the Court noted: "Generally, the provisions of chapter 15 are applicable to cases where 'assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding.' " 11 U.S.C. § 1501(b)(1). Once a foreign bankruptcy proceeding is recognized, a wide range of relief available under American bankruptcy law immediately becomes applicable…In the absence of recognition under chapter 15, this Court has no authority to consider Mr. Breton's request for a stay.").
73. 11 U.S.C. § § 1504, 1515.

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The commencement procedure is wholly contained within Chapter 15; the provisions of Chapter 3, subchapter 1 that govern commencement of cases under other chapters of title 11 do not apply to Chapter 15.[74] Sections 301, 302, and 303, the provisions for commencement of cases under Chapters 7, 9, 11, 12, and 13 all state that petitions to commence a case under a particular chapter can be filed by (or, under section 303, against) entities that "may be a debtor under such chapter."[75] Sections 109(b) through 109(f) specify the persons or entities who may be debtors under the respective liquidation, debt adjustment and reorganization chapters of the Code, Chapters 7, 9, 11, 12, and 13, establishing chapter-specific debtor eligibility requirements in addition to the general debtor-eligibility requirements of section 109(a).[76] Section 109 does not refer to Chapter 15, does not contain a subsection addressing debtor-eligibility criteria for Chapter 15, and does not specify the persons who may be debtors under Chapter 15 because "for the purposes of [chapter 15] the term – 'debtor' means an entity that is the subject of a foreign proceeding"; that is, not a debtor under title 11.[77]

F. Nature of debtor is extraneous to recognition under Chapter 15

The entity that is the subject of a foreign proceeding is not before the court in a Chapter 15 case. Rather, it is the foreign representative that is before the court seeking relief in the USA in respect of the foreign proceeding. Reference to the nature of the debtor that is the subject of the foreign proceeding is limited to two subsections of section 109, sections 109(b), and 109(e), which are referenced to explicate the exclusion of regulated debtors and consumers. There is no reference to section 109(a). The legislative history to section 1501 notes that it "largely tracks the language of the Model Law" but adds the consumer debtor exclusion discussed in the Guide along with the regulated debtor exclusion suggested by Article 1(2) of the Model Law.[78] In explaining the consumer debtor exclusion, the House Report cites paragraph 60 of the 1997 Guide which is now paragraph 55 of the Guide. By relying on this paragraph of the Guide, which says that the Model Law applies "irrespective of the nature of the debtor," Congress confirms that Chapter 15, like the Model Law, applies to any proceeding that meets the definitional requirements without regard to the attributes of the debtor.[79]

74. 11 U.S.C. § 103(a): "(**a**)… chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15."
75. 11 U.S.C. § § 301, 302, 303.
76. 11 U.S.C. § 109(b)–(f).
77. 11 U.S.C. § 1502(1).
78. H. R. Rep.at 106.
79. H.R. Rep. at 106, note 104; Guide at 55.

DOI: 10.1002/iir

IV. Where the Barnet Decision Went Wrong

A. Structural misunderstanding

The Appeals Court decision erroneously concluded that the "plain meaning" rule provided a relatively simple resolution of the case.[80] In doing so, it disregarded the implications of the discrete definitions of "debtor" in sections 101(13) and 1502(1), essentially conjoined those incompatible definitions and, consequently, misunderstood a structural issue as a definitional one.[81] By focusing on the definitions of "debtor" in the Code, it missed the relationships among the various chapters that reflect their quite different purposes. At the threshold, the existence of two distinct definitions of "debtor" within the Code should signal the unlikelihood that a plain meaning approach will be efficacious.[82] That conclusion should lead to the realization that the central issue is how section 109(a) applies to Chapter 15, obviously a structural issue. Once it is clear that Chapter 1 of the Code, including section 109 (a), does not fit the commencement process for Chapter 15 cases in a literal application, the plain meaning approach loses its usefulness and attention must turn to the structure and purpose of Chapter 15, while keeping one eye on the text.

The straightforward nature of the statutory interpretation that we offer bears emphasis. Section 103(a) makes all of Chapter 1 applicable to Chapter 15. Section 109(a)—within Chapter 1—creates a requirement that must be met by any "person…[who] may be a debtor under this title." Chapter 15 governs the recognition of foreign proceedings, which are defined as proceedings in which "the assets and affairs of the debtor are subject to control or supervision by a foreign court." [11 U.S.C. § 101(23)].

As discussed in the succeeding paragraphs, section 109(a) does apply to a foreign debtor in a full bankruptcy proceeding under Chapters 7 or 11 when, for example, the debtor files a US bankruptcy proceeding to seek enforcement of a foreign discharge. Section 109(a) also applies in a Chapter 15 case when, after recognition, section 1511 authorizes the foreign representative to commence a "full" case under section 301, 302, or 303. There, the debtor in the foreign proceeding that has been recognized must also be eligible to become a debtor under title 11. Conversely, the reason that section 109(a) does not apply to recognition is that the debtor in the foreign proceeding will not, by virtue of Chapter 15 recognition of the foreign proceeding, become "a debtor under this title."

80. Barnet, 737 F. 3d 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.' Section 109, of course, is within Chapter 1 of Title 11 and so, by the plain terms of the statute, it applies 'in a case under chapter 15.'")

81. 11 U.S.C. § 101(13) provides: "The term 'debtor' means person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 1502(1) provides: "For the purposes of this chapter, the term—(**1**)'debtor' means an entity that is the subject of a foreign proceeding."

82. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527, 109 S. Ct. 1981, 1994, 104 L. Ed. 2d 557 (1989) (J. Scalia) ("(W)here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."). Of course, the threshold question is the determination that the meaning is "plain."

DOI: 10.1002/iir

The *Barnet* court's syllogism – Chapter 1 of the Code applies to Chapter 15, therefore section 109(a) applies to recognition – is belied by the distinct definition of debtor in section 1502 and the scope of its application. The legislative history notes the limited nature of Chapter 15 cases as "ancillary to cases brought in a debtor's home country."[83] Reflecting the different status of a debtor in a Chapter 15 ancillary case from that of a debtor in "a full United States bankruptcy case [that is] brought under another chapter,"[84] section 1502(1) states that "[f]or the purposes of [chapter 15] the term – 'debtor' means an entity that is the subject of a foreign proceeding."[85] The Foreign Representatives correctly asserted that Octaviar was a debtor in an Australian proceeding and that they were not seeking recognition of a debtor but of a foreign proceeding: "Section 109(a) creates a requirement for debtors 'under this title,' whereas OA is a debtor under the Australian Corporations Act, not under Title 11."[86]

Essentially, the *Barnet* court says that both the definition of "debtor" in section 101(13) and the section 1502(1) definition apply to Chapter 15: "an entity that is the subject of a foreign proceeding" must also be a "person… concerning which a case under this title has been commenced." The Foreign Representatives argued that if Octaviar had to qualify as a debtor, it should only have to satisfy the section 1502 definition of debtor. The court demurred, "we cannot see how such a preclusive reading of Section 1502 is reconcilable with the explicit instruction in Section 103(a) to apply Chapter 1 to Chapter 15." But the Foreign Representatives' reading is reconcilable when each of the definitions is applied within its designated sphere. If the words "entity that is the subject of a foreign proceeding" are substituted for the word "debtor" every time it is employed relative to Chapter 15, as intended by Congress, then it is impossible to confuse the entity in the foreign proceeding with the person concerning which a case under title 11 has been commenced.[87] The statement of a rule and the separate statement of an exception to the rule are routine in the Code and indeed throughout American law. Only the "distinct definition" approach we suggest reconciles the apparently inconsistent definitions with each other and, more importantly, squares with the structure of the statute.

