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The Long (or Not so Long) Arm of Avoidance Claims: The Issue of Extraterritorial Application

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The Long (or Not so Long) Arm of Avoidance Claims: The Issue of Extraterritorial Application

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Acknowledgement

INSOL International is very pleased to present a technical paper titled “The Long (or Not so Long) Arm of Avoidance Claims: The Issue of Extraterritorial Application” by David Molton of Brown Rudnick LLP and Jacob Beiswenger of O'Melveny & Myers LLP both from New York, USA.

The insolvency regimes of most nations contain provisions which empower courts supervising insolvency proceedings to make orders "avoiding" or "setting aside" certain transfers of assets or classes of transactions which were improperly entered into prior to the commencement of insolvency proceedings. In the context of cross-border insolvency proceedings, an office holder's avoidance powers are among the most important tools available to maximize creditor recoveries.

Although one might expect that the "avoidance" remedies of a sophisticated insolvency regime have clear and undisputed extraterritorial effect and application, this is far from the case. The application of avoidance powers in the cross-border context is fraught with choice-of-law complications.

This paper examines the situation in the US, where the extraterritorial application of a specific statute can be limited under two key canons of statutory construction: (i) the “presumption against extraterritoriality;” and (ii) the doctrine of international comity. It highlights recent case law in the United States and United Kingdom, with often conflicting results regarding the extraterritorial application of avoidance powers.

The paper concludes that a global rule, akin to the one now being employed by the European Union, based upon applying the avoidance law of the jurisdiction where the debtor has its “centre of main interest” may avoid piecemeal application of a particular bankruptcy regime and minimize the amount of fraudulent activity or machinations that transferors and transferees may employ to remove otherwise avoidable transfers from the range of avoidance prosecution in any jurisdiction.

INSOL International sincerely thanks David Molton and Jacob Beiswenger for this detailed analysis and for writing this excellent technical paper.

October 2016

The Long (or Not so Long) Arm of Avoidance Claims: The Issue of Extraterritorial Application

By

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Introduction

In cross-border insolvency proceedings, a trustee's avoidance powers under the applicable bankruptcy regime are among the most important tools available to maximise creditor recoveries. These avoidance powers—which in the United States include, among other things, preferential payments¹ and fraudulent transfers²—are used to claw back funds that were improperly transferred prior to the commencement of the bankruptcy proceeding. In so doing, the trustee of a bankruptcy estate can unwind improper transactions and mitigate damages by “mak[ing] available to creditors those assets of the debtor that are rightfully a part of the bankruptcy estate, even if they have been transferred away³”. The application of such powers are especially vital in cases where the debtor perpetrated a massive fraud on its creditors, whether through a Ponzi scheme or otherwise, because the inability to unwind the fraud would often leave creditors, who had not cashed out before the fraud was exposed, at a complete loss.

The ancient origins (dating at least since the Statute of Elizabeth in 1570) and global acceptance of avoidance powers highlight the importance in insolvency proceedings⁴. However, their application in the cross-border context is fraught with choice-of-law complications, especially in the modern economy where transactions almost always have an international dimension. As Lord Toulson and Lord Hodge have noted in a recent United Kingdom Supreme Court judgment:

Money and intangible assets can be transferred into and out of a country with ease, . . . [and] there is frequently an international dimension to contemporary fraud. The ease of modern travel means that people who have committed fraud in this country [the United Kingdom] through the medium of a company (or otherwise) can readily abscond abroad⁵.

In a world with ever-increasingly mobile people and assets, the ability to employ and enforce avoidance powers across borders is necessary to prevent perpetrators of fraud from abusing the bankruptcy process. As one commentator warns, “the lack of effective actions to avoid cross-border transfers . . . offers an opportunity for parties to manoeuvre around the avoidance laws of all the interested jurisdictions, defeating their bankruptcy goals⁶”. Lords Toulson and Hodge comment:

It would seriously handicap the efficient winding up of a British company in an increasingly globalised economy if the jurisdiction of the court responsible for the winding up of an insolvent company did not extend to people and corporate bodies resident overseas who had been involved in the carrying on of the company's business⁷.

Accordingly, courts around the world have wrestled with when and how to apply their avoidance laws without interfering with the interests of foreign jurisdictions. This article highlights recent developments in the United States and United Kingdom regarding the extraterritorial application of avoidance powers and the potential benefits of a global rule, akin to the one now being employed by the European Union, based upon applying the avoidance law of the jurisdiction where the debtor has its “centre of main interest” (“COMI”).

* The views expressed in this article are the views of the authors and not of INSOL International, London. David Molton represents the BVI court-appointed liquidators of the Fairfield Funds (the largest feeder funds into the Madoff Ponzi scheme) in the Funds' Chapter 15 cases in the Bankruptcy Court in the Southern District of New York and the Funds' avoidance and other related litigation in that Court.

¹ See 11 U.S.C. § 547.

² See 11 U.S.C. § 548.

³ *Buncher Co. v. Official Comm. of Unsecured Creditors*, 229 F.3d 245, 250 (3d Cir. 2000).

⁴ See Edward R. Morrison, *Extraterritorial Avoidance Actions: Lessons from Madoff*, 9 BROOK. J. CORP. FIN. & COM. L. 268, 282 (2014), available at <http://brooklynworks.brooklaw.edu/bjcfcl/vol9/iss1/8>; *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 541 (1994) (discussing the ancient origins of fraudulent conveyance law).

⁵ *Jetivia SA v. Bilta (UK) Ltd. (in liquidation)*, [2013] EWCA (Civ) 968, [2015] UKSC 23 ¶ 213 (hereinafter “*Jetivia*”).

⁶ Jay Lawrence Westbrook, *Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases*, 42 TEX. INT'L L.J. 899, 915 (Summer 2007).

⁷ *Jetivia* ¶ 213.

