A National International Affair: The Long Jurisdictional Reach of *In re Irving H. Picard, Tr. for Liquidation of Bernard L. Madoff Investment Securities*

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INTRODUCTION

In 2008, Bernard L. Madoff Investment Securities suddenly and catastrophically collapsed because it lacked the capital to pay investors who wanted to withdraw their investments. Bernie Madoff's Ponzi scheme collapsed because much of the money deposited into Bernard L. Madoff Investment Securities was not invested, but rather went to creating the façade of a powerful, well-run business and filling the pockets of Madoff and his inner circle. However, as Bernie Madoff's company was beginning to fall apart, the initial investors who sought to withdraw their capital were able to do so. Those assets, and others that were under the control of Bernard L. Madoff Investment Securities (BLMIS), have been the subject of legal action, and much of it has been recovered, but there remain numerous ongoing claims.[1]

This Note addresses a Second Circuit decision on a bankruptcy case stemming from the Bernie Madoff Ponzi scheme. International feeder funds which had sourced their funds from other international investors were major investors in Madoff's business. When those investors withdrew from the Ponzi scheme, the funds would transfer in reverse from BLMIS to the feeder funds, and on to the individual investors. The Second Circuit's decision in *In re Irving H. Picard, Trustee. for Liquidation of Bernard L. Madoff Investment Securities*

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1. See Erik Larson & Christopher Cannon, *Madoff's Victims Are Close to Getting Their $19 Billion Back*, BLOOMBERG (Dec. 8, 2018), https://www.bloomberg.com/graphics/2018-recovering-madoff-money/.

("*Picard*") addresses whether the Bankruptcy Code provisions that avoid fraudulent or preferential transfers may be applied to transactions made between two parties outside of the United States.[2] In *Picard*, the Second Circuit ultimately held that because the initial transfers from BLMIS to the feeder funds originated in the United States, and investors knew that the funds were transferred from the United States, the Bankruptcy Court should have jurisdiction to reclaim those funds for creditors to the estate.[3]

The implications of *Picard* are far-reaching. Although the Second Circuit's decision is narrow—effectively only holding that initial transfers originating in the United States can justify United States jurisdiction over later international transfers—many previously unimagined transactions are now within the reach of United States bankruptcy trustees and creditors. Investors and debtors alike who believed their assets were safe from recovery in bankruptcy are now at risk of their transactions being avoided under bankruptcy law. The ruling in *Picard* subverts the presumption against extraterritoriality of bankruptcy law, which limits the ability of bankruptcy courts to assert their jurisdiction internationally. Under the presumption against extraterritoriality and international comity considerations before *Picard*, many United States Bankruptcy Courts would have been reluctant to hold that a transfer between two international parties fell under United States law.[4] This Note will attempt to establish whether the decision in *Picard* is a consistent interpretation of existing United States

2. *In re* Picard, 917 F.3d 85, 91 (2d Cir. 2019).

3. *Id*. at 86.

4. *See* Hadas Livnat, *Extraterritorial Application of Bankruptcy Code's Fraudulent Transfer Provisions (11 U.S.C.A. §§ 548, 550)*, WESTLAW 39 A.L.R. Fed. 3d Art. 5 (2019) (noting, however, that some courts found that sections 548 and 550 were meant to apply extraterritorially); Barry Z. Bazian, *Parsing Picard: Assessing the Extraterritorial Reach of the Bankruptcy Code's Avoidance and Recovery Provisions*, 29 NORTON J. BANKR. L. & PRAC. NL art. 4 (2020), WESTLAW 29 No. 2 JBKRLP-NL Art. 4, https://www.westlaw.com/Document/I1e20d4b878a011eaa5bf9855b4a150e7/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 (discussing the lack of clarity as to whether the avoidance provisions from the bankruptcy code are intended to apply extraterritorially and explaining that courts have therefore resolved the question inconsistently with each other); *see also in re* CIL Limited, 582 B.R. 46 (Bankr. S.D.N.Y. 2018); *in re* Bankruptcy Estate of Midland Euro Exchange Inc., 347 B.R. 708 (Bankr. C.D. Cal. 2006); *but see in re* Lyondell Chemical Company, 543 B.R. 127 (Bankr. S.D.N.Y. 2016); Diaz-Barba v. Kismet Acquisition, LLC, 2010 WL 2079738 (S.D. Cal. 2010) (finding the avoidance provisions to be intended to apply extraterritorially).

precedent, and whether the circumstances in *Picard* sufficiently rebut the presumption against extraterritoriality. Furthermore, this note seeks to determine whether *Picard* is consistent with international insolvency law, and whether it and any other case that might adopt the *Picard* court's holding are likely to be honored by foreign jurisdictions. This Note will attempt to answer these questions and propose an interpretation of *Picard* that is compatible with both United States and international insolvency law.