B. Scope of section 1502 definition not limited to Chapter 15

The Foreign Representatives argued that if the debtor had to satisfy an eligibility condition for the foreign proceeding to be recognized, then it should have to meet

83. H.R. Rep. at 106.
84. Id.
85. 11 U.S.C. § 1501(1).
86. Barnet, 737 F.3d at *248. The Bankruptcy Court noted that the practice under former § 304 recognized jurisdiction to grant relief when the debtor in the foreign proceeding had no property in the USA and was otherwise ineligible to be a debtor under Title 11. Memorandum Opinion In Support Of Certification Of Direct Appeal To The Court of Appeals For The Second Circuit, Chapter 15 Case, Doc. 47. p.7, citing cases.
87. H.R. Rep. at 107: " 'Debtor' is given a special definition … to eliminate the need to refer repeatedly to 'the same debtor as in the foreign proceeding.' "

DOI: 10.1002/iir

only the section 1502 definition, not the section 109(a) requirements. The court rejected this argument:

> Given its broadest reading, Section 1502 still could not affect the definitions contained within Chapter 1 because Section 1502's scope is expressly limited to "this chapter" (Chapter 15). It follows that the definitions of "foreign proceeding" and "foreign representative," which both occur within Chapter 1, would not be affected. 11 U.S. C. § 101(23)–(24). Because they both require a debtor, as discussed above, OA would need to satisfy Section 109 in order to meet the requirements contained within Chapter 15 that rely upon those definitions.[88]

A careful reading of section 1502 demonstrates the fallacy of the court's position. In its obsession with language that is conflicting on its face, the court ignores the purpose and structure of the statute. It does not explain why the plain meaning of section 109(a) trumps the plain meaning of section 1502. The court states that section 1502 supplants section 101(13), but only "within the context of chapter 15" and, in any case, not for purposes of the section 109(a) eligibility requirement because that is not a definition (although it adopts the language of the definition in section 101(13)). The court's analysis is flawed because it does not acknowledge and apply the unique introductory language of section 1502, "For the purposes of this chapter." Chapter 1 of the Code (section 101) and three other chapters contain definitions: Chapters 7, 11, and 15. The definition sections of Chapters 7 and 11 begin with words that limit the definitions to use within the chapter. Section 741 provides: "In this subchapter—" a term means what the definition prescribes. Similarly, section 1101 provides: "In this chapter—" a term means what the definition prescribes.

In contrast, section 1502 states "For purposes of this chapter__" and does not confine the use of the defined terms to Chapter 15. Instead, "debtor" as defined in section 1502(1) should be applied in any context under the Code that involves Chapter 15. "For the purposes of this chapter [15]", including recognition, the section 1502(1) definition of debtor as an "entity that is the subject of a foreign proceeding" applies, not the section 101(13) definition, "person …concerning which a case under this title has been commenced." Contrary to the court's statement that "Section 1502's scope is expressly limited", section 1502's scope is expressly expansive. Consequently, when the term debtor is used in the definitions of foreign representative and foreign proceeding, it does not invoke sections 101(13) and 109(a), it simply means "an entity that is the subject of a foreign proceeding." For the purposes of Chapter 15, section 1502(1) supplants section 101(13) within and without Chapter 15; the phraseology "for purposes of" does not permit the application of dual definitions.

88. Barnet, 737 F.3d at *249.

DOI: 10.1002/iir

C. Different case commencement procedures, rights, and duties of debtors implicate distinct definitions

Only a foreign representative can commence a case under Chapter 15, which contains its own commencement provision, section 1504, "Commencement of ancillary case," which states: "A case under this chapter is commenced by the filing of a petition for recognition of a foreign proceeding under section 1515."[89] Section 1515, in turn, provides that the foreign representative is the party who can file a petition: "A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition."[90]

Commencement of a case under all chapters other than Chapter 15 is governed by subchapter 1 of Chapter 3 of the Code, entitled "Commencement of a Case," which includes sections 301, 302, and 303.[91] Each of section 301, 302, and 303 speaks in terms of commencement of a case by (or against) a person or entity (or, in section 302, an individual and the individual's spouse) "that may be a debtor" under a specific chapter other than Chapter 15. This language aligns with the definition of "debtor" in section 101(13) as "a person …concerning which a case under this title has been commenced." Cases commenced under those sections are subject to the general eligibility criteria of section 109(a), "Who may be a debtor," coupled with the chapter-specific identification of those persons and entities who may be a "debtor in a case under this title." The structure of section 109 weighs against application to Chapter 15.[92] Section 109(a) specifies that "only a person that resides or has a domicile, a place of business, or property in the United States… may be a debtor under this title" while subsections 109(b) through 109 (f) identify the persons and entities eligible to be debtors under each of the debtor-oriented chapters: section 109(b) for Chapter 7; section 109(c) for Chapter 9; section 109(d) for Chapter 11; section 109(e) for Chapter 13; and section 109(f) for Chapter 12. Section 109(a) is an umbrella debtor-eligibility requirement for each of the chapter-specific subsections of section 109 that follow. Chapter 15 is notably absent from the series of chapters specifically addressed by the rest of section 109, leading naturally and "plainly" to the conclusion that section 109(a) does

89. 11 U.S.C. § 1504.

90. 11 U.S.C. § 1515.

91. Section 1528 specifically contemplates that a foreign representative – after recognition of a foreign main proceeding – may commence a case under another chapter "only if the debtor has assets in the United States." Upon recognition of a foreign main proceeding, the foreign representative has the right under 11 U.S.C. § 1511 to file a voluntary petition under one of § § 301 or 302 and it would seem that the requirement of § 1528 that there be assets in the USA would satisfy § 109(a). If the foreign proceeding is recognized as a foreign nonmain proceeding and an involuntary petition is filed under § 303, then it would seem that the debtor must have one of the attributes required to satisfy § 109(a), that is, residence, domicile, a place of business, or property in the USA.

92. Other than to the extent of the limited incorporation of sections 109(b) and (e) to exclude foreign proceedings of regulated entities and consumers. 11 U.S. C. § 1501(c).

DOI: 10.1002/iir

not apply to the commencement of a Chapter 15 case. In short, section 109(a) does not, by its mere reference to "debtor" convert a debtor that is the subject of a foreign proceeding to a debtor concerning which a case under title 11 has been commenced. A debtor is the central figure in all the operational chapters of the Code (7–13) *except* Chapter 15.[93] That striking structural exception compels a different understanding of the application *vel non* of section 109(a) to that chapter.