Extraterritorial application of avoidance powers in the United States

I. Statutory background

In the United States, the trustee's avoidance powers are found under Chapter 5 of the Bankruptcy Code. These powers include the right to avoid, or invalidate:

- (i) liens that would otherwise be avoidable by (1) perfected judgment lien creditors, (2) holders of an unsatisfied execution, or (3) a bona fide purchaser of real estate⁸;
- (ii) statutory liens⁹;
- (iii) preferential payments made to creditors within 90 days prior to the petition date (or one year for transfers to insiders)¹⁰;
- (iv) actual fraudulent transfers made with the "actual intent to hinder, delay, or defraud any entity"¹¹;
- (v) constructive fraudulent transfers in which (1) the debtor "received less than reasonably equivalent value" for the transfer and (2) (a) the debtor was insolvent or became insolvent by the transfer, (b) the debtor was left to operate with "unreasonably small capital", (c) the debtor became unable to pay its maturing debts, or (d) the transaction was not in the ordinary course of the debtor's business¹²; and
- (vi) unauthorised post-petition transfers¹³.

Additionally, the trustee may also claw back fraudulent transactions under applicable state laws, which generally follow either the Uniform Fraudulent Transfer Act or the Uniform Fraudulent Conveyance Act and provide for longer look-back periods and statute of limitations periods than under the Bankruptcy Code 14. Collectively, these powers create a formidable array of tools with which the trustee can generate the greatest possible pool of assets for administration and *pari passu* distribution to creditors in a debtor's bankruptcy estate.

In order to effectuate the avoidance powers, Bankruptcy Code Section 550(a) provides that, to the extent a transfer is avoidable under the foregoing provisions, "the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from — (1) the initial transferee of such transfer . . . or (2) any immediate or mediate transferee of such initial transferee¹⁵". Thus, the trustee can use its avoidance powers to recover funds directly from the initial transferee (or immediate or mediate transferees) who received the benefit of the improper prepetition transaction. However, this avoidance power tool belt can be significantly limited if the trustee cannot apply these powers to claw back improper transactions that were made outside the territorial jurisdiction of the United States. As such, it is important to ask when and to what extent avoidance powers apply to cross-border transfers.

II. Two key U.S. limitations on the extraterritorial application of avoidance powers

In the United States, it is well-established that "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States¹⁶". However, the extraterritorial application of a specific statute can be limited under two key canons of statutory construction:

- (i) the "presumption against extraterritoriality;" and

⁸ See 11 U.S.C. § 544.

⁹ See 11 U.S.C. § 545.

¹⁰ See 11 U.S.C. § 547.

¹¹ 11 U.S.C. § 548(a)(1)(A).

¹² 11 U.S.C. § 548(a)(1)(B).

¹³ See 11 U.S.C. § 549.

¹⁴ See 11 U.S.C. § 546 (stating that the statute of limitations period for avoidance actions is generally two years after the petition date); 11 U.S.C. § 548 (stating that a fraudulent transfer must have been incurred on or within two years prior to the petition date).

¹⁵ 11 U.S.C. § 550(a).

¹⁶ *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (hereinafter, "*Aramco*").

(ii) the doctrine of international comity¹⁷.

“Roughly speaking, the presumption against extraterritoriality asks a threshold question (Does this law apply abroad?) while comity asks a scope question (To what conduct abroad does the law apply?)¹⁸”. Each of these limitations is designed to “protect against unintended clashes between [U.S.] laws and those of other nations which could result in international discord¹⁹”. U.S. courts use these canons to determine whether U.S. avoidance powers apply to extraterritorial transfers of debtor assets.

A. The presumption against extraterritoriality

As articulated by the United States Supreme Court, the presumption against extraterritoriality is the principle that “unless there is the affirmative intention of Congress clearly expressed to give a statute extraterritorial effect, courts must presume it is primarily concerned with domestic conditions²⁰”. Any extraterritorial intention of Congress must be “unmistakably clear,” with any ambiguity resolved by not applying the statute to events occurring outside of the United States²¹. In determining whether to apply the presumption in a specific case, U.S. courts engage in a two-step inquiry. First, the U.S. court must identify the conduct regulated by the statute and determine whether such conduct occurred outside of the borders of the United States²². Then, if it is determined that the conduct occurred outside the United States, the U.S. court must determine whether Congress intended for the relevant statute to reach the extraterritorial conduct²³.

In determining whether a transfer is principally domestic or foreign in nature, U.S. courts rely on a flexible “centre of gravity” test, under which they “look at the facts of a case to determine whether they have a centre of gravity outside the United States²⁴”. This analysis requires consideration of “all component events of the transfers²⁵”, such as “whether the participants, acts, targets, and effects involved in the transaction at issue are primarily foreign or primarily domestic²⁶”. However, the transfer must have more than a mere tangential or remote connection to the domestic debtor²⁷. Although “it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States,” the improper transactions in a specific case must have been the types of transactions that were “the focus of congressional concern” or the types of “transactions that the statute seeks to regulate²⁸”. As the late Justice Scalia stated, “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case²⁹”. Accordingly, “where claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application³⁰”.

Historically, with respect to extraterritorial application of avoidance powers, U.S. courts have focused their inquiry on the “transfer of property to a subsequent transferee, not the relationship of that property to a perhaps-distant debtor³¹”. In short, the focus is on the

¹⁷ See *Maxwell Commc'n Corp. v. Societe Generale plc (In re Maxwell Commc'n Corp.)*, 186 B.R. 807, 823 (S.D.N.Y. 1995) (hereinafter “*Maxwell II*”) (applying both the presumption against extraterritoriality and principles of comity in analyzing the extraterritorial application of 11 U.S.C. § 547, noting that “[c]omity is ‘wholly independent’ of the presumption against extraterritoriality and applies even if the presumption has not been overcome or is otherwise inapplicable.”), *aff'g Maxwell Commc'n Corp. v. Barclays Bank plc (In re Maxwell Commc'n Corp.)*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994) (hereinafter “*Maxwell I*”). The Second Circuit affirmed the bankruptcy court’s and district court’s rulings that comity precluded application of 11 U.S.C. § 547, but it declined to decide whether the presumption against extraterritoriality would compel the same result. See *Maxwell Commc'n Corp. v. Societe Generale (In re Maxwell Commc'n Corp.)*, 93 F.3d 1036, 1051-55 (2d Cir. 1996) (hereinafter “*Maxwell III*”).

¹⁸ See E. Morrison, *supra* note 4, at 279.

¹⁹ *Aramco*, 499 U.S. at 247.

²⁰ *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (internal citations and quotations omitted).

²¹ *Maxwell II*, 186 B.R. at 818.