Part I will provide an introduction to United States law on extraterritoriality and international insolvency law. Part I will then briefly discuss the history of the presumption against extraterritoriality's development in international insolvency cases, up until the *Picard* decision. Part I will also examine the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency and explain how United States insolvency law fits into international law. Part II will describe the circumstances leading up to the *Picard* decision, examine the Second Circuit's holding in *Picard*, and discuss the subsequent legal history to the decision. Finally, Part III will consider the international implications of the holding in *Picard* and determine the likelihood that *Picard*'s holding, or others like it, would be accepted by an international court of law. This analysis ultimately establishes that *Picard* neither represents an improper interpretation of United States law, nor an impermissible decision under international law. Part III identifies that *Picard* represents a new interpretation of existing U.S. law doctrine on the presumption of extraterritoriality that expands U.S. jurisdiction.

I. THE UNITED STATES' STANCE ON EXTRATERRITORIALITY AND CROSS-BORDER INSOLVENCY UNDER UNCITRAL

The law of any one nation does not by default apply abroad. Nations may agree to create international laws that apply in multiple locations or accept the rulings of foreign courts under the principle of comity.[5] However, nothing guarantees a court will honor rulings that a foreign court attempts to apply abroad.[6]

5. *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2072–74 (2015).

6. *See id.* at 2074 ("[N]o rule of customary international law requires [a state] to recognize the judgment of a foreign court, to treat a foreign act of state

This note will look to see whether the *Picard* decision and other cases that use the Second Circuit's holding will have international effect. In order to set the scene for the *Picard* case, this part will consider the circumstances under which United States courts are willing to apply United States law abroad and provide background on how these principles are applied in United States bankruptcy matters. This Part will describe elements of international insolvency law as defined by the UNCITRAL Model Law on Cross-Border Insolvency. Finally, this Part will identify certain points where United States Bankruptcy Courts' international application of law may be in disagreement with the UNCITRAL Model Law on Cross-Border Insolvency.

A. THE UNITED STATES' STANCE ON EXTRATERRITORIALITY

It is a longstanding principle in American law that the "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[7] This time-honored principle serves to "protect against unintended clashes between our laws and those of other nations which could result in international discord."[8] This principle is often referred to as the presumption against extraterritoriality, and although it has changed in strength and substance over time,[9] it remains very much a substantial part of United States law.[10] The presumption against extraterritoriality began as a tool to determine whether American law applied in

as valid, or to allow foreign governments to bring suit . . . .").

7. Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949); *see also* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356–57 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."), *overruled on other grounds by* W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 407 (1990); The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824).

8. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1077, *as recognized in* Arbaugh v. W&H Corp., 546 U.S. 500, 512 (2006).

9. William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582, 1584–85 (2020).

10. For a more substantive examination of very early presumption against extraterritoriality law, see Aaron D. Simowitz, *The Extraterritoriality Formalisms*, 51 CONN. L. REV. 375, 383–84 (2019); *see also* Dodge, *supra* note 9, at 1589–1614.

international waters.[11] In *The Apollon*, an early case that applied the presumption, the Supreme Court held that United States law should not apply to non-Americans outside of United States territories.[12] In some circumstances, however, the presumption against extraterritoriality can be overcome. United States courts hold that when the presumption against extraterritoriality is overcome, United States law can, and does, apply internationally.[13] The recent history of the presumption against extraterritoriality plays a substantial role in the *Picard* decision.

Until 1991, the Supreme Court's understanding of the presumption against extraterritoriality largely revolved around a two-pronged test. As the basis for determining whether United States law applied to actions occurring inside or outside of the United States, the two-pronged test considered: (1) where a certain action had taken place in a territory, and (2) what territory the effects of that action were substantially felt in.[14] Under this test, if conduct occurred inside the United States or outside the United States while having a substantial effect within the United States, it was deemed to have overcome the presumption against extraterritoriality, and United States courts could exercise jurisdiction.[15] However, in 1991, the Supreme Court limited the two-pronged test that existed at the time, signaling diminished willingness of the Court to apply United States law abroad.

The Supreme Court, by a 6-3 majority, decided in *EEOC v. Arabian Am. Oil Co.* ("*Aramco*"), to overhaul the presumption against extraterritoriality.[16] Considering whether to apply United States anti-discrimination law to the employment practices of United States employers over United States citizens abroad, the Court held that Unites States law did not apply

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11. *See* Nicolette S. Kraska, *A Changing Tide: The Supreme Court's Modified Position Toward the Presumption Against Extraterritoriality*, 94 TUL. L. REV. 611, 614 (2020).

12. *The Apollon*, 22 U.S. (9 Wheat.) at 370 ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.").