Section 301 perfectly illustrates the point that a broad statement in a statute cannot be properly understood without a grasp of other relevant provisions—that is, a structural understanding. That section says "a voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter." The provision on its face applies to every chapter of the Code, including Chapter 15, and a Chapter 15 proceeding is, of course, a case. Thus, if section 301 applied to a Chapter 15 petition, a voluntary case under Chapter 15 could only be begun by a debtor, but Chapter 15 states explicitly that only a foreign representative can file a petition under Chapter 15.[94] If somehow the section 301 petition were permitted by Chapter 15, section 301(b) teaches us that it constitutes an order for relief, which triggers the automatic stay, but under Chapter 15, there is no stay until the granting of special emergency relief, the recognition of a foreign main proceeding or the granting of post-recognition relief in a foreign nonmain proceeding. § § 362(a), 1519, 1520, 1521. A puzzlement, unless one realizes that a provision facially making certain sections of a statute applicable in certain proceedings must necessarily mean "generally applicable subject to other provisions of the statute." The same structural logic confirms that section 109(a) does not apply to Chapter 15 notwithstanding the language in section 103 applying Chapter 1 to Chapter 15.

D. Territorial jurisdiction versus global jurisdiction

Jurisdiction over bankruptcy cases and proceedings is granted to the district court.[95] A petition under section 1504 commences "a case under this title [11]" as does a petition under section 301, 302, or 303.[96] Consequently, for jurisdictional purposes, a Chapter 15 case is within the grant of jurisdiction "of all cases under title 11."[97] However, the conclusion that the Chapter 15 case concerns the foreign proceeding and not the debtor is evidenced by the different scope of jurisdiction in full cases from the scope in Chapter 15 cases. Worldwide jurisdiction over property of the debtor and property of the estate is granted to the district court in which a full case is commenced: "exclusive jurisdiction of all of the property, wherever located, of the debtor…"[98] In contrast, the Model Law and

93. Further distancing a debtor subject to a foreign proceeding from a debtor in a case under title 11, the Chapters addressed by sections 109(b)–(f) have common attributes that are not shared by Chapter 15. The duties and benefits of a debtor under sections of Chapters 3 and 5 of the Code and the additional specific duties and benefits under Chapters 7, 9, 11, 12, and 13, none of which apply in Chapter 15, emphasize that a debtor in a case under title 11 and a debtor subject to a foreign proceeding are different creatures.
94. 11 U.S.C. § 1515.
95. 28 U.S.C. § 1334.
96. 11 U.S.C. § 101(42).
97. 28 U.S.C. § 1334(a).
98. 28 U.S.C. § 1334(e).

DOI: 10.1002/iir

Chapter 15 are territorial and deal with the debtor and property of the debtor that is in the enacting state. Chapter 15 contains a definition of "the territorial jurisdiction of the United States"[99] to distinguish its scope from the broad assertion of jurisdiction in "full" cases: "a limiting phrase is useful where the Model Law and this chapter intend to refer only to property within the territory of the enacting state."[100] The discussion in the House Report of the scope of the automatic stay in Chapter 15 illustrates this point:

> The only property covered by this section is property within the territorial jurisdiction of the United States as defined in section 1502. To achieve effects on property of the debtor which is not within the territorial jurisdiction of the United States, the foreign representative would have to commence a case under another chapter of this title.[101]

Because the general jurisdictional statute itself provides that as of the commencement of the case, the federal district court (and the bankruptcy court through the reference from the district court) "shall have jurisdiction of all the property, wherever located, of the debtor and of property of the estate,"[102] then this statement describing a territorial limitation becomes incongruous and puzzling if the Chapter 15 debtor is a section 109(a) debtor.

E. The court's plain meaning textual analysis is unsound

Because of the potential confusion arising from the *Barnet* case, it seems worthwhile to work through the problems in the court's analysis on its own terms as a matter of textual reading.

After concluding that it had appellate jurisdiction,[103] the Second Circuit on the merits of the appeal concluded that the "plain meaning" of sections 103 and 109(a) established pre-emptively that a foreign proceeding cannot be recognized under Chapter 15 unless the debtor that is the subject of the foreign proceeding meets the requirements of section 109(a). We have seen that the meaning on its face cannot have been "plain" and that in any case, as we discuss in the succeeding paragraphs, section 1508 rejects a purely textual reading of Chapter 15. But even on a textual analysis, the court either rejects or ignores the meaning, plain or otherwise, of other sections of title 11 that establish that the debtor subject to the foreign proceeding is not a debtor under title 11 and that the foreign proceeding, not the debtor, must be eligible for recognition.[104] In addition, the Guide, viewed through

99. 11 U.S.C. § 1502(8).

100. Guide at 178; H.R. Rep. at 107, 114–115,

101. H.R. Rep. at 114–115. *See also* the territorial limitations in 11 U.S.C. § § 1520(a) 1–2, 4, 1521(a) and 1528.

102. 28 U.S.C. § 1334 (e)(1); 28 U.S.C. § 157(a).

103. Shortly after certifying the appeal, the Bankruptcy Court denied Drawbridge's motion to stay the recognition order pending appeal and granted the Foreign Representatives' motion to conduct discovery. Drawbridge was aggrieved by the Bankruptcy Court's discovery order and, while discovery orders are usually not final orders and not appealable, the Second Circuit ruled that an exception to the rule applied: The appeal from the discovery order brought with it review of the recognition order, which "was a necessary prerequisite to ordering discovery." Consequently, "The Recognition Order is properly before us, therefore, as it has merged with the subsequent discovery order." *Barnet, 737 F.3d at 246.*

104. See 109(b)–(f), § § 1504 (Commencement of ancillary case), 1509(a) (Right of direct access), 1515 (Application for recognition) and 1517 (Order granting recognition), and sections of Chapters 3, 5, 7, 11, 12, 13 discussed in Section III. F. previously mentioned.

