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INTRODUCTION

This article discusses the ability of a foreign debtor to liquidate or reorganize under title 11 of the United States Code (the "Bankruptcy Code"). Foreign companies can address their debt in a bankruptcy case under the Bankruptcy Code if it satisfies the eligibility requirements set forth in section 109 of the Bankruptcy Code. [1] A court may dismiss a foreign company's bankruptcy case under section 305[2] or section 1112 of the Bankruptcy Code.[3] Part I of this article discusses the eligibility requirements under section 109 of the Bankruptcy Code.[4] Part II analyzes the possibility of dismissal for "cause" under section 1112. [5] Finally, Part III examines the "best interests" provision of section 305.[6]

I. TO BE ELIGIBLE FOR CHAPTER 11 BANKRUPTCY RELIEF IN THE UNITED STATES, A DEBTOR MUST QUALIFY UNDER SECTION 109.

[1] 11 U.S.C. § 109(a) (2012).
[2] 11 U.S.C. §305 (2005).
[3] 11 U.S.C § 1112 (b) (2010).
[4] 11 U.S.C. § 109(a) (2012).
[5] 11 U.S.C § 1112 (b) (2010).
[6] 11 U.S.C. §305 (2005).

To be eligible to file for relief under the Bankruptcy Code the filing party must be a "person" that resides, or has a domicile, a place of business, or owns property in the United States.[7] Eligibility is based on "the date the bankruptcy petition is filed."[8]

Although the residency and domicile requirement may be used interchangeably in other venue and jurisdiction provisions, the separate enumeration of each requirement indicates an intention to have a legal distinction between residence and domicile.[9] Domicile is where a person's "true, fixed, permanent home and principal establishment" is and where the person has intention of returning after being absent.[10] A domicile, once acquired, is assumed to continue as a domicile until a change is proven.[11] Residency is not equivalent to domicile and thus a less permanent occupancy will suffice to satisfy eligibility requirements.[12]

A place of business in the United States can also qualify a company as a debtor. The qualification of "place of business" is construed liberally given that the Bankruptcy Code does not require a debtor to have a "principal place of business" located in the United States.[13] A place of business under the Bankruptcy Code means a place where "a debtor has a business of his or her own and does not refer to the place where a person engages in gainful activities solely

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[7] 11 U.S.C. § 109(a) (2012).
[8] *In re* Northshore Mainland Servs., Inc., 537 B.R. 192, 200 (Bankr. D. Del. 2015) (citing *In re* Axona International Credit & Commerce, Ltd., 88 B.R. 597, 614–15 (Bankr.S.D.N.Y.1988)).
[9] 3 COLLIER ON BANKRUPTCY ¶ 109.2 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015).
[10] *Id.*
[11] Starwood Hotels & Resorts Worldwide, Inc. v. Hilton Hotels Corp., 2010 U.S. Dist. LEXIS 71436, at *23 (S.D.N.Y. June 16, 2010) (citing *Gutierrez v. Fox*, 141 F.3d 425, 427 (2d Cir. 1998)).
[12] *In re* Pettit, 183 B.R. 6, 8 (Bankr. D. Mass. 1995).
[13] *In re* Paper I Partners, L.P., 283 B.R. 661, 672 (Bankr. S.D.N.Y. 2002) (A principle place of business is not required to satisfy 109(a)'s requirement, it is merely a "place" of business that is required).

as a subordinate employee of another."[14] A place of business is sufficient if a person is conducting business on the person's behalf.[15] In *In re Paper I Partners, L.P.,*[16] the court found that the "place of business" requirement was satisfied by having a general partner in the United States that conducted business for the general partnership.[17]

Any property located in the United States satisfies the property requirement of section 109(a).[18] Thus, a foreign company with nominal property in the United States would be eligible to be a debtor under the Bankruptcy Code. Courts have determined that they do not have the discretion to look beyond the language and quantify what amount of property is sufficient to be an eligible debtor.[19] The courts may exercise discretion in keeping a foreign bankruptcy case where a debtor has property in the United States or to dismiss the case in deference to foreign courts.[20] In *In re Northshore Mainland Servs., Inc.*,[21] the majority of debtors organized under Bahamian law were eligible as debtors under section 109(a). Seven bank accounts satisfied the property requirement under section 109(a).[22]