13. *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 87 (1998); *but see id.* at 110 (noting as well, however, that at times "courts have disagreed about what the presumption against extraterritoriality means").

14. Simowitz, *supra* note 10, at 382–83.

15. *Id.*

16. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 244 (1991).

under a new interpretation of the presumption against extraterritoriality.[17] In reaching their decision, the majority held that the presumption against extraterritoriality turned not on conduct or on a law's ultimate effect, but rather on the legislative intent behind the law at issue.[18] Under this new interpretation, the Court required judges to focus more on the law that was the potential basis for the jurisdiction, as opposed to the facts surrounding the action that might give rise to jurisdiction.[19] In other words, the effect of an action alone no longer could justify the application of United States law to an extraterritorial action. Instead, the Court argued that legislators operated with the presumption against extraterritoriality in mind.[20] The Court looked solely at whether Congress' intent was for the law to apply internationally.[21] Although Congress would eventually overturn the result in *Aramco*—specifically in that instance by amending the law at issue in the case—the modified presumption against extraterritoriality would become the standard in later extraterritoriality cases.[22]

Modern United States bankruptcy law on extraterritoriality and United States jurisdiction in international insolvency cases has largely developed out of the decision in *Maxwell Communication Corp. v. Barclays Bank (In re Maxwell Communication Corp.)*, which resolved a jurisdictional dispute between parties that disagreed about whether to resolve an issue in the United States courts or U.K. courts.[23] The bankruptcy court in *Maxwell* confronted the then-novel issues of cross-border insolvency in the early stages of growing international commerce, multi-national conglomerations, and cross-border

17. *See id.* at 246.

18. *Id.* at 248 ("We assume that Congress legislates against the backdrop of extraterritoriality. Therefore, unless there is the affirmative intention of the Congress clearly expressed . . . we must presume it is primarily concerned with domestic conditions.") (internal quotations and citations omitted).

19. *See id.* at 251–52.

20. *Id.* at 248.

21. *Id.*

22. Simowitz, *supra* note 10, at 385.

23. Maxwell Commc'n Corp. v. Barclays Bank (*In re* Maxwell Commc'n. Corp.) (*Maxwell I*), 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd*, 186 B.R. 807 (Bankr. S.D.N.Y. 1995), *aff'd sub nom*. Societe General plc v. Maxwell Commc'n Corp. plc (*In re* Maxwell Commc'n Corp. plc), 93 F.3d 1036 (2d Cir. 1996), *superseded by statute*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1501, 119 Stat. 23, *as recognized by* Hosking v. Hellas Telecomms. (Lux.) II SCA (*In re* Hellas Telecomms. (Lux.) II SCA), 535 B.R. 543, 588 (Bankr. S.D.N.Y. 2015).

bankruptcies affecting large numbers of debtors across borders.[24] *Maxwell* heavily based its interpretation of the potential reach of the United States' bankruptcy jurisdiction on the holding in *Aramco*.[25] The *Maxwell* court turned to a textual analysis of the United States Bankruptcy Code and legislative reports for "indicia of Congressional intent."[26] In the end, the *Maxwell* court found no "unambiguous expression of congressional intent" to support overriding the presumption against extraterritoriality for Section 547, the relevant section of the Bankruptcy Code.[27] The *Maxwell* court held that "where a foreign debtor makes a preferential transfer to a foreign transferee and the center of gravity of that transfer is overseas," under the understanding of the presumption against extraterritoriality at that time, U.S. courts did not have sufficient jurisdiction to avoid that transfer."[28] *Maxwell* was affirmed by the District Court,[29] then the Second Circuit,[30] and the analysis in *Maxwell* on extraterritoriality became the standard for further cases determining the applicability of United States bankruptcy law in international insolvency cases.[31]

In 2010, the Supreme Court reaffirmed the increased strength of the presumption against extraterritoriality in *Morrison v. National Australia Bank*.[32] The *Morrison* court was

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24. *See* Maxwell Commc'n Corp. v. Barclays Bank (*In re* Maxwell Commc'n. Corp.) (*Maxwell II*), 186 B.R. 807, 813 (Bankr. S.D.N.Y. 1995) (describing the "unique" facts of the case).

25. *Maxwell I*, 170 B.R. at 809–14.

26. *Id.* at 810–11.

27. *Id.* at 812.

28. *Id.* at 814.

29. *Maxwell II*, 186 B.R. 807 (S.D.N.Y. 1995).

30. Societe General plc v. Maxwell Commc'n Corp. plc (*In re* Maxwell Commc'n Corp. plc) (*Maxwell III*), 93 F.3d 1036 (2d Cir. 1996).