²² *Weisfelner v. Blavatnick (In re Lyondell Chemical Co.)*, 543 B.R. 127, 148 (Bankr. S.D.N.Y. 2016) (hereinafter “*Lyondell*”) (citing *Maxwell II*, 186 B.R. at 816) (internal citations omitted).

²³ *Id.* (citing *Maxwell II*, 186 B.R. at 816) (internal citations omitted).

²⁴ *Id.* at 149 (citing *In re Florsheim Grp. Inc.*, 336 B.R. 126, 130 (Bankr. N.D. Ill. 2005)).

²⁵ *Maxwell II*, 186 B.R. at 816.

²⁶ *French v. Liebmann (In re French)*, 440 F.3d 145 (4th Cir. 2006) (hereinafter “*French*”).

²⁷ See *Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC*, 513 B.R. 222 (S.D.N.Y. 2014), *supp.* 2014 WL 3778155 (S.D.N.Y. July 28, 2014) (hereinafter “*Madoff*”).

²⁸ *Morrison*, 561 U.S. at 266.

²⁹ *Id.*

³⁰ *Lyondell*, 543 B.R. at 148 (Bankr. S.D.N.Y. 2016) (quoting *Kiobel v. Royal Dutch Petroleum Co.*, — U.S. —, 133 S.Ct. 1659, 1669 (2013)).

³¹ *Madoff*, 513 B.R. at 227.

property transferred, not the debtor itself (or its situs in the U.S.).³² But, as Judge Scheindlin of the U.S. District Court for the Southern District of New York has warned, “a limited conception of ‘transfer’ for purposes of an extraterritoriality analysis would have potentially dangerous implications for the future application of [avoidance powers]: a creditor—be it foreign or domestic—who wished to characterise a transfer as extraterritorial could simply arrange to have the transfer made overseas, a result made all too easy in the age of the multinational company and information superhighway³³”. Accordingly, U.S. courts will (and should) consider “the location of the transfers [arguably, the initial component event of a transfer] as well as the component events of those transfers” to determine whether the transactions had sufficient force within the territory of the United States³⁴.

Despite Judge Scheindlin's warning against a narrow construction of “transfer,” U.S. courts have regularly applied the presumption against extraterritoriality even when significant aspects of a transfer occur in the United States. For example, in *Maxwell II*, Judge Scheindlin herself held that the presumption against extraterritoriality applied when the only domestic connection to the preferential transfers between two foreign entities was that the source of the funds consisted of proceeds from a U.S. asset sale³⁵. The District Court found that the U.S. asset sale was merely “a preparatory step to the transfers” (it funded the foreign transfer to a foreign transferee) and, absent any other U.S. connection, could not be considered domestic³⁶. Similarly, in *Madoff*, the United States District Court for the Southern District of New York held that, although the initial transfer originated in New York, that fact alone was insufficient to make “otherwise thoroughly foreign subsequent transfers” domestic in nature³⁷. In *Sherwood*, the Bankruptcy Court for the Middle District of Florida found that certain alleged fraudulent transfers occurred extraterritorially because, even though the debtor's principal lived in and directed his business in the United States, the transfers themselves were between foreign entities and involved the trading and creation of securities that were performed in London³⁸. Even the United States Supreme Court, in applying the presumption against extraterritoriality in connection with the U.S. securities laws in *Morrison*, concluded that the presumption applied because the securities trades were not executed in the United States, even though the actual fraudulent conduct of misrepresenting the value of the securities occurred in New York³⁹.

If the U.S. court determines that the “centre of gravity” of the transactions occurred outside of the territorial jurisdiction of the United States, then the U.S. court proceeds to the second inquiry: Did Congress intend for the statute to apply extraterritorially? In order for an act of Congress to apply to conduct occurring outside of the United States, “the affirmative intention of the Congress to apply the law extraterritorially [must be] clearly expressed in the statute⁴⁰”. As the Supreme Court stated in *Morrison*, “[w]hen a statute gives no clear indication of an extraterritorial application, it has none⁴¹”. U.S. courts uniformly agree that the language of the avoidance power statutes and their relevant legislative history do not explicitly indicate a congressional intent to apply them extraterritorially⁴². For example, although Bankruptcy Code Section 547(b) provides that the trustee's power to claw back

³² See *Morrison*, 561 U.S. at 274 (announcing a new “transactional test” for application of presumption against extraterritorial application of U.S. laws); see also *Sherwood Invs. Overseas Ltd., Inc. v. The Royal Bank of Scotland N.V. (In re Sherwood Invs. Overseas Ltd., Inc.)*, Case No. 10-00584-KSJ, 2015 WL 4486470 at *19 (Bankr. M.D. Fla. July 22, 2015) (hereinafter “*Sherwood*”) (“[I]t is the transfer *not* the debtor's physical presence that determines whether a debtor seeks to impose [the avoidance powers] outside of the borders of the United States.”); see also *Sherwood*, 2015 WL 4486470, at *21 (quoting *Kiobel*, 133 S. Ct. at 1669) (“Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices to displace the presumption against extraterritorial application.”) (internal quotations omitted).

³³ *Maxwell II*, 186 B.R. at 816. It is telling that Judge Scheindlin made this statement in 1995, over twenty years ago, just as the giant leaps we have witnessed in digital technology in the business and financial sectors (and in society in general) were geometrically accelerating.

³⁴ *Id.* at 817.

³⁵ See *id.* (finding application of 11 U.S.C. § 548 to be extraterritorial where “the antecedent debts were incurred overseas, the transfers on account of those debts were made overseas, and the recipients . . . [are] all foreigners”).

³⁶ See *id.* (rejecting the claim that the alleged preferential transfers were domestic because the funds used for the transfers derived from the sale of U.S. assets).

³⁷ *Madoff*, 513 B.R. at 227-28 (finding that the relevant transfers were predominantly foreign: foreign feeder funds transferring assets abroad to their foreign customers and other foreign transferees).

³⁸ See *Sherwood*, 2015 WL 4486470, at *21; see also *Lyondell*, 543 B.R. at 149-50 (finding that the fraudulent transfers were not sufficiently connected to the United States, even though the transfers were initiated by and occurred at the direction of a principal located in New York).

³⁹ See *Morrison*, 561 U.S. at 285-86.

⁴⁰ *Maxwell II*, 186 B.R. at 818 (quoting *Aramco*, 499 U.S. at 248) (internal quotations omitted).

⁴¹ *Morrison*, 561 U.S. at 255.