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[14] 3 COLLIER ON BANKRUPTCY ¶ 109.2 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015).
[15] *In re* Paper I Partners, L.P., 283 B.R. at 672 (referring to *In re* Petition of Brierley, 145 B.R. 151, 161 (Bankr. S.D.N.Y. 1992), where English corporation had a place of business in the United States when the corporation's accountant, who was employed as an independent contractor, performed accounting functions from Arthur Andersen's offices in New York.)
[16] 283 B.R. 661, 672.
[17] *Id.* at 670-71.
[18] *See* GMAM Inv. Funds Tr. I v. Globo Comunicacoes E Participacoes S.A. (*In re* Globo Comunicacoes E Participacoes S.A.), 2004 U.S. Dist. LEXIS 23347, at *29 (S.D.N.Y. Nov. 17, 2004).
[19] *See In re* Global Ocean Carriers Ltd., 251 B.R. 31, 38-39 (citing *In re* McTague, 198 B.R. 428, 431-32).
[20] *See In re* Yukos Oil Co., 321 B.R. 396, 407 (Bankr. S.D. Tex. 2005). *See also,* Banque de Financement, S.A. v. First Nat'l Bank of Boston (*In re* Banque de Financement, S.A., 568 F.2d 911 (2d Cir. 1977).
[21] 537 B.R. 192.
[22] *See id*. at 197, 202.

Because of the broad construction of who may be a debtor in a bankruptcy proceeding, it has been said there is "virtually no formal barrier" to restructuring or liquidating a foreign debtor in the United States Bankruptcy Courts.[23] Despite qualifying as a debtor, a foreign company may face dismissal under section 1112(b) for cause or under section 305(a) if found to be in the best interest of debtors and creditors.

II. A COURT MAY DISMISS A FOREIGN DEBTOR'S CHAPTER 11 CASE IF IT WAS FILED IN BAD FAITH OR AS A LITIGATION TACTIC.

Under section 1112(b) of the Bankruptcy Code, a court may convert or dismiss a case "for cause."[24] "Cause" is not exclusively defined but the Bankruptcy Code offers a non-exhaustive list of examples.[25] This section is not meant to be read "in a vacuum," and interpretation of 1112(b) should take into account the legislative intent behind its enactment.[26]

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[23] *In re* Aerovias Nacionales de Colombia S.A. (*In re* Avianca), 303 B.R. 1, 9 (Bankr. S.D.N.Y. 2003) (quoting 2 L. King, Collier on Bankruptcy, P109.02[3] (15th ed. rev. 2003)).

[24] 11 U.S.C. 1112(b)(1).

[25] 11 U.S.C. 1112 (b)(4). For purposes of section 1112(b)(4), the term "cause" includes (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; (B) gross mismanagement of the estate; (C) failure to maintain appropriate insurance that poses a risk to the estate or to the public; (D) unauthorized use of cash collateral substantially harmful to 1 or more creditors; (E) failure to comply with an order of the court; (F) unexcused failure to satisfy timely any filing or reporting requirement established by [the Bankruptcy Code] or by any rule applicable to a case under [chapter 11]; (G) failure to attend the meeting of creditors convened under section 341(a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor; (H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any); (I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief; (J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court; (K) failure to pay any fees or charges required under chapter 123 of title 28; (L) revocation of an order of confirmation under section 1144; (M) inability to effectuate substantial consummation of a confirmed plan; (N) material default by the debtor with respect to a confirmed plan; (O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and (P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

[26] *In re Nikron, Inc.*, 27 B.R. 773, 777 (Bankr. E.D. Mich. 1983) ("To follow blindly the plain meaning of a statute without regard to the obvious intention of Congress would create an absurd