31. *See, e.g.*, French v. Liebmann (*In re* French), 440 F.3d 145, 149–150, 153 (4th Cir. 2006); United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207, 1223 (10th Cir. 2000); Emerald Capital Advisors Corp. v. Bayerische Motoren Werke Akiengesellschaft (*In re* Fah Liquidating Corp.), 572 B.R. 117, 123–24 (Bankr. D. Del. 2017); Weisfelner v. Blavatnik (*In re* Lyondell Chem. Co.), 543 B.R. 127, 148–55 (Bankr. S.D.N.Y. 2016); Hosking v. TPG Capital Mgmt. (*In re* Hellas Telecommunications (Lux.) II SCA), 526 B.R. 499, 513–14 (Bankr. S.D.N.Y. 2015); Midland Euro Exch. Inc. v. Swiss Fin. Corp. (*In re* Bankr. Est. of Midland Euro Exch. Inc.), 347 B.R. 708, 715–18 (Bankr. C.D. Cal. 2006); Florsheim Grp. Inc. v. USASIA Int'l Corp. (*In re* Florsheim Grp., Inc.), 336 B.R. 126, 130–33 (Bankr. N.D. Ill. 2005); *In re* Regus Bus. Ctr. Corp., 301 B.R. 122, 126–27 (Bankr. S.D.N.Y. 2003).

32. Morrison v. Nat'l Austrl. Bank, 561 U.S. 247, 273 (2010).

looking to determine whether Section 10(b) of the Securities Exchange Act had extraterritorial effect.[33] In *Morrison* the Court added a second step to the extraterritoriality analysis, to supplement the textual analysis set out in *Aramco*.[34] Under *Morrison* a court should first look "to see if the presumption ha[s] been rebutted by a 'clear indication of extraterritoriality.'"[35] Under the second step created by the *Morrison* court, where there is no indication that Congress intended to rebut the presumption against extraterritoriality, a court should determine whether the law at issue is being applied domestically.[36] The ruling in *Morrison* was echoed by a number of similar rulings that followed.[37] This line of cases culminated in *RJR Nabisco, Inc. v. European Community*, where the Supreme Court "adopt[ed] 'a two-step framework for analyzing extraterritoriality issues.'"[38] The Court held that if there was not "a 'clear, affirmative indication' rebutt[ing] the presumption against extraterritoriality," that the court should look to see if the facts of the case constituted a substantial "domestic application" of the law at issue.[39] In the scenario where a court finds that a particular law has a potentially substantial domestic application, provided that the statute's "focus" is domestic, and the action that is the subject of that focus also occurred

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33. *See* Dodge, *supra* note 5, at 2128 n.342.

34. *See* Dodge, *supra* note 9, at 1585.

> The Supreme Court's 2010 decision in Morrison v. National Australia Bank Ltd. articulated a new presumption against extraterritoriality. First, the Court said explicitly that the presumption was not a 'clear statement rule' and that 'context can be consulted' to determine whether the presumption has been rebutted. Second, Morrison abandoned the presumption's traditional dependence on the location of the conduct.

Id.; *see also* Simowitz, *supra* note 10, at 378 (citing *Morrison*, 561 U.S. at 266).

35. Dodge, *supra* note 9, at 1605 (citing *Morrison*, 561 U.S. at 265).

36. Simowitz, *supra* note 10, at 378.

37. See Kiobel v. Royal Dutch Petro. Co., 569 U.S. 108, 121–22 (2013); RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 335 (2016) ("Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.").

38. Dodge, *supra* note 9, at 1586 (the two-step system "looks first for a clear indication of geographic scope and, in the absence of one, applies Morrison's 'focus' test").

39. Simowitz, *supra* note 10, at 388 (quoting *RJR Nabisco*, 579 U.S. at 337).

domestically, such a finding can also justify overcoming the presumption against extraterritoriality.[40] Put alternately, the Court held that if "the conduct relevant to the statute's focus" was domestic and the law's purpose is to address a domestic issue, a law which Congress did not mean to apply extraterritorially can still be applied extraterritorially.[41] The two-step test set forth in *RJR Nabisco* has only been applied by the Supreme Court once,[42] and it is viewed by scholars as a difficult and confusing standard which creates more questions than answers.[43] Nevertheless, it has become the standard test for addressing the extraterritoriality question, and has been incorporated into the *Restatement (Fourth) of Foreign Relations Law*.[44] It is in this light that *Picard* was decided. Thus, perhaps understandably, under this confusing standard for the presumption against extraterritoriality, the Second Circuit decided on a novel interpretation of when United States bankruptcy law can apply abroad.

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40. *RJR Nabisco*, 579 U.S. at 337 ("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.' If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad . . .").

41. *Id.*

42. Kraska, *supra* note 11, at 617; *see also* WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2136–38 (2018) (applying the RJR Nabisco two-step analysis).