⁴² See, e.g., *Maxwell II*, 186 B.R. at 819 (“[N]othing in the language or legislative history of [the Bankruptcy Code's avoidance powers] expresses Congress' intent to apply the statute to foreign transfers.”); *Barclay v. Swiss Fin. Corp. (In re Midland Euro Exch. Inc.)*, 347 B.R. 708, 717 (Bankr. C.D. Cal. 2006) (“Nothing in the text of [the Bankruptcy Code's avoidance powers] indicates a congressional intent to apply it extraterritorially”); *Madoff*, 513 B.R. at 227 (“Nothing in this language suggests that Congress intended for [the Bankruptcy Code's avoidance powers] to apply to foreign transfers, and the Trustee does not argue otherwise.”); *Lyondell*, 543 B.R. at 151 (“The text of [the Bankruptcy Code's avoidance powers] does not contain any express language or indication that Congress intended the statute to apply extraterritorially.”).

preferential transfers applies to “any transfer,” the *Maxwell II* court held that “broad, boilerplate language such as the term ‘any transfer’ is insufficient to overcome the presumption against extraterritoriality⁴³”. However, a U.S. court is not limited by the language of the statute itself; it may also consider the context of the statute, including “the language and legislative history of [the avoidance power statutes] and the entire Bankruptcy Code as well as any other evidence which may shed light on Congress’ intent⁴⁴”.

Because the avoidance power statutes and their legislative history are not particularly helpful in this analysis, U.S. courts have turned to other sections of the Bankruptcy Code for context, particularly Bankruptcy Code Section 541(a) which defines “property of the estate.” In the avoidance power context, the definition of “property of the estate” is relevant because, for example, Bankruptcy Code Sections 547 and 548 apply to “any transfer of an interest of the debtor in property⁴⁵”. Under Bankruptcy Code Section 541(a), “property of the estate” extends to property “wherever located and by whomever held,” including “any interest in property that the trustee recovers [pursuant to its avoidance powers under the Bankruptcy Code]⁴⁶”. Although the language “wherever located and by whomever held” appears to be clear evidence that Bankruptcy Code Section 541 has extraterritorial application, it has not been uniformly applied in the avoidance action context⁴⁷. Accordingly, the determination of whether the Bankruptcy Code’s avoidance powers apply extraterritorially turns on a U.S. court’s interpretation of whether the property transferred in the avoidable transaction is property of the debtor’s estate. This determination has been the subject of an important intra-district split in the Southern District of New York, as illustrated in the *Madoff* and *Lyondell* cases discussed below. This specific split has not yet been resolved by the relevant federal appeals court, the United States Court of Appeals for the Second Circuit, and the Bankruptcy Court in the *Madoff* proceeding (Bernstein J) is expected to soon weigh in on the matter in connection with (i) cases remanded to it by District Judge Rakoff (who held that Bankruptcy Code’s avoidance claims do not have extraterritorial application) for consideration of whether certain transfers have the required U.S. nexus, and (ii) cases not considered by Judge Rakoff. A decision is expected before the end of 2016.

i. *Madoff*

In *Madoff*, Irving Picard, the trustee appointed under the Securities Investor Protection Act to administer the estate of Bernard L. Madoff Investment Securities LLC, a New York-based limited liability company (“Madoff Securities”), filed fraudulent transfer actions seeking to recover billions of dollars of funds that had been transferred from Madoff Securities to several “feeder funds” and then from those feeder funds to various foreign customers as part of an unprecedented Ponzi scheme that spanned several decades and defrauded customers of over \$20 billion⁴⁸. Two of the main feeder funds to Madoff Securities were Fairfield Sentry Limited, a British Virgin Islands company (“Fairfield”), and Harley International (Cayman) Limited, a Cayman Islands company (“Harley”) ⁴⁹. Prior to Madoff Securities’ collapse, customers invested directly with a feeder fund for the specific and express purpose of having their money invested with Madoff in New York, and the feeder funds in turn invested in Madoff Securities. As the direct customers of Madoff Securities, the feeder funds would, upon redemptions from their customers, withdraw funds from time to time and subsequently transfer those funds to their various customers. Because the feeder funds, including both Fairfield and Harley, entered liquidation in their home countries as a result of Madoff Securities’ collapse in 2008, the trustee brought suits seeking to recover from both the feeder funds and their subsequent transferees under Bankruptcy Code Section 550(a)(2)⁵⁰. The

⁴³ *Maxwell II*, 186 B.R. at 819.

⁴⁴ *Id.* at 818-19; see also *Madoff*, 513 B.R. at 228; *Lyondell*, 543 B.R. at 151.

⁴⁵ 11 U.S.C. §§ 547(b), 548(a)(1).

⁴⁶ 11 U.S.C. § 541(a)(3).

⁴⁷ See *French*, 440 F.3d at 151 (“Pursuant to § 541 of the Bankruptcy Code, all of the debtor’s property, whether domestic or foreign, is ‘property of the estate’ subject to the bankruptcy court’s in rem jurisdiction. . . . Section 541 defines the property of the estate broadly as all property ‘wherever located.’ . . . This phrase first appeared in the Bankruptcy Code in 1952; Congress explained that the amendment ‘make[s] clear that a trustee in bankruptcy is vested with the title of the bankrupt in property which is located without, as well as within, the United States.’ H.R. Rep. No. 82-2320, at 15 (1952), reprinted in 1952 U.S.C.C.A.N. 1960, 1976. Thus, “property of the estate” includes both foreign and domestic property.”); but see *Fed. Deposit Ins. Corp. v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 131 (2d Cir. 1992) (hereinafter “*Colonial Realty*”) (finding that Bankruptcy Code Section 541 only applies to property of the estate and that Congress did not intend for avoidance powers to apply extraterritorially because the avoidance of preferential or fraudulent transfers do not become property of the estate until actually recovered).

⁴⁸ See *Madoff*, 513 B.R. at 225.

⁴⁹ *Id.*

⁵⁰ See *id.*

subsequent transferees filed motions to dismiss the fraudulent transfer complaints, arguing that Bankruptcy Code Section 550(a)(2) does not apply extraterritorially and, therefore, does not reach subsequent transfers between foreign entities⁵¹. After withdrawing the reference from the Bankruptcy Court to the District Court for the Southern District of New York, Judge Rakoff heard the motions to dismiss on the limited issue of whether Bankruptcy Code Section 550(a)(2) allows a trustee to avoid a subsequent foreign transfer of an initially domestic fraudulent transfer⁵².

