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The Restructuring Review of the Americas 2019

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The Restructuring Review of the Americas 2019

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Restructuring Review of the Americas 2019

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Global Restructuring Review is a leading source of news and insight on cross-border restructuring and insolvency law and practice, read by international lawyers, insolvency practitioners and accountants, judges, corporate counsel, investors and academics.

We deliver on-point daily news, surveys and features that give our subscribers the most readable updates and analysis of all the cross-border developments that matter, allowing them to stay on top of their game even more so than they already are.

In the past couple of years, we have published exclusive interviews with bankruptcy judges around the world, unearthed nuggets from court hearings that other news services missed, released several original surveys – including on the experiences of female professionals working in restructuring – and features such as a comparative study looking at current restructuring strategies in the retail sector. Our newly introduced Worked Out series, profiling key jurisdictions around the world, has so far published profiles on Singapore, Ukraine and Delaware, with the Cayman Islands, Hong Kong and China still to come. Our book-length *Art of the Ad Hoc* guide gathers the wisdom and perspectives of some of the leading practitioners in the area of ad hoc committees in restructurings.

Complementing our news and magazine coverage, *The Restructuring Review of the Americas* provides exclusive thought leadership, direct from pre-eminent practitioners. The *Review* gathers the expertise of 19 leading figures from 12 different firms in eight jurisdictions. Contributors are vetted for international standing and knowledge of complex issues before being approached.

In this volume we have expanded our coverage in the United States. In addition to an overview of Chapter 11 of the US Bankruptcy Code, our expert panel also reviews hedge fund and private equity fund participation and some of the investment strategies that funds continue to adopt to maximise their returns. Chapter 15 is discussed in two chapters: first, a full review of Chapter 15 as a tool providing effective mechanisms for dealing with cross-border insolvency cases and looking at whether it remains a welcoming destination for foreign debtors; second, a look at the limits of Chapter 15 with specific consideration to the high burden parties must overcome to invoke section 1506 of the Bankruptcy Code, which allows courts to refuse to take action on public policy grounds.

Furthermore, our panel provides an overview of the bankruptcy law in Argentina and considers criticisms made against Brazil's restructuring legislation and the proposed amendments suggested in May 2018 to revamp corporate restructuring in the country. We also review the broad and flexible restructuring options available in Canada; offshore restructuring in the Bahamas; and the Concurso Law in Mexico, explaining why it has not provided a feasible and efficient restructuring procedure for companies in financial distress. Additionally, our experts in Chile consider the flaws of the local regime, while our panel in Venezuela assesses the current regime, which lacks a statutory concept of insolvency, in the face of widespread economic instability.

The *Review* is annual and will expand with each edition. If you have a suggestion for a topic to cover or would just like to find out how to contribute please contact mahnaz.arta@globalrestructuringreview.com.

GRR would like to thank all our contributors for their time and effort.

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US – How Foreign is Too Foreign? Extraterritorial Limits on the Recovery of Fraudulent Transfers

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Introduction

Section 550(a)(2) of the US Bankruptcy Code allows a trustee to recover property that is the subject of an avoided transfer from 'any immediate or mediate transferee' of an initial transferee. Whether this power to recover extends to property that was transferred from a foreign initial transferee to a foreign subsequent transferee has long been an unresolved question. In recent years, several courts have weighed in on the question, clarifying and refining the framework for answering it with respect to individual transfers in specific cases. While the recent case law has provided more guidance to litigants, several open questions remain. In this chapter, we discuss the current landscape with respect to the application of section 550(a)(2) to foreign-to-foreign transfers, the questions that remain unanswered and how an appeal currently pending before the Second Circuit could alter the terrain dramatically.

The basic question: how do Code sections 550(a)(2) and 541 interact?

Under Code section 541, 'property of the estate' is defined expansively to include certain categories of property 'wherever located and by whomever held'. These categories of property include '[a]ny interest in property that the trustee recovers under [section 550]'. Section 550(a)(2) allows a trustee to 'recover, for the benefit of the estate', property transferred to 'any immediate or mediate transferee' of an initial transferee, 'to the extent that [the] transfer is avoided' under one of several avoidance sections provided elsewhere in the Code.

Trustees in a number of bankruptcy proceedings have argued that their recovery powers under section 550(a)(2) extend to property that was the subject of an overseas (or foreign-to-foreign) transaction. To support this argument, these trustees have generally either relied on the broad definition of 'property of the estate' in section 541, or on the notion that this type of transaction, in certain instances, should be considered 'domestic', so that recovery of the assets transferred would not require extraterritorial application of the Code section in the first place.