43. *See* Dodge, *supra* note 9, at 1586 ("Scholars have been critical of the new presumption against extraterritoriality. It has been called a 'runaway canon' and a 'Frankenstein's Monster.'") (quoting Maggie Gardner, *RJR Nabisco and the Runaway Canon*, 102 VA. L. REV. ONLINE 134 (2016) and Anthony J. Colangelo, *The Frankenstein's Monster of Extraterritoriality Law*, 110 AJIL UNBOUND 51 (2016)); Kraska, *supra* note 11, at 617 ("Amongst scholars, the two-step formula has been met with criticism due to its confusing reasoning and tendency to produce more aggressive results with regard to the presumption."); Gardner, *supra*, at 135–36 (noting that, in addition to the "worrisome implications for separation of powers," the opinion was "disappointing on practical grounds."); *see generally* Colangelo, *supra* (discussing the problems created by the RJR Nabisco opinion).

44. *See* Dodge, *supra* note 9, at 1586 (citing RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (AM. L. INST. 2018)).

B. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY, AND ITS ADOPTION BY THE UNITED STATES AND GREAT BRITAIN

The United Nations General Assembly established UNCITRAL in 1966 in response to growing international trade, and requests for guidance on resolving commercial disputes across borders for states with divergent laws.[45] UNCITRAL's goal is to harmonize differing legal systems' laws on international trade and to remove legal obstacles to the flow of international trade.[46] Responding to requests for a tool capable of resolving conflicts in international insolvencies at a 1992 meeting of UNCITRAL, a Colloquium on cross-border insolvency was held by UNCITRAL and the International Association of Insolvency Practitioners at Vienna in April, 1994.[47] These events led to the drafting of the Model Law on Cross-Border Insolvency (the "Model Law"), which was officially adopted by the UN in 1997.[48] The official goal of the Model Law is to provide states "with a modern legal framework to more effectively address cross-border insolvency proceedings [by] . . . authorizing and encouraging cooperation and coordination between jurisdictions . . . ."[49]

In practice, the Model Law has helped create uniformity among insolvency practices internationally and create an environment where parties can more easily participate in an increasingly international economy. Scholars view the Model Law as having made successful strides towards a transnational practice of insolvency law.[50] Indeed, since the Model Law took

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45. Claudia Tobler, *Managing Failure in the New Global Economy: The U.N.C.I.T.R.A.L. Model Law on Cross-Border Insolvency*, 22 B.C. INT'L & COMP. L. REV. 383, 403–04 (1999).

46. *Id.*; *see also* G.A. Res. 2205 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 99, *reprinted in* [1966] U.N.Y.B. 917, 917–21, U.N. Sales No. E.67.I.1 (establishing UNCITRAL); U.N. Comm'n On Int'l Trade, Cross-Border Insolvency, Addendum, ¶ 11, U.N. Doc. A/CN.9/378/Add.4 (1993), https://documents-dds-ny.un.org/doc/UNDOC/GEN/V93/865/52/IMG/V9386552.pdf?OpenElement.

47. Tobler, *supra* note 45, at 405.

48. *Id.* at 406–07.

49. *UNCITRAL Model Law on Cross-Border Insolvency*, UNCITRAL, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency UNCITRAL (last visited Mar. 9, 2022); see also Model Law on Cross-Border Insolvency, U.N. GAOR 52d Sess., Supp. No. 17, at 67, U.N. Doc. A/52/17 (May 30, 1997) [hereinafter Model Law on Cross-Border Insolvency].

50. *See* Edouard Adelus, *Global Law-Making in Insolvency Law: The Role*

effect, new bankruptcy legislation based on it has been adopted in 49 states and 52 jurisdictions.[51] Nevertheless, the Model Law has neither been able to fully eliminate choice of law issues nor dissolve the borders of different territorial jurisdictions.[52] The very text of the Model Law acknowledges the fact that jurisdictional questions are left unresolved, noting that, in granting or denying relief ordered by another court from an international jurisdiction, a court "must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected."[53] Therefore, even though the United States incorporates the Model Law in Chapter 15 of the Bankruptcy Code, which covers international bankruptcies, whether an American court's ruling over a foreign party or assets is accepted is subject to other nations accepting the American law's ruling under the principles of comity.[54] Under the Model Law, if a court is not satisfied that the foreign jurisdiction has adequately considered the rights of the creditors, debtor, or other interested persons, it may "at its own motion, modify or terminate" the relief requested by the foreign court.[55]

Ultimately, the Model Law is unable to create an environment in which international insolvency actions are considered within a universal jurisdiction, and international insolvencies still are resolved in individual states' jurisdictions. Therefore, an extraterritorial application of United States bankruptcy law, even if it overcomes the presumption against extraterritoriality, does not guarantee that a foreign court will apply American law.