Judge Rakoff focused on the foreign nature of the subsequent transfers at issue in *Madoff* and determined that such foreign transfers required an extraterritorial application of the trustee's avoidance powers under Bankruptcy Code Sections 548 and 550⁵³. According to Judge Rakoff, Bankruptcy Code Section 550 focuses on "the transfer of property to a subsequent transferee, not the relationship of that property to a perhaps-distant debtor", such that the fact that the fraudulent transfers initiated in New York with Madoff Securities is "insufficient to make the recovery of these otherwise thoroughly foreign subsequent transfers a domestic application of section 550(a)⁵⁴". Accordingly, Judge Rakoff determined that the trustee would have to rebut the presumption against extraterritoriality.

In finding that Congress did not intend for Bankruptcy Code Section 550(a)(2) to apply extraterritorially, Judge Rakoff rejected the trustee's argument that Congress indirectly incorporated Bankruptcy Code Section 541's definition of "property of the estate", which includes property "wherever located and by whomever held", into the avoidance power provisions of the Bankruptcy Code, all of which use the phrase "an interest of the debtor in property" to describe transfers that a trustee may avoid⁵⁵. While admitting that the trustee's theory was "clever", Judge Rakoff determined it was "neither logical nor persuasive" under the Second Circuit's opinion in *Colonial Realty*, *supra*⁵⁶. In *Colonial Realty*, which did not involve the question of the extraterritorial application of the Bankruptcy Code's avoidance claims, the Second Circuit noted that Bankruptcy Code Section 541(a)(3) provides that, with respect to avoidance actions, property of the estate only includes "any interest in property that the trustee recovers" which "clearly reflects the congressional intent that such property is not to be considered property of the estate until it is recovered⁵⁷". Although Bankruptcy Code Section 541 includes the language "wherever located", Judge Rakoff concluded that such language is irrelevant because "fraudulently transferred property became property of the estate only after it has been recovered by the Trustee, so section 541 cannot supply extraterritorial authority that the avoidance and recovery provisions lack on their own⁵⁸". Thus, Judge Rakoff found that Bankruptcy Code Section 550(a) does not apply extraterritorially to allow a trustee to recover subsequent transfers of an initially domestic fraudulent transfer when the subsequent transfers are between foreign entities⁵⁹.

In the aftermath of Judge Rakoff's decision in *Madoff*, many practitioners became concerned that his decision provided a roadmap for making avoidance actions irrelevant in the cross-border context. As one commentator observed, under *Madoff*, "[a] transfer can be immunised from recovery simply by interposing a foreign-based transferee between the debtor and the ultimate foreign beneficiary⁶⁰". This result would significantly handicap a trustee's ability to maximise recoveries for a bankruptcy estate.

⁵¹ See *id.* at 226.

⁵² See *id.*

⁵³ See *id.* ("The Court concludes that . . . the application of section 550(a)(2) here would constitute an extraterritorial application of the statute . . ."). Although Judge Rakoff concluded that the subsequent foreign transfers would require an extraterritorial analysis, Judge Lifland of the Bankruptcy Court for the Southern District of New York, who presided over the Madoff proceeding before he passed away, found in a related case that where the initial transfer was domestic, avoidance actions against the subsequent foreign transferees remained a domestic application of the statute. See *SIPC v. Bernard L. Madoff Inv. Securities LLC (In re Bernard L. Madoff Inv. Securities LLC)*, 480 B.R. 501, 524, 528 (Bankr. S.D.N.Y. 2012) ("[T]he focus of the avoidance and recovery sections is on the initial transfers that deplete the bankruptcy estate and not on the recipient of the transfers or the subsequent transfers. . . . Thus, Congress expressed intent for the application of Section 550 to fraudulently transferred assets located outside the United States and the presumption against extraterritoriality does not apply.").

⁵⁴ See *Madoff*, 513 B.R. at 227-28.

⁵⁵ See *id.* at 229.

⁵⁶ See *id.*

⁵⁷ *Colonial Realty*, 980 at 131 (emphasis added).

⁵⁸ See *Madoff*, 513 B.R. at 229.

⁵⁹ See *id.* at 232.

⁶⁰ E. Morrison, *supra* note 4, at 269-70.

Significantly, in the specific factual context of the Madoff case, there may be no need even to get to the question of whether U.S. avoidance claims applied extraterritorially. The Madoff feeder funds operated, with Madoff's knowledge and consent, for the express and all but sole purpose of finding foreign investors for Madoff Securities and channelling these investments directly and all but solely to Madoff Securities. Moreover, the decision of a feeder fund's customer to redeem its investment should logically trigger the transfer from Madoff Securities to the feeder fund and then from the feeder fund to the foreign investor that would be the very subject matter of the avoidance claim at issue. Under these particular factual circumstances, Madoff Securities is hardly a "remote" debtor, and the U.S. nexus of the transfer is hardly insubstantial or tenuous. Accordingly, a case can be made that the extraterritorial application of the Bankruptcy Code's avoidance powers is not involved in the Madoff situation⁶¹.

ii. *Lyondell*

Nearly 18 months after the *Madoff* decision, Judge Gerber of the Bankruptcy Court for the Southern District of New York delivered a decision in *Lyondell* that expressly disagreed with Judge Rakoff⁶². In *Lyondell*, the trustee of a litigation trust formed to prosecute the claims of debtor Lyondell Chemical Company ("Lyondell") brought a complaint asserting 21 claims related to a failed leveraged buyout transaction completed in late December 2007 (the "LBO")⁶³. In connection with the LBO, Lyondell entered into \$21 billion of secured indebtedness, of which \$12.5 billion was paid to Lyondell shareholders⁶⁴. In the complaint, the trustee sought, among other things, to avoid and recover a \$100 million shareholder distribution made on 7 December, 2007 to Lyondell's two Luxembourg-based subsidiaries (the "December Distribution") as a fraudulent transfer under Bankruptcy Code Sections 548 and 550⁶⁵. As in *Madoff*, the *Lyondell* defendants filed motions to dismiss the complaint for failure to state a claim on the grounds that the December Distribution was an extraterritorial transfer and the Bankruptcy Code's avoidance power provisions cannot be applied extraterritorially⁶⁶.