The pre-Madoff framework: Maxwell, French and Morrison

In re Maxwell[1]

The seminal *Maxwell* case cemented comity and a presumption against extraterritoriality as the twin principles guiding US courts addressing the extraterritorial reach of US insolvency law. The case involved an English debtor corporation, and centred on a series of transfers by foreign transferors to foreign recipients that were otherwise avoidable under section 547. The Bankruptcy Court for the Southern District of New York declined to permit recovery of these transfers, reasoning that 'neither the language nor legislative history of section 547 or the bankruptcy code as a whole evinced Congress's intent to apply section 547 to conduct occurring outside the borders of the U.S.' On appeal, the district court endorsed the Bankruptcy Court's analysis, but held that, separate and apart from the presumption against territoriality, principles of international comity counselled against extraterritorial application of the US Bankruptcy Code.

The district court began by recognising that the presumption against extraterritoriality 'is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'. The presumption 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord'. The court articulated a 'two-fold inquiry' for application of the presumption: 'First, a court must determine if the presumption applies at all'; in other words, the court must determine whether the 'conduct [at issue] occurred outside of the borders of the U.S.' If the court determines that the presumption applies, it then must determine whether 'Congress intended to extend the coverage of the relevant statute to such extraterritorial conduct'.

The court determined that the transactions at issue 'clearly' occurred overseas, but it declined to rest this decision solely on the basis that the transfers were made from and to bank accounts located outside of the United States. It noted that 'such a limited conception of "transfer" for purposes of an extraterritoriality analysis would have potentially dangerous implications', because a creditor seeking to have a transfer characterised as extraterritorial 'could simply arrange to have the transfer made overseas'. Instead, the court noted, the analysis requires a consideration of 'all component events of the transfers'.

In performing the analysis, the court determined that the transferors and transferees were all foreign entities, whose relationships were 'centered in England'. The debts underlying the payments had been made and maintained in England, and were governed by English law. The only connection to the US was that the payments represented proceeds from a sale of US assets, a sale that depleted the bankruptcy estate. The court dismissed the importance of this connection, however, holding that the sale was 'more appropriately characterized as a preparatory step to the transfers'.

The court implicitly left open the possibility that the presumption might not apply to foreign defendants who subjected themselves to the equitable claims adjustment process by submitting a proof of claim. It declined to make such a finding in this case because, although the foreign defendants had submitted proofs of claim, they had done so only in a parallel proceeding in England.

Having determined that the transfers at issue were extraterritorial, the court turned to the second step of its inquiry: whether Congress intended section 547 of the Bankruptcy Code to apply extraterritorially. It stated that a statute will not be applied extraterritorially 'unless the affirmative intention of the Congress to apply the law extraterritorially is clearly expressed in the statute' and that 'any ambiguity in the statute must be resolved in favor of refusing to apply the law to events occurring outside U.S. territory.'

The court declined to find Congressional intent to apply section 547 of the Bankruptcy Code extraterritorially. First, it rejected an argument that extraterritoriality was implied by the words 'any transfer' in section 547, explaining that this type of 'boilerplate language' is 'insufficient to overcome the presumption against extraterritoriality' and noting that the parties had not pointed to any legislative history that would alter this conclusion. Next, it rejected an argument that the definition of 'property of the estate' in section 541 (to include property 'wherever located') mandated extraterritorial application, reasoning that property is not 'property of the estate' until after it has been recovered.

Having concluded that section 547 could not be applied extraterritorially, the court offered comity as a separate and independent ground to block recovery of the transfers at issue in the case. It noted that '[c]omity is wholly independent of the presumption against extraterritoriality and applies even if the presumption has been overcome or is otherwise inapplicable.' Since the transfers at issue 'occurred in England on account of debt incurred there', and 'most creditors [of the overseas transferor] are English', the court held that 'the effect on U.S. creditors of the transfers is outweighed by the effects of the transactions in England.'

In re French[2]

A decade later, the Court of Appeals for the Fourth Circuit in *In re French* applied the analysis laid out in *Maxwell* to the transfer of real estate located in the Bahamas, but reached the opposite conclusion:

- recovery of the property at issue, although its transfer took place abroad, did not require extraterritorial application of the recovery statute;
- in any event, Congress intended the recovery statute to be applied extraterritorially; and
- comity did not bar recovery of the transferred property.