DOI: 10.1002/iir

the portal of section 1508, confirms that there is no debtor-eligibility component to recognition of a foreign proceeding.[105]

The court also posits that the Foreign Representatives' interpretation fails "because it would render Section 109(a) meaningless."[106] While the court's explanation of this point is difficult to follow, the conclusion is wrong in any event. Though it does not apply to eligibility for recognition, section 109(a) does apply in a Chapter 15 case after recognition when a foreign representative exercises its authority under section 1511 to commence a case under section 301, 302, or 303.[107] The debtor in such a case would have to be eligible under section 109(a) to be a debtor in a case under this title, as defined in section 101(13).[108]

A debtor in a foreign main proceeding might have need of a full bankruptcy and the automatic stay imposed through section 1520 would not prevent that debtor from filing a petition under section 301.[109] In that event, section 109(a) would apply notwithstanding the pendency of the Chapter 15 case. This possibility also illustrates that "debtor" under Chapter 15 is different from that term used throughout the rest of the Code and exemplifies a reason Congress would have applied section 109(a) generally: in an individual case, the person who was the subject of the bankruptcy abroad may want to seek relief in the United States separate from any relief given to the foreign representative. The classic case would be the foreign debtor seeking discharge of the debts not paid or provided for in the foreign bankruptcy. And indeed, two recent state court cases dealt with exactly that situation; one state court granted comity to a foreign discharge while another denied it.[110]

The New York Supreme Court case involved a Mr. Kemsley, a UK citizen (a real estate developer/consultant) who filed for individual bankruptcy in the UK. Trustees were appointed in his case. Under a court-approved agreement, the debtor agreed to pay a certain amount to his creditors and received a discharge. But among the millions of pounds Mr. Kemsley owed to his creditors was £5 m owed to Barclays Bank, which chose not to file a proof of claim in the UK proceeding and claimed not to be bound by the discharge. Prior to discharge, Barclays had brought two lawsuits against the debtor in the New York Supreme Court. The UK trustees then filed a Chapter 15 petition, presumably to obtain a stay blocking the Barclays' lawsuit.[111] Bankruptcy Judge Peck refused recognition in an interesting opinion we firmly resist discussing, except to say that it turned on center of main

105. See Sections III. C. and E previously mentioned.
106. Barnet, 737 F.3d at 249.
107. Section 1511(a) provides: "(a) Upon recognition, a foreign representative may commence—(1) an involuntary case under section 303; or (2) a voluntary case under section 301 or 302, if the foreign proceeding is a foreign main proceeding.."
108. While § 1511 is silent on the need to satisfy § 109 (a), Article 11 of the Model Law confirms that, aside from granting standing to the foreign representative, generally applicable conditions for commencing an insolvency proceeding are not excused: "…the article [11] makes it clear (by the words 'if the conditions for commencing such a proceeding are otherwise met') that it does not otherwise modify the conditions under which an insolvency proceeding may be commenced in the enacting State." Guide at 113.
109. 11 U.S.C. § 1520(c) provides "Subsection (a) does not affect the right of … an entity to file a petition commencing a case under this title…"
110. *Kemsley* 992 N.Y.S. 2d 602; Kumkang Valve Manu. Co. v. Enterprise Products Operating LLC, 442 S.W. 3d 602 (Texas Civ. App. Houston 2014) (holding that debtor had right to seek discharge in the USA despite lack of recognition of foreign proceeding).
111. *In re* Kemsley, 489 B.R. 346, 352 (Bankr. S.D.N. Y. 2013).

DOI: 10.1002/iir

interests (COMI) considerations, not anything to do with the validity of the UK proceeding or the discharge.[112] After the Chapter 15 was dismissed, Barclays resumed the state court lawsuit and Kemsley defended with his UK discharge. The state court recognized the UK discharge as a matter of comity and dismissed Barclays' case, holding:

> Judge Peck properly noted that the plain language of Chapter 15 applies only to a "foreign representative" such as a trustee. There is no mention of individual debtors in Chapter 15, nor any indication that Chapter 15 is applicable to foreign bankruptcy discharge orders issued to individual debtors. Accordingly, I adopt the instructive view and opinion of Judge Peck, that Chapter 15 of the Bankruptcy Code does not preempt New York common law principles of international comity as applied to foreign bankruptcy discharge orders issued to individual foreign debtors.[113]

As part of its logic for applying section 109(a) to eligibility for recognition, the *Barnet* court faults the Foreign Representatives for not explaining why Congress did not expressly restrict section 109(a) from applying in Chapter 15, if that is what was intended. But commencement of Chapter 15 cases was excluded by the omission of Chapter 15 from the list of chapters covered by section 109, Chapters 7, 9, 11, 12, and 13. Congress had no need to amend section 109 because it functions as a component of the mechanism for commencement of cases under the specified chapters, while Chapter 15 contains its own case commencement provisions.

F. Puzzling disregard of section 1508

The Second Circuit never mentioned section 1508 in *Barnet*. Section 1508 dictates that the text of Chapter 15 should be interpreted in light of its international context, negating a rigid, literal plain meaning interpretation. This provision is written as a directive not a suggestion, "[i]n interpreting this chapter the court shall consider its international origin, and the need to promote an application …that is consistent with the application of similar statutes adopted by foreign jurisdictions."[114] In its earlier *Fairfield Sentry* decision, the Court quoted section 1508 and acknowledged the recommendation in the legislative history that the Guide and cases addressing the Model Law be consulted for guidance.[115] The court's prefatory comment to its consideration of foreign statutes and cases may have been unintentionally prophetic: "*Although the statutory text controls*, first and ultimately, we consider

112. "COMI" means center of main interests of the debtor. 11 U.S.C §1517(b). Judge Peck focused on where the peripatetic debtor had his COMI on the date of commencement of the UK bankruptcy but stated that the result might have been different if the focus was as of the filing of the Chapter 15 petition. *Id.* at 356. The Second Circuit subsequently ruled that COMI must be measured as of the date of the Chapter 15 petition. *In re* Fairfield Sentry Limited, 714 F.3d 127, 136 (2d Cir. 2013).

113. Barclays v. Kemsley, 992 N.Y.S. 2d at 606. Notwithstanding the failure of the UK Trustee to obtain recognition, Mr. Kemsley could have filed a US bankruptcy because he apparently had either domicile or property in the USA that satisfied section 109(a). *Kemsley*, 489 B.R. at 356.

114. 11 U.S.C. § 1508; see alse H.R. Rep. at 106 (note 101) and 109.

115. *Fairfield Sentry*, 714 F.3d 127, 132.

DOI: 10.1002/iir

international sources to the extent they help us carry out the congressional purpose of achieving international uniformity in cross-border insolvency proceedings."[116] (emphasis supplied).

As a bankruptcy court aptly stated, the court should "take into account more than the words used within a particular section of Chapter 15 [which] is a license to depart where appropriate from the well-settled rule of statutory interpretation that a court should prefer specific provisions over the general when striving to uncover the meaning of a statute."[117] The comment in *Fairfield Sentry* that "the statutory text controls" was literally followed in *Barnet* to improperly subordinate section 1508. While that section does not obviate statutory analysis, it is an explicit command from the democratically elected legislature to introduce some flexibility that might not be required in another statute.

The *Barnet* decision reads as if section 1508 was absent from the Code when instead it colors the entirety of the application of Chapter 15. When a court is interpreting a statute— including the limited debtor-exclusions of section 1501(c) and the recognition requirements of section 1517— how can it fail to mention or apply a section of that statute entitled "Interpretation"? Section 1508 should have led the court to the House Report and the Guide and the conclusion that the attributes of the debtor are extraneous to recognition.

Since the enactment of Chapter 15, courts have recurrently noted the requirement of section 1508 that they look to the Guide for instruction on the meaning of Chapter 15. One of the earliest and most cited decisions stated:

> Congress prescribed a rule of interpretation that expressly requires United States courts to take into account the statute's international origin and to promote applications of Chapter 15 that are consistent with versions of the Model Law adopted in other jurisdictions. 11 U.S.C. § 1508; H.R.Rep. No. 109–31, at 109–10.[118]

Prior to *Barnet*, every Chapter 15 decision by a Circuit Court of Appeals discussed section 1508 and acknowledged its direction to consider the Model Law and the Guide in interpreting Chapter 15.[119] All of those decisions recited the requirements for recognition and none of them included section 109(a) among those requirements.