Although Judge Gerber determined that the December Distribution was an extraterritorial transfer because the transfer was from a foreign transferor to a foreign transferee and had minimal contacts to the U.S., he disagreed with Judge Rakoff's conclusion that the Bankruptcy Code's avoidance powers cannot be applied extraterritorially⁶⁷. Relying on the Fourth Circuit's opinion in *French*, Judge Gerber concluded that Bankruptcy Code Section 548 applies extraterritorially because it "provides for the recovery of property that *would have been* property of the estate—i.e., property *worldwide* in which the debtor *would have had* an interest—but for the fraudulent transfer⁶⁸". In *French*, the Fourth Circuit emphasised that "[Bankruptcy Code Section] 548 plainly allows a trustee to avoid any transfer of property that would have been 'property of the estate' prior to the transfer in question . . . even if that property is not 'property of the estate' now⁶⁹". Judge Gerber explained the *French* decision as recognising a temporal distinction regarding "property of the estate," in which Bankruptcy Code Section 541(a)(1) speaks of "*all legal or equitable interests* of the debtor in property *as of the commencement of the case*" and Bankruptcy Code Section 541(a)(3) speaks of property at a time when it is later recovered under Bankruptcy Code

⁶¹ By contrast, the U.S. nexus to the transfers at issue in *Maxwell*, *supra*, and *Lyondell*, *infra*, was more indirect and insubstantial. See *Maxwell II*, 543 B.R. at 817 (holding that transfers made overseas from a foreign corporation to foreign transferees on behalf of antecedent debts incurred overseas were extraterritorial where the sole U.S. nexus was that the transferred funds derived from U.S. asset sales); *Lyondell*, 543 B.R. at 148-51 (holding that shareholder distribution from a Luxembourg company to its Luxembourg parent that was directed by a principal located in New York as part of a merger with a U.S. company was an extraterritorial transfer).

⁶² See *Lyondell*, 543 B.R. at 153 n. 115 ("To the extent that the Court's decision here is inconsistent with *Maxwell I*, *Maxwell II*, and *Madoff*, the Court respectfully disagrees with those decisions as well."). Although *Madoff* was decided by the District Court (a higher level court than the Bankruptcy Court), Judge Gerber was not bound by the conclusions in *Madoff* because Judge Rakoff acted as the trial court on the matter due to his withdrawal of the reference from the Bankruptcy Court to the District Court.

⁶³ See *id.* at 133.

⁶⁴ See *id.*

⁶⁵ See *id.* at 134.

⁶⁶ See *id.* at 148.

⁶⁷ See *id.* at 148-51.

⁶⁸ See *id.* at 152.

⁶⁹ See *French*, 440 F.3d at 151-52. This premise was also endorsed by Judge Lifland of the Bankruptcy Court for the Southern District of New York when he concluded that "Congress explicitly incorporated the language of Section 541 to allow a trustee to maximize recoveries for the bankruptcy estate by permitting the avoidance of any transfer that would have been property of the estate, which necessarily includes assets fraudulently transferred outside the United States." *In re Bernard L. Madoff Inv. Securities LLC*, 480 B.R. at 528.

Section 550⁷⁰. Furthermore, Judge Gerber noted that the Fifth Circuit came to a similar conclusion in *Criswell*, finding that prior to recovering a fraudulent transfer the trustee has an *equitable* interest in the transferred funds, which transforms into a *possessory* interest upon its recovery⁷¹.

Accordingly, Judge Gerber found that the Bankruptcy Code's avoidance power provisions must apply extraterritorially in order to protect the *in rem* jurisdiction of the U.S. bankruptcy courts over assets recovered under Bankruptcy Code Section 541(a)(3) and avoid the inconsistent result of including recovered fraudulent transfers in the definition of "property of the estate" while not allowing a trustee to pursue such claims to obtain that recovery⁷².

B. International comity

In addition to the presumption against extraterritoriality, the second limitation on the extraterritorial application of the Bankruptcy Code's avoidance powers is the doctrine of international comity. Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws"⁷³. As the Second Circuit has stated, international comity is a "separate notion from the presumption against extraterritoriality" and requires that a statute "ought never to be construed to violate the law of nations, if any other possible construction remains"⁷⁴. As "simply a rule of construction," international comity cannot override the explicit intent of Congress, but it can "shorten the reach of a statute" or allow for an "act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state"⁷⁵. This means that, even if the Bankruptcy Code's avoidance powers apply extraterritorially, the doctrine of international comity can limit the scope of its extraterritorial reach.

However, "[i]nternational comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction"⁷⁶. A "true conflict" exists in the avoidance power context only if "it is impossible to distribute the debtor's assets in a manner consistent with [the rules of both jurisdictions]"⁷⁷. "Nonetheless, many courts consider the 'centre of gravity' of a transaction when they assess whether international comity bars application of U.S. law to the transaction"⁷⁸. When applied to avoidance powers, U.S. law is generally found to be in harmony with its common law ancestor, the United Kingdom. As the District Court for the Southern District of New York has noted, "English preference policy is not that different than that of the U.S., and the application of English law would thus not be so unfair as to require the use of U.S. law"⁷⁹. Despite their similarities, some U.S. courts have still found that comity should apply to avoidance powers because, for example, (i) "the 'intent' requirement in the English law would dictate a different distributional outcome than would United States law"⁸⁰ and (ii) in certain circumstances England may have a closer connection to the dispute and thus "a greater interest in applying their own laws than does the United States"⁸¹. Accordingly, the principles of international comity often lead to the piecemeal application of various bankruptcy regimes, which adds another layer of complications for a trustee attempting to maximise recoveries for creditors⁸².

⁷⁰ See *Lyondell*, 543 B.R. at 154 (emphasis added).

⁷¹ See *Cullen Ctr. Bank & Trust v. Hensley (In re Criswell)*, 102 F.3d 1411, 1417 (5th Cir. 1997) ("[W]hen a soon-to-be-bankrupt debtor . . . fraudulently transfers property to shield it from his creditors, that debtor/transferor should be considered to have retained an *equitable* interest in the property so that it will continue to be considered 'property of the estate.'"); see also E. Morrison, *supra* note 4, at 277 n.71 ("Actually, the Second Circuit's decision [*In re Colonial Realty*, 980 F.2d 125] may not be inconsistent with the Fifth Circuit approach. The debtor's estate at commencement includes an *equitable* interest in property previously conveyed to third parties via voidable transfers. A *possessory* interest enters the estate when the property is recovered under Section 550(a)(3).").