The subject property was a house in the Bahamas that had been transferred by the debtor to her children, as a gift, at a time that the debtor was already insolvent.[3] The court noted that both the debtor and her children were located in the United States; that the decisions to transfer the property and to make the transfer a gift had also been made there; and that recordation of the deed in the Bahamas was 'at most incidental' to the conduct regulated by the fraudulent-transfer statute. The court concluded that the transfer of the house was therefore a domestic transfer, so that its recovery did not require extraterritorial application of any Bankruptcy Code section.

The court did recognise that the Bahamas had a 'powerful interest' in real property within its boundaries – an interest that 'perhaps merits special weight in the balancing test'. However, the court determined that it did not need to 'resolve this slippery question' because even if recovery of the property required extraterritorial application of the Bankruptcy Code, there was sufficient evidence of congressional intent favouring such application that the presumption against extraterritoriality was rebutted. Acknowledging the existence of a circuit split regarding the question, the court sided with Fifth Circuit precedent to hold that the 'property of the estate' includes property that would have been property of the estate but for the fraudulent transfer. It then reasoned that the definition of 'property of the estate' in section 541 (which includes property 'wherever located') 'demonstrated an affirmative intention [by Congress] to allow avoidance of transfers of foreign property that, but for a fraudulent transfer would have been property of the debtor's estate'.

Finally, the court determined that comity would not block recovery of the Bahamian property. It rested this decision on a determination that it would be more appropriate to apply US law to the transfer than Bahamian law: most activity surrounding the transfer took place in the US, almost all the parties with an interest were located in the US, and the debtor had a strong connection to the US. In addition, because no parallel insolvency proceedings were taking place in the Bahamas, there was no risk of conflicting judicial opinions. The court concluded that 'applying Bahamian law here would undercut the purpose of the United States Bankruptcy Code by withdrawing its protections from those it is intended to cover, while simultaneously failing to protect any Bahamian residents.'

Morrison and Nabisco

The extraterritoriality question reached the US Supreme Court in 2010. In *Morrison v. National Australia Bank*,[4] a securities fraud case, the Court proceeded from the principle that there exists a presumption against extraterritorial application of statutes. It outlined a two-step approach for determining whether in a given case this presumption blocks recovery of property involved in an avoided foreign-to-foreign transfer. First, the court is to determine whether the presumption has been rebutted, by examining whether Congress intended the statute to apply extraterritorially. Second, if the presumption against extraterritoriality has not been rebutted, the court is to determine whether the litigation involves extraterritorial application of the statute.[5] The Court emphasised that the presumption against extraterritoriality is not a 'clear statement rule' – a court can look beyond the words of the statute and review the statute in context, but it made clear that in seeking to overcome the presumption, 'uncertain indications do not suffice'.

In the subsequent *Nabisco* decision, in which the Supreme Court was called upon to apply the *Morrison* test in a RICO[6] context,[7] the first step of this inquiry was phrased as follows: 'If the statute is not extraterritorial then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus".'

The Madoff cases: divergent application of the Morrison test to section 550

Two of the first opinions applying the *Morrison* test to recovery of fraudulent transfers reached diametrically opposite conclusions. Interestingly, both opinions were rendered in adversary proceedings arising out of the Bernard Madoff Ponzi scheme, and involved offshore 'feeder funds' that pooled capital from investors worldwide for investment in Madoff Securities. The feeder funds had received distributions from Madoff Securities, which they transferred to their foreign customers.

BLI[8]

In what is commonly referred to as the *BLI* matter, the trustee for the Madoff Securities estate sought to recover certain transfers received by foreign entities, including the Taiwanese Bureau of Labour Insurance (BLI), via one of the largest feeder funds for Madoff Securities.

The US Bankruptcy Court for the Southern District of New York applied the *Morrison* steps in reverse order.[9] First, it determined that the 'focus' of the avoidance and recovery sections in the Bankruptcy Code is on the initial transfer, from the bankruptcy estate to an initial transferee, since it is this initial transfer that depletes the estate. The court explained that 'if the acts or objects upon which the statute focuses are located in the United States, application of the statute is domestic and the presumption against extraterritoriality is not implicated, even if other activities or parties are located outside the United States'. Because Madoff Securities was located in New York, the court held that the relevant transfers were domestic and application of section 550 to recover transferred assets would not be extraterritorial, even if the recovery involved a subsequent transferee located abroad.