II. THE DECISION IN *PICARD*

In mid-2020, the Supreme Court denied certiorari to an

for the United Nations Commission for International Trade Law, 24 UNIF. L. REV. 175, 176–77 (2019).

51. *See Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)*, UNCITRAL, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (last visited Mar. 9, 2022). The United States and the UK have been signatories to the Model Law on Cross-Border Insolvency since 2005 and 2006 respectively. *Id.*

52. *See* Adelus, *supra* note 50, at 212.

53. Model Law on Cross-Border Insolvency, *supra* note 49, art. 22.

54. *Id.*; *see also* 11 U.S.C. § 1501 et seq.; *supra* note 5 and accompanying text.

55. *See* Model Law on Cross-Border Insolvency, *supra* note 49, art. 22(3).

appeal of the Second Circuit's decision in *Picard*.[56] In doing so, the Supreme Court allowed, at least for the time being, application of the *Picard* ruling in other cases, despite the decision's controversial nature. Before examining the ramifications of the decision in *Picard*, this Part will provide a brief overview of the facts that led up to the decision, provide a synopsis of the underlying cases, and analyze the Second Circuit decision. Finally, this Part will show how the decision in *Picard*, while proposing a novel international application of United States law, hardly considered the U.S. court's place in international law, limited its analysis to a domestic perspective, and failed to address the likelihood of international recognition or rejection of the decision.

A. THE FACTUAL CIRCUMSTANCES LEADING UP TO *PICARD*

In *Picard*, the Second Circuit addressed eighty-eight consolidated appeals that were related to ongoing proceedings resulting from the collapse of Bernard Madoff's notorious Ponzi scheme.[57] Bernard Madoff's Ponzi scheme is well known for being possibly the largest Ponzi scheme in history, and for the spectacular fallout that resulted from its sudden, catastrophic, but perhaps inevitable implosion.[58] Madoff began his career as a penny stock trader, and ran a brokerage firm that was revolutionary for its early use of computer trading software that would ultimately be adopted by the NASDAQ exchange and form the foundation for modern electronic trading systems.[59] Despite having made substantial earnings and developing a respectable reputation through his legitimate businesses, Madoff began operating his Ponzi scheme through the wealth-management arm of his business, as early as 1975.[60]

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56. HSBC Holdings PLC v. Picard, 140 S.Ct. 2824 (2020) (denying certiorari); *see also* HSBC Holdings PLC v. Picard, 140 S.Ct. 643 (2019) (requesting that the Solicitor General file a brief in the case expressing the opinion of the United States on Picard).

57. *In re* Picard, 917 F.3d 85, 91 (2d Cir. 2019).

58. *See id.* at 92; see also *Bernie Madoff*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/other/bernie-madoff/#:~:text=Bernie%20Madoff%20is%20famous%20for,to%20150%20years%20in%20prison (last visited Feb. 2, 2022); Adam Hayes, *Bernie Madoff*, INVESTOPEDIA, https://www.investopedia.com/terms/b/bernard-madoff.asp (Apr. 30, 2021).

59. *See* CORP. FIN. INST., *supra* note 58.

60. *See id.*; Hayes, *supra* note 58.

The scheme operated by enticing investors to buy into Madoff's investment funds through promised returns that were dramatically and consistently beyond market averages and expectations.[61] However, instead of investing the money, Madoff deposited the funds into his personal checking account at J. P. Morgan Chase Manhattan Bank.[62] Despite account statements regularly issued to customers reflecting trading activity at the firm, the funds were used to maintain BLMIS operations, and predominantly "to enrich Madoff and his inner circle."[63] Like many other Ponzi schemes, "Madoff used the investments of new and existing customers to fund withdrawals of principal and supposed profit made by other customers."[64] In 2008, Madoff's scheme collapsed when requests for withdrawals from the fund could no longer be sustained by BLMIS' bank account and the incoming investments with the fund.[65]

Before the scheme collapsed, Madoff had taken tens of billions of dollars from numerous and varied sources as close as his fellow synagogue members and as distant as international charitable organizations.[66] Many of Madoff's international investors deposited money through internationally headquartered "feeder funds" which pooled money from numerous investors to be invested with BLMIS.[67] Three such feeder funds, two organized in the British Virgin Islands ("BVI") and one in the Cayman Islands, were at issue in *Picard*, and were the focus for the international law questions in the case.[68]

Since the collapse of BLMIS in 2008, there has been an immense amount of scrutiny of and litigation over the funds remaining under Madoff's control at the time of collapse.[69] Numerous bankruptcy cases have involved attempts to recover money transferred out by BLMIS to investors through the avoidance of fraudulent or preferential transactions. *Picard* is

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61. See CORP. FIN. INST., *supra* note 58; Hayes, *supra* note 58.

62. Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Bernard L. Madoff Inv. Sec. LLC), 424 B.R. 122, 129 (Bankr. S.D.N.Y. 2010) (providing an excellent synopsis of the technical breakdown of the various BLMIS firm departments, and their respective roles in the fund), *aff'd*, 654 F.3d 229 (2d Cir. 2011).

63. *Id.* at 129.

64. *In re* Bernard L. Madoff Inv. Sec. LLC, 654 F.3d 229, 232 (2d Cir. 2011).

65. *Id.*

66. *See* Hayes, *supra* note 58.

67. *See In re* Picard, 917 F.3d 85, 92–93 (2d Cir. 2019).

68. *Id.* at 93.

69. Larson & Cannon, *supra* note 1.

one of many such cases.

B. THE PROCEDURAL POSTURE OF *PICARD*

Picard was a consolidated appeal from a decision of the United States Bankruptcy Court for the Southern District of New York.[70] The Bankruptcy Court's ruling depended on a prior decision in the United States District Court for the Southern District of New York,[71] where the postural analysis will begin.

Judge Rakoff, the District Court Judge, presided over an action by Irving H. Picard, the trustee for the liquidation of BLMIS (the Trustee).[72] The Trustee sued under Section 550(a)(2)[73] of the Bankruptcy Code to recover the value of fraudulent transfers made by BLMIS to international feeder funds by avoiding the transfers.[74] Three of the most substantial feeder funds in the case were Fairfield Greenwich Group, organized in the BVI, The Kingate Funds, also organized in the BVI, and The Harley International, organized in the Cayman Islands.[75] In addition to the initial transfers between BLMIS and the feeder funds, the Trustee also sued to recover the subsequent transfers from the feeder funds to the various persons who had invested in the feeder funds, many of whom were foreign individuals.[76] This relationship is well portrayed by this diagram, used by the Second Circuit in the *Picard* decision[77]:

70. Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff), Adv. P. No. 08-01789 (SMB), SIPA Liquidation (Substantively Consolidated), Adv. P. No. 11-02732 (SMB), LEXIS 4067 (Bankr. S.D.N.Y. Nov. 21, 2016), *vacated and remanded by In re* Picard, 917 F.3d at 85.

71. Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 513 B.R. 222 (S.D.N.Y. 2014), *supplemented by In re* Madoff, 2016 LEXIS 4067 at *1, *vacated and remanded by In re* Picard, 917 F.3d at 85.

72. *Id.* at 225.

73. 11 U.S.C. § 550(a) (setting forth the grounds upon which a trustee may recover property transferred, regardless of whether it is from the initial transfer or transferee, or any subsequent transferee).

74. *In re* Madoff, 2016 Bankr. LEXIS 4067, at *2.

75. *See In re* Picard, 917 F.3d at 93.

76. *In re* Madoff, 2016 Bankr. LEXIS 4067, at *5–6.

77. *Picard*, 917 F.3d at 93.

Therefore, in many cases the Trustee was seeking to avoid transfers between two foreign entities, after the initial transfer from BLMIS to one of the foreign feeder funds.[78]

In considering the issue of the subsequent transfers, "Judge Rakoff held that the Trustee could not pursue recovery of 'purely foreign subsequent transfers' due to the presumption against extraterritoriality."[79] Judge Rakoff interpreted "purely foreign subsequent transfers" to mean "transfers received abroad by a foreign transferee from a foreign transferor," such as the transfers from foreign feeder funds to foreign investors.[80] Holding that the focus of the law was domestic, and the actions at issues were extraterritorial, Judge Rakoff found insufficient evidence to overcome the presumption against extraterritoriality under the first prong "focus test."[81] The district court then applied the legislative analysis test set forth in *Aramco* and *Morrison*.[82] Determining that neither the language of Section 550(a) nor its legislative context indicated that Congress intended the Section to apply to foreign transfers, Judge Rakoff held that the presumption against extraterritoriality was not rebutted.[83] Therefore, the Trustee could not pursue the avoidance action against purely foreign subsequent transfers.[84]

Judge Rakoff went on to decide that, even if the presumption against extraterritoriality had been overcome, such transfers should be dismissed according to "considerations of international comity."[85] The court noted first that the feeder funds were involved in liquidation proceedings in their home countries.[86] Reasoning then that, because those "foreign jurisdictions have their own rules concerning on what bases the recipient of a transfer from a debtor should be required to disgorge it[,]" and "foreign jurisdictions have a greater interest in applying their own laws than does the United States[,]" Judge Rakoff held that

78. *See In re Madoff*, 2016 Bankr. LEXIS 4067, at *1–2.