⁷² See *Lyondell*, 543 B.R. at 154-55 ("It would be inconsistent (such that Congress could not have intended) that property located anywhere in the world could be property of the estate once recovered under section 550, but that a trustee could not avoid the fraudulent transfer and recover that property if the centre of gravity of the fraudulent transfer were outside of the United States.").

⁷³ *Maxwell III*, 93 F.3d at 1046 (quoting *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)).

⁷⁴ *Id.* at 1047 (quoting *Murray v. the Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804)).

⁷⁵ *Id.*

⁷⁶ *Id.* at 1049 (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993)).

⁷⁷ *Id.* at 1050.

⁷⁸ E. Morrison, *supra* note 4, at 281.

⁷⁹ *Maxwell II*, 186 B.R. at 820.

⁸⁰ *Maxwell III*, 93 F.3d at 1050.

⁸¹ *Madoff*, 513 B.R. at 232.

⁸² See Allan L. Gropper, *The Curious Disappearance of Choice of Law as an Issue in Chapter 15 Cases*, 9 BROOK. J. CORP. FIN. & COM. L. 152, 157-58 (2014), available at <http://brooklynworks.brooklaw.edu/bjcfcl/vol9/iss1/4> (noting that in *Maxwell III*, the Second Circuit rejected the

Other perspectives

I. United Kingdom favours extraterritorial application of avoidance powers

Similar to the United States, courts in the United Kingdom have also recently wrestled with the issue of whether their domestic avoidance powers apply extraterritorially. For example, in April 2015, the Supreme Court of the United Kingdom delivered a judgment in *Jetivia*, in which three judges of the seven judge panel considered the issue and in *dicta* unequivocally determined that U.K. avoidance powers have extraterritorial application and effect (Lords Sumption, Toulson and Hodge)⁸³. In *Jetivia*, the liquidators of Bilta (UK) Ltd., an English company (“Bilta”), brought claims against Jetivia SA, a Swiss company, and three directors and shareholders of Bilta for the avoidance of a series of transactions relating to European Emissions Trading Scheme Allowances that constituted a VAT “carousel fraud” in the aggregate amount of over £38 million⁸⁴. The liquidators’ claims were brought under, among other things, Section 213 of United Kingdom’s Insolvency Act 1986 (the “Insolvency Act”) which provides, in relevant part, that the court “may declare that *any persons* who were knowingly parties to the carrying on of the business [with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose] are to be liable to make such contributions (if any) to the company’s assets as the court thinks proper⁸⁵”. In short, the liquidators sought to claw back the defendants’ fraudulent transfers for the benefit of Bilta’s estate.

In recognising that Section 213 of the Insolvency Act applied extraterritorially, the Lords Toulson and Hodge relied on two key principles. First, similar to the United States’ rule against extraterritoriality, they found that the extraterritorial application of a statute is permitted only by interpreting the particular statute to determine the type of conduct that the statute intended to regulate⁸⁶. The statute can only be given extraterritorial effect “if the purpose of the legislation could not be effectually achieved without such effect⁸⁷”. Under Section 213 of the Insolvency Act, Parliament directed the provision to apply against “(a) parties to a fraud; and (b) [parties] involved in the carrying on of the now-insolvent company’s business⁸⁸”. Additionally, Parliament did not express any limitation on Section 213’s application to “any person” such that it “must be left to bear its literal, natural meaning⁸⁹”. Lords Sumption, Toulson and Hodge recognised that the statute could be applied extraterritorially because the substance of the liquidators’ allegations were congruent with the statutory purpose; specifically that the defendants were parties to a VAT fraud that harmed Bilta, the parties conducted Bilta’s business to carry on the fraud, and they obtained the proceeds of the fraud⁹⁰. Second, Lords Toulson and Hodge considered the principle of international comity and concluded that comity would not otherwise prevent the extraterritorial application of Section 213⁹¹.

II. Utilising the “centre of main interests” principle

In addition to the foregoing bases for extraterritorial application of Section 213, Lords Toulson and Hodge also noted that there may be further support for the extraterritorial application of avoidance powers based upon the “centre of main interests” or COMI principal articulated under the revised European Insolvency Regulation⁹². Under Article 3(1) of the European Insolvency Regulation, “the courts of the member state within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings⁹³”. The debtor’s COMI is presumed to be the place of its registered office⁹⁴. In this regard, the European Insolvency Regulation provided inspiration to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-

position that “all of the provisions of a unitary bankruptcy statute must be applied in a given proceeding, and that, as a result, the *lex fori* *consensus* or law of the forum (the United States) necessarily governed”).

⁸³ See *Jetivia* ¶¶ 108, 213.

⁸⁴ See *id.* ¶¶ 2-4.

⁸⁵ See *id.* ¶ 211 (emphasis added).

⁸⁶ See *id.* ¶ 212.

⁸⁷ *Id.* ¶ 212; see also *id.* ¶ 108.

⁸⁸ *Id.* ¶ 213.

⁸⁹ *Id.* ¶ 214.

⁹⁰ *Id.* ¶ 215; see also *id.* ¶ 108.

⁹¹ *Id.* ¶ 214.

⁹² *Id.* ¶ 216.

⁹³ Council Regulation (EU) No. 2015/848 of 20 May 2015, Art. 3(1) (hereinafter “*European Insolvency Regulation*”).

⁹⁴ See *id.*

Border Insolvency 1997 (the “Model Law”) and its related Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency 2013 (the “Enactment Guide”), which contains guidance on the interpretation and application of COMI. Under the Enactment Guide, COMI is determined by two principal factors; namely, the “location: (a) where the central administration of the debtor takes place, and (b) which is readily ascertainable by creditors⁹⁵”. If these principal COMI factors do not provide a clear answer, then the Enactment Guide prescribes 13 additional factors, each to be given greater or lesser weight based on the circumstances⁹⁶. Importantly, these COMI principles originating in the European Union’s insolvency regime have now been applied around the world, including under the European Insolvency Regulation in European courts and under Chapter 15 of the U.S. Bankruptcy Code for application in cross-border ancillary proceedings⁹⁷.