Second, although the court found that recovery of the transferred assets in this case did not call for extraterritorial application of the avoidance provisions, it determined that the statutory context showed Congress's intent to allow such application. Congress demonstrated this intent through 'interweaving terminology and cross-references' by:

- defining 'property of the estate' in section 541 to include all property worldwide;
- incorporating the language 'interest of the debtor in property' in avoidance sections 544, 547, and 548; and
- explicitly authorising recovery of all avoided transfers in section 550.

The court added that disallowing recovery of assets fraudulently transferred abroad would 'render hollow the avoidance and recovery provisions of the Code, an outcome clearly unintended by Congress'. It distinguished the SDNY's findings in *Maxwell* on the basis that the *Maxwell* debtor was located outside the United States, so that depletion of the estate in that case occurred abroad.

Finally, the court held that considerations of comity did not bar recovery of the transferred assets, distinguishing the *Maxwell* court's comity decision as having 'no applicability to the instant case', because BLI was not involved in parallel liquidation proceedings in a foreign country.

ET – District Court[10]

In a different adversary proceeding emanating from the Madoff Securities bankruptcy, the District Court for the Southern District of New York reached the opposite conclusion from the *BLI* court.

Applying a *Morrison/Nabisco* analysis, the court first determined that recovery of the transfers at issue would require extraterritorial application of section 550. The 'focus' of the section, according to the court, was on 'the property transferred and the fact of its transfer', not on the debtor. Applying the 'component events' test articulated in *Maxwell*, the court observed that the transfers and transferees involved in the proceeding were predominantly foreign, and that the funds' origination at Madoff Securities in New York was insufficient to render them domestic. The court also rejected the argument that the use of correspondent banks in the US to execute the transfers would render the transfers domestic.

The court next concluded that Congress did not evince 'clear intent' to permit extraterritorial application of section 550. It rejected the relevance of section 541's definition of 'property of the estate', citing Second Circuit precedent for the proposition that 'preferential transfers do not become property of the estate until recovered.'[11] On the basis of this precedent, the court declined to follow *In re French*. In doing so, it noted that *In re French* was distinguishable in any event, since it involved transfer activity that took place in the US as well as parties based in the US. The court brushed aside an argument (endorsed by the *Maxwell* court) that barring extraterritorial application of section 550 would allow debtors and creditors to avoid recovery by arranging for their transfers to occur abroad, reasoning that 'the desire to avoid such loopholes in the law must be balanced against the presumption against extraterritoriality'.

Finally, the court cited comity as an independent ground for disallowing recovery from the foreign transferees. It reasoned that, since many of the feeder funds were involved in foreign liquidation proceedings, investors in foreign funds 'had no reason to expect that U.S. law would apply to their relationships with the feeder funds'. The court added that given the 'indirect relationship between Madoff Securities and the transfers . . . foreign jurisdictions have a greater interest in applying their own law than does the United States'.

The court did not dismiss any of the pending claims, instead remanding the case to the bankruptcy court, to determine which claims should be dismissed for being 'purely foreign transfers'.

ET – on remand[12]

Before the Bankruptcy Court could address the issues left on remand, parties to more than 80 parallel adversary proceedings filed motions to dismiss on, among other things, extraterritoriality grounds, relying on the District Court's decision. The court issued an omnibus decision addressing the motions together.

The judge[13] noted the stark differences between the *BLI* and *ET* decisions, and construed his task narrowly: to review the allegations 'to determine whether they survive dismissal under the extraterritoriality or comity principles enunciated in the *ET* decision'.

The court first examined the claims under principles of comity. Most claims based on transfers originating in feeder funds that were subject to a foreign liquidation proceeding were dismissed on the basis of comity.[14] Although the court noted that a finding of 'comity among nations does not require parallel proceedings', it did not engage in a comity analysis for the remaining transfers.

The court next performed a detailed extraterritoriality analysis, painstakingly analysing the numerous claims one by one to determine 'the critical factor—where the transfer occurred'. The court stated that the *ET* decision 'identifie[d] only four possibly relevant facts to consider in determining whether the Trustee has rebutted the presumption against extraterritoriality: (i) the location of the account from which the transfer was made, (ii) the location of the account to which the transfer was made; (iii) the location or residence of the subsequent transferor and (iv) the location or residence of the subsequent transfer'.