Citing to section 1112(b) and its legislative history, courts have imposed a good faith requirement on chapter 11 cases.[27] Once a case is challenged under section 1112(b) for lack of cause or good faith, the burden automatically shifts to the debtor to prove good faith.[28] The good faith requirement is a "fact intensive inquiry" where the court examines totality of the circumstances to determine whether the filing was done with a valid purpose.[29] The Court of Appeals for the Third Circuit determined that there are two factors that should be considered in determining whether a petition is filed in good faith: (1) whether there is a valid bankruptcy purpose for the petition, and (2) whether the petition was filed solely for tactical litigation advantage.[30]

In *In re Northshore Mainland Services, Inc.*,[31] the court determined that the debtors'[32] bankruptcy filing served a valid bankruptcy purpose and was not being used merely as a litigation tactic.[33] Prior to filing for bankruptcy, the debtors were clearly on the verge of financial ruin due to missed construction deadlines and the absence of payments.[34] This satisfied the first

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result in accord with neither established principles of statutory construction nor common sense.") (*citing In re* Adamo, 619 F.2d 216, 219 (2d Cir. 1980)). *See also,* Official Comm. of Unsecured Creditors v. Nucor Corp. (*In re* SGL Carbon Corp.), 200 F.3d 154, 165-67 (Because the list defining "cause" is not exhaustive, it is important to consider the legislative history of court's discretion to control their docket and to dismiss cases where cause is present.).

[27] *In re* SGL Carbon Corp., 200 F.3d at 165-67.

[28] *In re* Tamecki, 229 F.3d 205, 207 (3d Cir. 2000) ("Once a party calls into question a petitioner's good faith, the burden shifts to the petitioner to prove his good faith") (citation omitted); *In re* Integrated Telecom Express, Inc., 384 F.3d 108, 118 ("At its most fundamental level, the good faith requirement ensures that the Bankruptcy Code's careful balancing of interests is not undermined by petitioners whose aims are antithetical to the basic purposes of bankruptcy[.]").

[29] *See In re* Integrated Telecom Express, Inc., 384 F.3d 108, 118 (3d Cir.2004).

[30] *See In re* SGL Carbon Corp., 200 F.3d at 165.

[31] *See* 537 B.R. 192.

[32] Northshore Mainland Services Inc. and its affiliated debtors and debtors in possession.

[33] *See In re* Northshore Mainland Services, Inc., et al., Debtors, 537 B.R. 192 (Bankr. Del. September 15, 2015).

[34] *See id*. at 202-03.

prong of having a valid bankruptcy purpose. However, despite that the debtors admitted that their purpose for filing chapter 11 bankruptcy was an effort to gain control of a failing project and to reorganize rather than liquidate, the court did not consider this to be a litigation tactic that would amount to bad faith.[35] The court describes a good faith and bad faith spectrum, ranging from "clearly acceptable" to "patently abusive."[36]

An example of a case that failed the test under the first prong of the good faith analysis is *In re Integrated Telecom Express, Inc.*[37] There, the debtor, Integrated Telecom Express, Inc. ("Integrated"), had no intent to reorganize or liquidate under the Bankruptcy Code and was technically "out of business." The court, however, determined that the debtor was highly solvent and financially healthy without any debt.[38] Integrated argued that its bankruptcy case should not be dismissed because the bankruptcy provided a framework for resolution of a securities class action.[39] However, this was not a valid bankruptcy purpose.[40] The appellate court held that the

[35] *See id*. at 203.
[36] *Id.*; *In re* Integrated Telecom Express Inc., 384 F.3d at 120 (citing *Marsch v. Marsch* (*In re Marsch*), 36 F.3d 825, 828 (9th Cir. 1994) ("The test is whether a debtor is attempting to unreasonably deter or harass creditors or attempting to effect a speedy, efficient reorganization on a feasible basis."); United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (*In re* Timbers of Inwood Forest Assocs., Ltd.), 808 F.2d 363, 373 (5th Cir. 1987) (en banc) (stating that if Chapter 11 plan does not have a rehabilitative purpose, the "statutory provisions designed to accomplish the reorganization objective become destructive of the legitimate rights and interests of creditors, the intended beneficiaries"); *In re* Coastal Cable T.V., Inc., 709 F.2d 762, 764 (1st Cir. 1991) (Breyer, J.) (stating that there must be "some relation--at least an arguable relation--between the chapter 11 plan and the reorganization-related purposes that the chapter was designed to serve")).
[37] *See In re* Integrated Telecom Express Inc., 384 F.3d at 120.
[38] *Id.* at 115, 120 ("Integrated had $105.4 million in cash and $1.5 million in other assets at the time that it filed for bankruptcy.").
[39] *See id*. at 124.
[40] *See id*. at 124.