In considering whether a Foreign Representative could bring an action in *Condor*, a Chapter 15 case invoking foreign avoidance law, the Fifth Circuit stated: "Our interpretive task is in part guided by the circumstance that Chapter 15

116. Fairfield Sentry, 714 F.3d 127, 136. The statutory injunction to give regard to the international context includes the uniformity concern but also requires the courts to consider the special needs of an international system such as that established by a Model Law. Jay Lawrence Westbrook, *Interpretation Internationale*, __ Temple L. Rev. ___ (forthcoming).

117. In re JSC BTA Bank, 434 B.R. 334 (Bankr. S.D.N. Y. 2010).

118. In re Tri-Continental Exchange Ltd., 349 B.R. 627, 632 (Bankr. E.D. Cal. 2006).

119. The Second Circuit discussed section 1508 in *Fairfield Sentry* and followed its direction to consider foreign sources but found that they were of limited use in selecting the date to measure COMI. 714 F. 3d at 137. In a decision subsequent to *Barnet* that arose from the Fairfield Sentry Chapter 15 case, the Second Circuit quoted section 1508 but nevertheless reverted to a narrow statutory interpretation. Krys V. Farnum Place, LLC, 768 F. 3d 239 (2d Cir. 2104).

DOI: 10.1002/iir

implements the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency. Chapter 15 directs courts to 'consider its international origin, and the need to promote an application of the Chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.'" (footnotes omitted). The court recited the requirements for recognition but did not include section 109(a) among them: "To be recognized, the foreign proceeding must either fall within the definition of a 'foreign main proceeding' or 'foreign nonmain proceeding.'"[120]

As recently as 2013, circuit courts around the country were applying section 1508 in interpreting Chapter 15. Just a few months after *Condor*, in considering whether the COMI of an individual was located where he had previously run a business or where he now lived permanently, the same court added: "The statutory intent to conform American law with international law is explicit in the text of Section 1501(a), and also is expressed in Section 1508…"[121] The court listed the prerequisites for recognition and did not include satisfaction of section 109(a) among them. In a decision, issued two and one-half years later, involving a request to enforce a *concurso* plan that contained third-party release provisions, the Fifth Circuit noted the requirements for recognition, again without mention of section 109(a), and reiterated its reliance on the Model Law and Guide for interpretation of Chapter 15.[122]

Also in 2013, the Third Circuit reviewed the recognition of an Australian liquidation case and noted that "…U.S. bankruptcy courts must recognize a foreign insolvency proceeding when it is 'a collective judicial or administrative proceeding in a foreign country… under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.' 11 U.S.C. § 101(23); id. § 1517(a). The statute requires recognition when the foreign proceeding meets the requirements of section 1502. Id. § 1517(a)."[123] (footnotes omitted). In formulating its recognition analysis, the court quoted liberally from the Model Law and the Guide but never suggested that section 109(a) be applied.

A Fourth Circuit opinion was the most recent predecessor to *Barnet*. The Court addressed Chapter 15 recognition in the context of determining whether a German insolvency administrator should be allowed to terminate license agreements and relicense technology, free of the rights of licensees.[124] Although the court denied the substantive relief sought by the foreign representative,[125] the court observed that recognition must be granted if the requirements listed in section 1517 are met and it did not mention section 109(a) among the requirements. It also relied recurrently on the Model Law and the Guide to Enactment because "[i]In

120. In re Condor Insurance Ltd., 601 F.3d 319, 321 (5th Cir. 2010).
121. In re Ran, 607 F.3d 1017, 102-1021 (5th Cir. 2010).
122. In re Vitro S.A.B. de C.V, 701 F.3d 1031 (5th Cir. 2013)
123. In re ABC Learning Centres Ltd., 728 F. 3d 301, 304 (3d Cir. 2013).
124. Jaffe v. Samsung, 737 F. 3d 14 (4th Cir. 2013).
125. The foreign representative sought to reject certain patent licensing contracts.

DOI: 10.1002/iir

enacting Chapter 15, Congress stated that it intended to codify the Model Law. See 11 U.S.C. § 1501(a). And, in doing so, it also indicated strongly that the Model Law, and the accompanying Guide to Enactment issued by UNCITRAL in conjunction with its adoption of the Model Law, should inform our interpretation of Chapter 15's provisions."[126]

G. The venue statutes provide guidance

The *Barnet* court also rejected an argument that the Chapter 15 venue statute supported the Foreign Representatives' position that section 109(a) did not apply because "28 U.S.C. § 1410 provides a venue for Chapter 15 cases even when 'the debtor does not have a place of business or assets in the United States.'"[127] The distinct venue provisions for cases under Title 11 and for cases ancillary to foreign proceedings reinforce the different eligibility requirements for cases under other chapters of title 11 and those under Chapter 15. Section 1408 of the Judicial Code, "Venue of cases under title 11," mandates venue based on the location of the domicile, residence, principal place of business in the United States, or principal assets in the United States "of the person or entity that is the subject of such case;" there is no venue for a case under those chapters in the absence of a US presence. In contrast, Section 1410 of the Judicial Code, "Venue of cases ancillary to foreign proceedings", does not use "the subject of such case" terminology because the debtor in a foreign proceeding is not the subject of a Chapter 15 case, that is, is not a debtor in a case under title 11. More importantly, 28 U.S.C § 1410 contemplates that a Chapter 15 case may be commenced even if the debtor does not have a place of business or assets in the USA. The Second Circuit was not persuaded that Congress meant anything substantive by providing a venue for Chapter 15 cases in which the debtor in the foreign proceeding had no assets or place of business in the USA. Instead, it rejected the argument, stating: "This venue statute, however, is purely procedural. Given the unambiguous nature of the substantive and restrictive language used in Sections 103 and 109 of Chapter 15, to allow the venue statute to control the outcome would be to allow the tail to wag the dog."[128]

Yet, the salient import of the venue statute is not that it controls the determination of whether section 109(a) applies in Chapter 15, but rather that its language supports the structural, textual, and policy reasons why section 109(a) does not apply in Chapter 15. The court entirely missed the thrust of the Foreign Representatives' argument and offered no explanation of the purpose served by the Chapter 15 venue statute if section 109(a) is a requirement of recognition.

126. Id. at 28.
127. Barnet, 737 F.3d at *250.
128. Id. However, the effect of ignoring the special Chapter 15 venue provision is to have Congress create a wagging tail without any dog attached.