The following table summarises the claims that were dismissed and upheld as a result of this analysis.

The court dismissed transfers:	The court declined to dismiss transfers:
from foreign funds where there was no allegation that the transfer was made to or from a US account	by foreign corporations with a principal place of business in New York, where the transfers were made from and to US-based accounts
by foreign corporations that were alleged to 'conduct daily business' in the US, where the corporations were not registered in the US and there were no allegations that the transfer occurred domestically	by a foreign entity to a US correspondent bank account, where the only connection to the United States was the residence of the recipient
made and received by foreign entities, neither of whom maintained offices in the US, where the recipient sometimes used US bank accounts to facilitate money transfers	by a foreign entity, controlled by a US citizen resident in the US, transferred from US bank accounts, where information about the recipient bank account had not been provided
by a foreign entity, controlled by a US citizen resident in the US, where there was no allegation that the transfer was made to or from a US account	by a foreign entity registered to do business in New York, from a New York bank account, where there was no information about the location where the transfers were received
from a New York account, where the trustee had supplied conflicting information about the recipient account and the amount of the transfer	by a foreign entity resident in the US, from and to US bank accounts, where there was no allegation that the bank accounts used were not correspondent bank accounts

Madoff appeal and outstanding questions

The Madoff Securities trustee filed a petition for leave to appeal the *ET* District Court decision and the subsequent decision on remand to the Court of Appeals for the Second Circuit,[15] presenting the court with two questions:

- whether the Bankruptcy Code and the Securities Investor Protection Act 'permit the recovery of property fraudulently transferred by the debtor when it has been subsequently transferred in transactions with allegedly extraterritorial components'; and
- '[w]hether the comity of nations independently bars recovery of such property.'

The petition was granted on 27 September 2017.[16]

As the petition points out, there is substantial ground for difference of opinion on these questions, as demonstrated by the 'perfectly opposed' decisions rendered in *BLI* and *ET*. Both courts based their analysis on the Supreme Court's *Morrison* test, and both courts provided detailed, carefully reasoned and lengthy opinions in support of their decisions. Two additional decisions have recently addressed these questions in the Second Circuit: in *In re Lyondell Chemical Company*,[17] the Bankruptcy Court for the Southern District of New York followed the reasoning of *In re French* to allow extraterritorial recovery of transferred assets; and in *In re Ampal-American Israel Corporation*,[18] a different judge for the same court sided with *Maxwell* and *ET* to decline to apply section 547 of the Bankruptcy Code extraterritorially.[19]

Since considerable authority exists for both approaches, it is hazardous to predict how the Second Circuit will rule, but it is almost certain that any decision rendered by the court will significantly alter the landscape in this area. If the court follows the *Maxwell/ET* line of reasoning, it will solidify a split between the Second Circuit and the Fourth Circuit (which, in *In re French*, adopted the opposite reasoning and conclusions) and limit the ability of bankruptcy trustees to recover assets transferred to overseas recipients. If, on the other hand, the court sides with the *In re French/BLI* decisions, we expect to see an uptick in litigation against foreign recipients of fraudulently transferred assets, not only in the Second Circuit but nationwide.

Recent developments

Subsequent to the filing of the *Madoff* appeals to the Second Circuit, in January 2018, the Bankruptcy Court for the Southern District of New York issued a decision applying the *Maxwell/ET* line of reasoning described above, holding that sections 544(b), 548 and 550 of the Bankruptcy Code could not be used to avoid the transfer at issue because this would constitute an impermissible extraterritorial application of those provisions.

In *In re CIL Limited* (CIL),[20] the trustee for the estate of CIL Limited, a Cayman Islands company, sought to avoid CIL's 'equity transfer' as a fraudulent transfer. Specifically, as part of a prepetition corporate restructuring, CIL reduced its ownership interest in CEVA Group plc, a foreign holding company that controlled certain operating entities, from 100 per cent to 00.01 per cent, and received no consideration in exchange for its loss of ownership interest. Post-transfer, CIL commenced provisional liquidation proceedings in the Cayman Islands. In response to the trustee's complaint, the defendants, CIL's directors and the corporate entities involved in the transfer, moved to dismiss on numerous grounds, including that the claims improperly sought extraterritorial application of the Bankruptcy Code to a transfer from a UK entity to a Marshall Islands entity.