District Court and the Bankruptcy Court erred as a matter of law and "because Integrated was not in financial distress, its Chapter 11 petition was not filed in good faith."[41]

The timing of the filing of a bankruptcy petition is a major factor in analyzing the second prong, i.e., whether the petition was filed as a litigation tactic.[42] The debtors in *In re 15375 Memorial Corp v. Bepco, L.P.*[43] filed their bankruptcy due to pending litigations.[44] The bankruptcy filings would give the debtors an advantage in litigation by providing them with protection against certain damages.[45] The fact that the debtors filed two months prior to trial was a main factor in the court's determination that the bankruptcy was filed as a litigation tactic.[46]

III. A COURT MAY DISMISS A CHAPTER 11 CASE IF DISMISSAL WOULD BE IN THE BEST INTERESTS OF THE DEBTOR AND ITS CREDITORS.

Section 305(a) of the Code provides a court with discretion to dismiss a case if dismissal would better serve the interests of both the creditors and the debtors.[47] According to the Bankruptcy Appellate Panel for the Ninth Circuit, in considering whether to dismiss or abstain under Section 305, a bankruptcy court should look to whether both the creditors and the debtors would be "better served" by granting this relief. [48] The moving party bears the burden of proving

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[41] *Id*. at 130.
[42] *In re* SGL Carbon Corp. 200 F.3d 154, 165 (Where "the timing of the filing of a Chapter 11 petition is such that there can be no doubt that the primary, if not sole purpose of the filing was a litigation tactic, the petition may be dismissed as not being filed in good faith.")
[43] *See* 589 F.3d 605.
[44] *See id.* at 615-16.
[45] *See id*. at 625.
[46] *See id.* (concluding "the Debtors' filing for bankruptcy did not maximize the value of their estates" and failed to meet a valid bankruptcy purpose. Further, "the timing of the Debtors' bankruptcy petitions shows that they were filed primarily as a litigation tactic to avoid liability [in another action.]").
[47] 11 U.S.C. § 305 (2005) (discussing the courts discretion in dismissing bankruptcy cases under the abstention exception in order to better serve parties' interests).
[48] 3 COLLIER ON BANKRUPTCY ¶ 305.02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015) (citing RHTC Liquidating Co. v. Union Pac. R.R. (*In re* RHTC Liquidating Co.), 424 B.R.

that dismissal better serves both the debtors and creditors.[49] Recent case law favors a seven-factor "best interest" test;[50] each factor is given neither equal weight nor strict balancing.[51]

A court may abstain when a foreign proceeding is pending with respect to the same debtor.[52] However, because of the high standard of demonstrating that both the interests of the creditors and debtors would be better served elsewhere, courts rarely abstain.[53] Courts have dismissed cases in deference to foreign proceedings where the debtors or creditors would anticipate a liquidation to occur and where the parties are best served.[54] For example, the Court in *In re RHTC Liquidating Co.* denied a motion to dismiss a chapter 7 bankruptcy case because there was no evidence that the interests of the parties would be better served in a Canadian proceeding.[55] Further, the court weighed the parties' expectations finding that it would be

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714, 720–21 (Bankr. W.D. Pa. 2010); *In re* Eastman, 188 B.R. 621, 624–25 (B.A.P. 9th Cir. 1995)).

[49] *In re* RHTC Liquidating Co., 424 B.R. at 720–21 (discussing the interests of both parties must be met and the party moving for dismissal bears the burden of proof).