DOI: 10.1002/iir

H. Discussion of 28 U.S.C. § 1782 misunderstands Chapter 15

The Foreign Representatives' final argument was that the purpose of Chapter 15 would be undermined by application of section 109(a).[129] Not so, said the court; the purposes listed in section 1501 can be accomplished with or without imposition of section 109(a).[130] The court acknowledges that the Model Law contains no analog to section109(a) but concludes that the omission is not sufficient "to outweigh the express language Congress used in adopting Sections 109(a) and 103(a). This is especially true where other provisions of federal law provide the relief that the Model Law was intended to provide. Here, 28 U.S.C. § 1782(a) provides for discovery in aid of foreign proceedings without any requirement akin to Section 109(a). (footnote omitted).[131]

With respect, the court is plainly wrong for two reasons. First, it ignores the mandate of section 1508 to interpret Chapter 15 in light of its international origin and purpose. Second, it assumes that a foreign representative can seek judicial assistance under 28 U.S.C. § 1782(a) without first obtaining recognition. To assist foreign tribunals and litigants to obtain discovery in the USA, 28 U.S. Code § 1782 – "Assistance to foreign and international tribunals and to litigants before such tribunals" permits a district court to order testimony or document production based on a request of the foreign tribunal or "upon the application of any interested person." Sections 1509(b) and (c) make clear that a foreign representative cannot apply to a court in the USA without first obtaining recognition of the foreign proceeding.[132] Section 1509(b) states that "[i]f the court grants recognition … (2) the foreign representative may apply to a court in the United States; and (3) a court in the United States shall grant comity or cooperation to the foreign representative." Section 1501(c)(2) adds a requirement that such a request be accompanied by a copy of the order granting recognition.[133] The Legislative History confirms: "Subsections (b)(2), (b)(3), and (c) make it clear that Chapter 15 is

129. Id.

130. Barnet, 737 F.3d at *251. Section 1501 (a) provides: "(**a**)The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—(**1**)cooperation between—(**A**)courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and (**B**)the courts and other competent authorities of foreign countries involved in cross-border insolvency cases; (**2**)greater legal certainty for trade and investment; (**3**)fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor; (**4**)protection and maximization of the value of the debtor's assets; and (**5**) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment." 11 U.S.C. § 1501(a).

131. Barnet, 737 F.3d at *251.

132. 11 U.S.C. § 1509(b) and (c).

133. Id.

DOI: 10.1002/iir

intended to be the exclusive door to ancillary assistance to foreign proceedings."[134] Several bankruptcy and district courts agree.[135]

The court is just wrong in its view that a foreign representative can apply to a court for discovery under 28 U.S.C. § 1782 without first obtaining recognition. Thus, if the foreign representative learns that the crucial computer data are in the hands of the debtor's former accountant in Toledo or a list of the debtor's worldwide assets is in a banker's file in Los Angeles, it will be helpless to collect that information on behalf of creditors, unless a questionable maneuver (discussed in the succeeding paragraphs) succeeds.[136]

I. Secondary authorities do not support application of section 109(a)

The Second Circuit ostensibly found support in secondary authorities, stating that "[c]ommentators have reached the same conclusion" that section 109(a) must be satisfied before recognition can be granted.[137] However, it misunderstood the first commentator and accepted a flawed analysis by the second.

A quote from Collier on Bankruptcy appears to reflect the court's view: "Although Chapter 15 is the principal Chapter of the Bankruptcy Code that governs the conduct of ancillary cases, several other sections of the Bankruptcy Code …directly affect cases under Chapter 15. These include … section 109, which limits the types of debtors eligible for Chapter 15...."[138] However, Collier was discussing the imported limitations of subsections 109(b) and (e), which are referenced in section 1501; it was not discussing section109(a), which is not referenced anywhere in Chapter 15.

The court also cited a law review article to the effect that "section 109(a) cannot be reconciled with Chapter 15 and …contrary to Congress' intent, foreign representatives of foreign debtors without assets in the U.S. are not, on the face of the statute, entitled to the assistance of U.S. bankruptcy courts."[139] The article was written by a well-respected commentator who made a mistake in this instance. It relies on the incorrect premise that the foreign debtor is the subject of a Chapter 15 case, not just an occasional object: "thus after BAPCPA, the Bankruptcy Code

134. H.R. Rep. 110.

135. See United States v. J.A. Jones, 333 B.R. 637 (E.D. N.Y. 2005) (finding a lack of jurisdiction to honor a stay request by a Canadian receiver because of a failure to obtain an order recognizing the foreign proceeding and entering a temporary stay to enable the receiver to file a Chapter 15 petition); Wanachek Mink Ranch v. Alaska Brokerage Int'l, Case No. 06-089RSM (W.D. Wash. Dec. 2, 2009) (declining to recognize a UK administration proceeding and stay litigation against it without a showing that the UK proceeding had been granted recognition under Chapter 15); Oak Point Partners, Inc. v. Lessing, 2013 U.S. Dist. LEXIS 56674 (N.D. Cal. Apr. 19, 2013) (no comity will be afforded to a foreign representative before recognition of the foreign proceeding.); *In re* Millard, 501 B.R. 644 (Bankr. S.D.N.Y. 2013 ("it being remembered that recognition is the *sine qua non* for access to the U.S. courts").

136. See Part VI.

137. Barnet, 737 F.3d at *247–248.

138. A second Collier treatise, the Collier Bankruptcy Practice Guide (Alan N. Resnick and Henry J. Sommer eds.) was more expansive at 19.03, n.2. 1501.3 of the main Collier treatise (written by Mr. Glosband) was revised following the *Barnet* decision to clarify that § 109(a) was not intended to apply to Chapter 15 recognition.

139. Barnet, 737 F.3d at *247–248, citing Susan Power Johnston, *Conflict Between Bankruptcy Code § § 109(a) and 1515: Do U.S. Bankruptcy Courts Have Jurisdiction Over Chapter 15 Cases If the Foreign Debtor Has No Assets or Presence in the U.S.?*, 17 J. Bankr.L. & Prac. 5, art. 6 (Aug.2008), at 1

DOI: 10.1002/iir

on its face requires that all debtors, *including debtors that seek assistance from U.S. bankruptcy courts pursuant to a Chapter 15 petition*, have a residence, a domicile, a place of business or property in the U.S." (emphasis added). As we have seen, a foreign debtor cannot even file a Chapter 15 petition or receive Chapter 15 relief, so the article's reading was importantly flawed from the start.