Applying the *Morrison/Nabisco* analysis, the Bankruptcy Court found that the avoidance provisions of the Code do not apply extraterritorially. As to step one, 'whether the presumption against extraterritoriality has been rebutted—i.e., whether the statute gives a clear, affirmative indication that it applies extraterritorially',[21] the court found no indication from congressional intent or the statutes' text that sections 548 and 550 were to be applied extraterritorially. Moreover, the Court explicitly agreed with the reasoning set forth in *Maxwell*, *ET*[22] and *In re Ampal*, that 'in assessing the scope of the Bankruptcy Code's avoidance provision, section 541(a)(1) is irrelevant because property that is the subject of an action does not become estate property until it is recovered.'[23]

At the second step, whether the case involves domestic application of sections 548 and 550, the court noted that the 'focus of those avoidance and recovery provisions is the initial transfer that depletes the property that would have become property of the estate'.[24] Applying this principle, the court emphasised that '[n]ot only was the transfer one among foreign entities that allegedly harmed foreign creditors, it was accomplished outside of the United States' through board meetings chaired in London and shares issued by a foreign company in accordance with UK law.[25] Thus, the court found that even adopting the 'centre of gravity' test the trustee relied on, the fact that the issuance of stock was partially negotiated and documented by domestic professionals in the United States was not enough to make the transfer a domestic transaction.[26]

Moreover, the court rejected the trustee's attempt to avoid the transfer pursuant to UK law based on section 544(b), which permits avoidance of a transfer 'that is voidable under applicable law'.[27] The court found that the phrase 'voidable under applicable law' did not give section 544(b) *de facto* extraterritorial application and that because it had already determined that the equity transfer was not a domestic transfer, it could not be avoided under section 544(b).[28]

Finally, addressing principles of international comity, the court concluded that while the international protocol,[29] which had been sanctioned by both the US and Cayman courts, provided sufficient grounds for the trustee's avoidance claims to proceed before the Bankruptcy Court, the law of the Cayman Islands should govern. The court considered several factors in its decision that the Cayman Islands had a greater interest in the adjudication of the claims, including:

- the pendency of parallel insolvency proceedings in the Cayman Islands;
- the status of Cayman entities as both debtor and creditors;
- any injury to the debtor would have occurred in the Cayman Islands;
- the Cayman Islands' interest in evaluating fraudulent transfers involving Cayman parties; and
- the respect owed to Cayman-domiciled companies transacting business on local legal norms.

The court thus dismissed the trustee's fraudulent transfer claims under sections 544, 548 and 550 with prejudice but allowed the trustee to assert its intentional fraudulent transfer claim under Cayman Islands law, 'divorced of any aspect of the Bankruptcy Code'.[30]

Notably, in June 2018, the court granted the trustee's motion for reconsideration, which requested that the court amend its previous decision dismissing with prejudice its avoidance claims under the Bankruptcy Code and permit the trustee to file a second amended complaint. The trustee's proposed second amended complaint contained allegations that the parties to the transaction undertook a number of steps in the United States. Accordingly, the trustee claimed it could establish the transfer at issue to be a 'domestic transaction' that could be avoided under sections 544 548, and 550.[31] While the court permitted the trustee to file its amended complaint, it has not yet determined whether it should ultimately be dismissed. It thus appears that this important area of the law will remain unsettled at least until the Second Circuit rules on the *Madoff* appeals.

* *The authors express appreciation to Jennifer Prevete for her significant assistance in the preparation of this chapter.*

Notes

1 *In re Maxwell Commc'n Corp plc, 186 BR 807* (SDNY 1995), aff'd sub nom. *In re Maxwell Commc'n Corp plc*, 93 F3d 1036 (2d Cir 1996).

2 440 F3d 145 (4th Cir 2006).

3 Unlike the transfers at issue in *Maxwell* and the other recovery cases discussed in this chapter, the transfer in *In re French* was an 'initial transfer', made directly by the debtor to a transferee, and recoverable under section 550(a)(1) of the Bankruptcy Code.

4 561 US 247 (2010).

5 As described below, the two-step *Morrison* test is often applied in reverse order.

6 Racketeer Influenced and Corrupt Organizations Act.

7 *RJR Nabisco, Inc v European Cmty*, 136 S Ct 2090 (2016).

8 *Sec Inv'r Prot Corp v Bernard L Madoff Inv Sec LLC* ('BLI'), 480 BR 501 (Bankr SDNY 2012).