[50] 2 NORTON BANKRUPTCY LAW AND PRACTICE § 24:1 (William L. Norton, Jr. ed., 3d ed. 2008) (citing *In re* Monitor Single Lift I, Ltd., 381 B.R. 455, 464–65, (Bankr. S.D. N.Y. 2008)).

[51] *In re* AMC Investors, LLC, 406 B.R. 478, 488 (Bankr. Del. 2009) (granting abstention requires more than a balancing of the harm to both parties). *See also*, *In re* Mylotte, Davis & Fitzpatrick, at *6; In re Paper I Partners, L.P., 283 B.R. 661, 679 (the seven factors are: (1) economy and efficiency of administration; (2) whether another forum is available to protect interests of both parties or there is already pending proceeding in state court; (3) whether federal proceedings are necessary to reach just and equitable solution; (4) whether there is alternative means of achieving equitable distribution of assets; (5) whether debtor and creditors are able to work out less expensive out-of court arrangement which better serves all interests in this case; (6) whether non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and (7) purpose for which bankruptcy jurisdiction has been sought).

[52] *Id.* ¶ 305.02(a)(1)[2][e].

[53] 3 COLLIER ON BANKRUPTCY ¶ 305.02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2015).

[54] *See e.g.*, *In re* RHTC Liquidating Co., 424 B.R. 714, 726.

[55] *See id*. at 721.

reasonable to conclude the parties would anticipate liquidation to occur in the same country where most of its operations, assets, and customers were.[56]

Similarly, the *In re Northshore* court considered the best interest factors in their analysis and deferred based on the stakeholders' expectation of insolvency proceedings taking place in the Bahamas.[57] The court acknowledged the truly international aspect of this case, and despite venue provisions in the contracts, the central focus of the bankruptcy proceeding was the unfinished project in the Bahamas.[58] The court recognized "the deep and important economic interest of the Government of The Bahamas in the future of [this] Project" and placed tremendous weight on the stakeholders' "expectation" of the insolvency proceedings occurring in the Bahamas.[59] Further, the court found that in light of international comity, abstention was supported, and the proceedings that occurred in Bahamian Supreme Court had treated the debtors fairly and impartially.[60]

In re Northshore imposed an unqualified subjective element, the expectation of stakeholders, to the test of determining the interests of both a creditor and debtor in deciding whether to abstain a case under Section 305(a).[61] For both creditors and debtors, the location of investment may have tremendous weight in determining the expected location and tribunal for an insolvency proceeding.[62]

Conclusion

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[56] *See id.* at 726.
[57] *See In re Northshore,* 537 B.R. at 204-08.
[58] *See id.*
[59] *Id*. at 205-06.
[60] *See id*., at 208.
[61] The Bankruptcy Code, 11 U.S.C. § 305 (2005).
[62] *See In re RHTC Liquidating Co.,* 424 B.R. 714, 726.

Having a domicile, residence, place of business, or possessing nominal property in the United States such as a bank account, will qualify a foreign company as a debtor under the Bankruptcy Code.[63] However, a foreign debtor faces the obstacles of dismissal under section 1112(b) for cause, or section 305(a) in the best interests of the creditors and debtors.[64] If a foreign debtor's bankruptcy purpose is questioned, the debtor must show their filing serves a valid bankruptcy purpose and is not a specific tactic to gain advantage in litigation. A bankruptcy court will also consider whether a United States bankruptcy is in the best interest of both the creditors and debtors.

Therefore, foreign debtors and their counsel should be cognizant of the strengths or weaknesses of venue provisions in foreign investment contracts.[65] With the growth and expansion of foreign investments, the *In re Northshore* decision could subject many foreign creditors or debtors to foreign tribunals and bankruptcy cases, despite eligibility to file in United States courts.[66]

[63] *Supra* note 12.
[64] 11 U.S.C. 1112(b); 11U.S.C. 305(a).
[65] *See In re* Northshore, 537 B.R. at 206.
[66] *See id.* at 201, 208.