Prior to the enactment of the revised European Insolvency Regulation in May 2015, the Court of Justice of the European Union held that once a court is granted jurisdiction under COMI principles to open an insolvency proceeding, it should be granted international jurisdiction to determine all matters that “derive directly” from those proceedings and which are “closely connected” to them⁹⁸. Although the holding in *Schmid* was somewhat controversial at the time, the revised European Insolvency Regulation now expressly endorses its position, stating that “the courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for *any* action which derives directly from the insolvency proceedings and is closely linked with them, *such as avoidance actions*⁹⁹”. Similar rules have also been proposed in a 2012 study published by the American Law Institute entitled “Global Rules on Conflict-of-Laws Matters in Insolvency Cases” (the “Global Rules”)¹⁰⁰. Under Rule 21 of the Global Rules, it is prescribed that any exceptions to the *lex fori concursus* (or application of the law of the jurisdiction in which the insolvency proceeding is pending) should “not preclude actions for voidness, voidability, or unenforceability of legal acts detrimental to the general body of creditors . . . as determined by Global Rule 12¹⁰¹.” Global Rule 12 provides that “the law applicable to insolvency proceedings *and their effects* shall be that of the state within which the territory of which such proceedings are opened¹⁰²”. The Global Rules also incorporate the use of COMI to determine where insolvency proceedings are opened, and thus which law would apply to the insolvency proceedings and “their effects” (*i.e.*, related proceedings, such as avoidance actions)¹⁰³. Therefore, taken together, the Global Rules (similar to the European Insolvency Regulation) prescribe that the avoidance powers of the COMI state should apply extraterritorially.

⁹⁵ See Enactment Guide ¶ 145 (2013), available at <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>.

⁹⁶ See *id.* ¶ 147 (2013) (providing that the additional COMI factors include: “(i) the location of the debtor’s books and records; (ii) the location where financing was organized or authorized, or from where the cash management system was run; (iii) the location in which the debtor’s principal assets or operations are found; (iv) the location of the debtor’s primary bank; (v) the location of employees; (vi) the location in which commercial policy was determined; (vii) the site of the controlling law or the law governing the main contracts of the company; (viii) the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; (ix) the location from which contracts (for supply) were organized; (x) the location from which reorganization of the debtor was being conducted; (xi) the jurisdiction whose law would apply to most disputes; (xii) the location in which the debtor was subject to supervision or regulation; and (xiii) the location whose law governed the preparation and audit of accounts and in which they were prepared and audited”).

⁹⁷ See Council Regulation (EC) No. 1346/2000 of 29 May 2000, Preamble ¶ 13 (“The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”); see also *Eurofood IFSC Ltd.*, Case C-341/04, European Court of Justice (May 2, 2006), ¶ 69(1), available at <http://curia.europa.eu/juris/showPdf.jsf?docid=56604&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=609393> (“[T]he centre of main interests . . . is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect.”); *Morning Mist Holdings Ltd. v. Kryz (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 130 (2d Cir. 2013) (“The relevant principle (for which we consult foreign law, as directed by the statute) is that the COMI lies where the debtor conducts its regular business, so that the place is ascertainable by third parties.”); see *In re SPhinx, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006) (applying the additional COMI factors later described in ¶ 147 of the Enactment Guide).

⁹⁸ *Schmid v. Hertel* (Case C-328/12) [2014] 1 WLR 633, ¶ 30.

⁹⁹ European Insolvency Regulation, Art. 6(1) (as recast in May 2015); see also Preamble ¶ 35 (“The courts of the Member State within the territory of which insolvency proceedings have been opened should also have jurisdiction for actions which derive directly from the insolvency proceedings and are closely linked with them. Such actions should include avoidance actions against defendants in other Member States and actions concerning obligations that arise in the course of the insolvency proceedings . . .”).

¹⁰⁰ AM. LAW. INST., *Global Rules on Conflict-of-Laws Matters in Insolvency Cases*, in TRANSNATIONAL INSOLVENCY: GLOBAL PRINCIPLES FOR COOPERATION IN INTERNATIONAL INSOLVENCY CASES ann. at 200 (2012) available at http://www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf (hereinafter “Global Rules”).

¹⁰¹ Global Rule 21.

¹⁰² Global Rule 12 (emphasis added).

¹⁰³ See Global Rules at Principle 13 (“[T]he courts or other authorities of a state should have jurisdiction to open an insolvency case in respect of a debtor when . . . the debtor’s centre of main interests is situated within that state’s territory . . .”).

Conclusion

According to Professor Westbrook, “[g]iven the rapid movement of assets around the world today, no rule can provide a reasonable prediction about the results of a bankruptcy case except a universalist system applying the bankruptcy law of the centre of the debtor’s main interests¹⁰⁴”. The foregoing principles articulated by the Insolvency Act, the European Insolvency Regulation, the Model Law, and the Global Rules prescribe a global application of COMI as a guiding conflict-of-law principle in cross-border insolvency cases¹⁰⁵. As endorsed by former U.S. Bankruptcy Judge Allen Gropper, COMI allows for deference to the *lex fori concursus* “as a matter of principle and frame[s] the issues by reference to familiar concepts such as the ‘centre of gravity’”, which is already part of the U.S. analysis under the presumption against extraterritoriality analysis¹⁰⁶. Although some of these sources suggest limited exceptions to the *lex fori concursus* of the COMI state “given the present stage of uneven development of national laws governing such sensitive matters as . . . transaction avoidance,” the general approach of using a global COMI rule (which is already applied in most jurisdictions in other contexts) for extraterritorial application of avoidance powers may prevent the piecemeal application of a particular bankruptcy regime and minimise the amount of fraudulent activity or machinations that transferors and transferees may employ to remove otherwise avoidable transfers from the range of avoidance prosecution in any jurisdiction.

¹⁰⁴ Jay Lawrence Westbrook, *Universalism and Choice of Law*, 23 PENN. ST. INT’L L. REV. 625, 630 (2005).

¹⁰⁵ Gropper, *supra* note 82, at 178.

¹⁰⁶ *Id.*; see also *Maxwell I*, 170 B.R. at 816 (“The traditional federal choice-of-law rule is to apply the law of the jurisdiction having the greatest interest in the controversy...”).



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