9 Before performing the *Morrison* analysis, the court determined that it had personal jurisdiction over BLI through a 'minimum contacts' analysis.

10 *Sec Inv'r Prot Corp v Bernard L Madoff Inv Sec LLC* ('ET'), 513 BR 222 (SDNY 2014).

11 *ET*, 513 BR at 228-230, citing *In re Colonial Realty Co*, 980 F2d 125, 131 (2d Cir 1992)).

12 *Sec Inv'r Prot Corp v Bernard L Madoff Inv Sec LLC*, No. AP 08-01789 (SMB), 2016 WL 6900689 (Bankr SDNY 22 November 2016), petition for direct appeal docketed, No. 17-1341 (2d Cir 28 April 2017).

13 The omnibus decision on remand from *ET* was written by Judge Bernstein. The *BLI* decision was written by Judge Lifland.

14 Claims against three of these defendants were upheld because the court had not received sufficient information about the foreign liquidation proceedings to reach a conclusion.

15 Pet. Of Appellant Irving H Picard for Permission to Appeal Pursuant to 28 USC section 158(d)(2)(A), Case No. 17-1341 (2d Cir 28 April 2017).

16 Docket No. 388 (Order), Case No. 17-1294 (2d Cir 27 September 2017).

17 543 BR 127 (Bankr SDNY 2016).

18 562 BR 601 (Bankr SDNY 2017).

19 The decision in *In re Ampal* was authored by Judge Bernstein, who also issued the *ET* decision on remand.

20 582 BR 46 (Bankr SDNY 5 January 2018) amended on reconsideration, 2018 WL 3031094 (Bankr SDNY 15 June 2018). CIL was decided by Bankruptcy Court Judge James L Garrity, Jr.

21 Id. at 83 (quoting *RJR Nabisco, Inc v European Cmty*, 136 S Ct 2090, 2101(2016)).

22 The court refers to the *ET* decision as '*Madoff/CACEIS*'. Id. at 84-85.

23 Id. at 92.

24 Id. at 93.

25 Id.

26 Id. at 96.

27 11 USC section 544(b).

28 CIL, 582 BR at 97.

29 The 'international protocol' was an agreement among the trustee and the appointed joint liquidators that was designed to promote the orderly administration of the estate. Id. at 99.

30 Id. at 103.

31 *In re CIL Ltd*, No. 13-11272-JLG, 2018 WL 3031094, at *6 (Bankr SDNY 15 June 2018).

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Mr Graulich is a partner in Davis Polk's insolvency and restructuring group. He is a recognised leader in the restructuring field, having played a high-profile and instrumental role in numerous significant restructurings and bankruptcies, including a key role in many of the most important cross-border cases in the past several years.

Mr Graulich's recent cross-border representations include representing Fung Retailing in the Chapter 11 cases of *Toys R Us*; the foreign representative in the Chapter 15 case of *ENNIA*; Volkswagen AG on the restructuring of Takata Corp; Embraport on its out-of-court restructuring; the joint administrators of Lehman Brothers International (Europe) on claims against Lehman Brothers Inc in the largest SIPC case in history; and the foreign representatives of Elpida Memory, Inc in the first-ever Chapter 15 recognition of a Japanese reorganisation case. His more notable domestic representations include representing the steering committee of secured lenders to C&J Energy Services; and the largest creditor and commercial counterparty on the litigation of the assumption of AAdvantage Program agreements. Mr Graulich also plays a key role in the firm's representation of certain global financial institutions on their Dodd Frank resolution planning.

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Elliot Moskowitz is a partner in Davis Polk's litigation department. His practice focuses on bankruptcy litigation and complex commercial litigation, and he has represented major financial institutions and creditors in connection with trials and proceedings in bankruptcy courts around the country. Most recently he served as lead litigation counsel in the Chapter 11 proceedings of Bonanza Creek Energy (on behalf of the debtor) and the Tribune Company (on behalf of JPMorgan Chase), as well as in the landmark Lehman Brothers proceeding under the Securities Investor Protection Act.

Mr Moskowitz also has extensive experience representing corporate clients and professional firms in connection with a wide range of state and federal regulatory inquiries and civil litigation.

In his pro bono practice, Mr Moskowitz served as chief counsel to the Special Commission on the Future of the New York State Courts, a blue-ribbon panel appointed by then Chief Judge Judith S Kaye to study the courts and propose reforms.

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