The article repeats the mistake in its otherwise excellent discussion of the jurisprudence under section 304, the predecessor to Chapter 15 that was repealed by BAPCPA.[140]

V. Subsequent Decisions and a Possible Maneuver

A. Delaware bankruptcy court rejects *Barnet*

Subsequent to the *Barnet* decision, a bankruptcy court for the District of Delaware disagreed with *Barnet*, refused to apply section 109(a) to the recognition of a foreign proceeding and predicted that the Third Circuit would agree. The bankruptcy court's decision was rendered orally and the transcript says:

> The decision of the Second Circuit is not controlling on this Court. And this Court does not agree with the decision of the Second Circuit. And it is the Court's belief that there is a strong likelihood that the Third Circuit, likewise, would not agree with that decision.
>
> Section 109(a) provides for Debtors under this title, and it is a Foreign Representative who is petitioning the Court, not the Debtor in the foreign proceeding. The Foreign Representative is asking for recognition in aid of that foreign proceeding. And the requirements of Section 109(a) do not control. Commentators have reflected on the possibility that it was a scrivener's error and that the intent was that 109(a) not apply.
>
> And I would also read to you from Section 1502 which is the definition section for Chapter 15, and 109(a) again some Courts' have said is applicable. But 1502, Section 1502 defines Debtor as an entity that is the subject of a foreign proceeding. And there was nothing in that definition in Section 1502 which reflects upon a requirement that Debtor have assets. A Debtor is an entity that is involved in a foreign proceeding, which is what we have here.[141]

B. Second attempt at recognition succeeds in *Barnet*

Shortly after the Second Circuit issued its decision in *Barnet*, the Foreign Representatives filed a new Verified Petition Under Chapter 15 for Recognition of Foreign

140. In discussing the legislative history of section 304, the article misquotes H.R. Rep. No. 95-595 as saying "where a foreign bankruptcy case is pending concerning a particular debtor and that debtor has assets in this country, *the foreign debtor* may file a petition under this section [304] (emphasis supplied)." However section 304 was similar to section 1515 in designating the foreign representative, not the debtor, as the only person who could commence an ancillary case: "A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative." H.R. Rep. No. 95-595 actually says that the "*foreign representative may file a petition* under this section, which does not commence a full bankruptcy case…" (emphasis supplied). The idea that the debtor could file the case and somehow be a "debtor in a case under this title" infects the analysis in the article and, in turn, the article provides illusory support for the Second Circuit's view of the applicability of section 109(a).

141. *In re* Bemarmara Consulting A.S., Case No. 13-13037 (Bankr. D. Del. Dec. 17, 2013)

DOI: 10.1002/iir

Proceedings.[142] The Foreign Representatives identified two types of property – claims and causes of action and an undrawn retainer held by their counsel – that they asserted satisfied the eligibility requirement of section 109(a) that a debtor must have "domicile, a place of business or property in the United States."[143] As before, satisfaction of the recognition requirements of section 1517 was undisputed.[144] Drawbridge again objected, asserting that satisfaction of section 109(a) must be as of the filing of the first petition for recognition, that the second petition should be dismissed as an abuse of process and that, even if recognition were granted, the court should dismiss the case to further the objectives of Chapter 15.[145] Drawbridge argued that because the causes of action were "potential future causes of action" at the time of the first petition, they could not constitute "property."[146] Even if the causes of action did constitute property, the claims should be deemed to be located in Australia, Octaviar's domicile, and would not be a property "in the United States," as required by section 109(a).[147] The bankruptcy court rejected both arguments.

By the time of the hearing on the second petition, complaints against the Drawbridge entities had already been filed in the Southern District of New York and in the New York Supreme Court. Citing well-established precedent that causes of action constitute "property of the estate" under bankruptcy law, the court held that these claims were in fact "property" that satisfied the requirements of section 109 (a).[148] The court rejected the argument that the causes of action were not located in the USA, finding that Drawbridge misconstrued Judge Lifland's ruling in the *Fairfield Sentry* case that causes of action, as intangible assets, are located where the plaintiff is domiciled rather than the defendant.[149] The court reasoned: "Judge Lifland made clear …that the situs of intangibles depends upon a 'common sense appraisal of the requirements of justice and convenience' in the particular circumstance of the case."[150] Here, where the claims arose under US law against US defendants and included allegations that funds were unlawfully transferred to US entities, the court held that such causes of action were property "in the United States" and thus satisfied the requirements of section 109(a).[151]

Drawbridge conceded that funds held in a retainer account by the lawyers for the Foreign Representatives constituted property in the USA for purposes of section 109(a), but it argued that the transfer of funds into the client trust account maintained by the Foreign Representatives' US counsel was a bad faith, improper,

142. In re Octaviar Administration Pty Ltd (Debtor in a Foreign Proceeding), 511 B.R. 361 (Bankr. S.D.N.Y. June 19, 2014) ("Octaviar II").
143. Octaviar II at *369 and *372.
144. Octaviar II at *369.
145. Id. at *368.
*146. Octaviar II at*370.*
*147. Octaviar II at*372.*
*148. Octaviar II at*369–*370.*
149. In re Fairfield Sentry Ltd., 484 B.R. 615, 624 (Bankr. S.D.N.Y. 2013) (internal citations omitted) (After claim prices rose, the Fairfield Sentry liquidator attempted to escape from a contract to sell its claim against Bernard L. Madoff Investment Securities, LLC even though the BVI Court overseeing the liquidation ruled that the liquidator was bound by the contract. In the circumstances, Judge Lifland ruled that the BVI Court held the paramount interest in the sale of the claim and the claim should be deemed located outside of the United States – but on both points the Second Circuit reversed. Krys v. Farnum Place, LLC (*In re* Fairfield Sentry Ltd.), No. 13-3000, 2014 WL 4783370 (2d Cir. Sept. 26, 2014))
*150. Octaviar II at*371.*
*151. Octaviar II at*372.*

DOI: 10.1002/iir

manufactured attempt to meet the eligibility requirements of 109(a).[152] The court found no bad faith and noted precedent holding that cash deposits or retainers held in US accounts comprised "property" sufficient to satisfy the debtor eligibility requirements of section 109(a).[153] The court relied on the Second Circuit's emphasis on a "plain meaning" approach to the Code to limit its property inquiry: "Section 109(a) says, simply, that the debtor must have property; it says nothing about the amount of such property nor does it direct that there be any inquiry into the circumstances surrounding the debtor's acquisition of the property."[154]

Notwithstanding the success of the retainer account as property in *Octaviar*, whether foreign representatives are safe in relying on this sort of tactic is not at all clear; for now in the Second Circuit, it may permit business to be done. But application of section 109(a) invites a subjective, "bad faith" attack that circumnavigates the objective policy and structure of Chapter 15 and the Model Law and could be an impediment to recognition: "if recognition is not contrary to the public policy of the enacting State (see article 6) and if the application meets the requirements set out in the article, recognition will be granted as a matter of course."[155] Essentially, section 109(a) permits substitution of the high hurdle "manifestly contrary to public policy" limitation with the lower bar of lack of good faith.[156]

Drawbridge's final argument was that even if recognition was granted, the case should be dismissed under section 305(a)(2) of the Code to further the objectives of Chapter 15.[157] To the contrary, the court held that the Foreign Representatives should be allowed to bring the causes of action that they identified and that "in furtherance of the goals of Chapter 15, granting recognition will foster the fair, efficient, and timely administration of the Octaviar insolvency, and possibly, depending on the merits, assist in protecting the interests of Octaviar and maximizing the value of Octaviar's assets for the benefit of its creditors."[158]

C. Octaviar begets Suntech

Suntech Power Holdings Co. Ltd. was the Cayman Islands' registered parent of a group of companies in the solar power business.[159] Suntech identified the location of its principal executive offices as Wuxi, China and none of the Suntech companies

*152. Octaviar II at*372.*

153. Octaviar II at *372-373, citing *In re* Cenargo Int'l PLC, 294 B.R. 571, 603 (Bankr. S.D.N.Y. 2003); *In re* Yukos Oil Co., 321 B.R. 396, 401-403 (Bankr. S. D. Tex. 2005); *In re* Global Ocean Carriers Ltd., 251 B.R. 31, 39 (Bankr. D. Del. 2000).

*154. Octaviar II at*373.*

155. Guide at 150.

156. Cf., e.g., Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (*In re* Little Creek Dev. Co.), 779 F. 2d 1068, 1071-1072 (5th Cir. 1986) ("Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings…. Such a standard furthers the balancing process between the interests of debtors and creditors which characterizes so many provisions of the bankruptcy laws and is necessary to legitimize the delay and costs imposed upon parties to a bankruptcy.")

*157. Octaviar II at*368.* Section 305(a)(2) provides: **a**) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—(**2**) (**A**)a petition under section 1515 for recognition of a foreign proceeding has been granted; and (**B**)the purposes of chapter 15 of this title would be best served by such dismissal or suspension.

*158. Octaviar II at*375.*

159. In re Suntech Power Holdings Co., Ltd., 520 B. 399 (Bankr. S.D.N.Y. 2014).

DOI: 10.1002/iir

conducted business in the Cayman Islands.[160] When Suntech defaulted on its US-issued debt and negotiated a restructuring agreement, it agreed to propose a scheme of arrangement in the Cayman Islands and seek Chapter 15 relief if necessary.[161] The provisional liquidators appointed in the Cayman Islands took control of Suntech and its dealings with creditors, effectively migrating its COMI from China to the Cayman Islands.[162] To comply with the *Barnet*-imposed eligibility requirements of section 109(a), the provisional liquidators transferred $500 000 to the Bank of New York ("BONY") account of an unrelated third party who, the court found, held the account as agent for Suntech.[163] Citing *Octaviar* and *Yukos*, the court ruled that the BONY account, admittedly funded for the purpose of satisfying section 109(a), was sufficient for that purpose.[164] We remain unsure whether this process of creating jurisdiction will be upheld if appealed in Manhattan or will be emulated elsewhere.[165] It would be a shame if a restructuring approved in a foreign proceeding could not be enforced against US creditors, US assets of a foreign debtor could not be recovered or other basic relief could not be granted because the foreign debtor did not satisfy a requirement that was never intended to apply to it.

VI. Conclusion

The Second Circuit decision in *Barnet* represents an ostensibly stubborn adherence to literal statutory interpretation when the statutory provisions at issue *prima facie* were not susceptible to literal interpretation and when Congress instructed courts to look beyond the statute for guidance in harmonizing Chapter 15 to the Model Law. We hope courts in other circuits will apply section 1508 and not impose requirements for recognition beyond those set forth in section 1517. To eliminate the risk of misapplication of section 109(a), Congress could modify section 103(a) to make it unavoidably clear that section 109(a) does not apply to eligibility of a foreign proceeding for recognition.

For courts within the Second Circuit, the requirement to satisfy section 109(a) may be a small bump in the road to an order recognizing a foreign proceeding, but it could possibly be a roadblock. While the focus of recognition should be on the eligibility of the foreign proceeding and the foreign representative, as specified by section 1517, the additional requirement that the debtor in the foreign proceeding have residence, domicile, property, or a place of business in the United States could be satisfied with little more than the "dollar, dime or peppercorn," proffered by the Octaviar foreign representatives.[166] If the courts decide such a proffer raises questions of good faith, a trial may stand between the foreign representative and the prompt recognition that is the central goal of the statute.

160. Id. at 2.
161. Id. at 2–3.
162. Id. at 14.
163. Id. at 9.
164. Id.
165. The bankruptcy bench in Southern New York is well-known for its welcoming attitude toward cases arguably having greater connections elsewhere. *See, e.g.*, *In re* Enron Corp., 274 B.R. 327 (Bankr. S.D.N.Y. 2002). The jurisdictional device of a bank account or similar property sufficing to avoid jurisdictional difficulties is somewhat reminiscent of what one reads of Sixteenth Century fictions in the common law courts.
166. In re Octaviar Administration Pty Ltd (Debtor in a Foreign Proceeding), Case No. 14-10438, (Bankr. S.D. N.Y.), Doc. 6, par. 10 (quoting *In re* McTague, 198 B. R. 428 (Bankr. W.D.N.Y. 1996)).

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APPENDIX

Table of concordance of paragraph numbers between the 1997 and 2013 versions of the United Nations Commission on International Trade Law Guide to Enactment of the Model Law on Cross-Border Insolvency

1997	2013	1997	2013	1997	2013	1997	2013	1997	2013	1997	2013
1	1	41*	220	81	96	118	133	155	190	192	233
2	2	42*	224/226	82	97	119	134	156	191	193	234
3	3	43*	197	83	98	120	135	157	192	194	235
4	12	44*	229	84	99	121	136	158	193	195	236
5	13	45	deleted	85	100	122	137	159	194	196	237
6	14	46	deleted	86	101	123	140	160	195	197	238
7	15	47	deleted	87	102	124	150	161	196	198	239
8	16	48	deleted	88	103	125	163	162	197	199	240
9	17	49	23	89	104	126	154	163	198	200	241
10	18	50	22	90	105	127	155	164	199	201	242
11	19	51	48	91	106	128	156	165	200	202	243
12	20	52	50	92	107	129	164	166	201		
13	5	53	51	93	108	130	165	167	203		
14	6	54	46	94	109	131	166	168	204		
15	7	55	47	95	110	132	167	169	205		
16	8	56	52	96	111	133	168	170	206		
17	9	57	53	97	112	134	169	171	207		
18	10	58	52	98	113	135	170	172	208		
19	11	59	54	99	114	136	171	173	211		
20	21	60	55	100	115	137	172	174	213		
21	22	61	56	101	116	138	173	175	214		
22	53	62	57	102	117	139	174	176	215		
23	66	63	58	103	118	140	175	177	216		
24	71	64	59	104	119	141	176	178	217		
25	deleted	65	60	105	120	142	177	179	218		
26	deleted	66	61	106	121	143	178	180	219		
27	deleted	67	62	107	122	144	179	181	220		
28	127	68	63	108	123	145	180	182	221		
29	del	69	79	109	124	146	181	183	222		
30	deleted	70	80	110	125	147	182	184	224		
31*	81	71	65	111	126	148	183	185	225		
32	37	72	81	112	127	149	184	186	226		
33	38	73	85	113	128	150	185	187	227		
34*	189	74	87	114	129	151	186	188	229		
35	deleted	75	88	115	130	152	187	189	230		
36	deleted	76	91	116	131	153	188	190	231		
37	28	77	92	117	132	154	189	191	232		
38		209			78		93				
39		210			79		94				
40		deleted			80		95				

*These paras. have been reproduced only in part. The substance of deleted paras. is addressed in the remarks on individual articles.

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