79. *Id.* at *2 (quoting Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 513 B.R. 222 (S.D.N.Y. 2014)).

80. Sec. Investor Prot. Corp., 513 B.R. at 232.

81. *Id.* at 226–28.

82. *Id.* (first citing Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 266 (2010), then citing EEOC v. Arabian Am. Oil Co., 449 U.S. 244 (1991)).

83. *Id.* at 228–31.

84. *Id.*

85. *Id.* at 231–32.

86. *See id.* at 225.

U.S. law should not apply abroad.[87] Quoting the Second Circuit's decision affirming *Maxwell*, Judge Rakoff determined that standard principles of international comity, and the interests of the affected nations militated against application of United States law to the transfers at issue.[88] The District Court, however, did not dismiss any of the claims at issue, and returned the adversary proceedings to the Bankruptcy Court for further proceedings consistent with the decision.[89]

The Bankruptcy Court would echo part of Judge Rakoff's decision, expressly adopting Rakoff's decision and dismissing the claims of the Trustee on comity grounds. Judge Stuart Bernstein of the Bankruptcy Court first dismissed the portion of the Trustee's claims that had been asserted against subsequent transferees already in foreign insolvency proceedings (Fairfield, Kingate, and Harley) as a matter of international comity without reaching the issue of extraterritoriality.[90] As for any remaining subsequent transferees that fell into the purely foreign category outlined by Judge Rakoff, the Bankruptcy Court dismissed claims against them as well, under the presumption against extraterritoriality.[91]

C. THE SECOND CIRCUIT'S DECISION IN *PICARD*

The Second Circuit responded to the District Court and Bankruptcy Court holdings in 2019. In *Picard*, the Trustee specifically appealed all instances of subsequent transfers between foreign feeder funds and foreign investors.[92] In a proceeding consolidating a total of eighty-eight appeals and hundreds of foreign investor appellees, the Second Circuit responded to the question of:

> whether, where a trustee seeks to avoid an initial property transfer under § 548(a)(1)(A), either the presumption against extraterritoriality or international

87. *Id.* at 232.

88. *Id.* at 232 (quoting *Maxwell III*, 93 F.3d at 1053).

89. *Id.* at 232–33.

90. Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff), Adv. P. No. 08-01789 (SMB), SIPA Liquidation (Substantively Consolidated), Adv. P. No. 11-02732 (SMB), LEXIS 4067 at *3–4, *32–55 (Bankr. S.D.N.Y. Nov. 21, 2016), *vacated and remanded by In re* Picard, 917 F.3d at 85.

91. *Id.* at *55–125.

92. *See In re* Picard, 917 F.3d 85, 91, 94 (2d Cir. 2019).

> comity principles limit the reach of § 550(a)(2) such that the trustee cannot use it to recover property from a foreign subsequent transferee that received the property from a foreign initial transferee.[93]

The *Picard* court would ultimately hold that neither the presumption against extraterritoriality nor consideration of international comity barred international application of the US bankruptcy laws at issue or recovery in the instant action.[94] Therefore the *Picard* court would remand the case to the Bankruptcy Court for further proceedings.

1. The Presumption Against Extraterritoriality in *Picard*

After briefly summarizing the factual and procedural circumstances surrounding the case, and describing the foreign feeder funds and foreign investor at issue in the case, the Second Circuit began its analysis with the presumption against extraterritoriality issue. Looking to *Morrison* initially to ground its discussion of extraterritoriality, the court also applied more recent precedent from the Supreme Court's decisions in *RJR Nabisco* and *WesternGeco*.[95]

The Second Circuit did not consider the legislative intent prong of the presumption test, and instead addressed the focus prong of the presumption against extraterritoriality by invoking *WesternGeco*, which clarified this cumbersome and ill-defined test.[96] The Second Circuit noted that in *WesternGeco*, "the Supreme Court explained that '[t]he focus of a statute is the 'object of its solicitude,' which can include the conduct it 'seeks to regulate,' as well as the parties and interests it 'seeks to protect' or 'vindicate.'"[97] The Second Circuit then stressed that the focus of the statute at issue does not necessarily have to be found in the specific statute at issue, but can also be found in any other statutory provisions that the statute at issue incorporates.[98] Therefore, the Second Circuit held that in order to determine the focus of Section 550(a) in an action, a court

93. *Id.* at 91.
94. *Id.*
95. *Id.* at 95–100.
96. *Id.* at 96.
97. *Id.* at 96 (quoting WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129, 2137 (2018)).
98. *Id.* at 96–97.

would also need to look at the relevant avoidance provision, namely Section 548(a)(1)(A),[99] which allows a trustee to avoid any transfer that was made with the intent to hinder, delay, or defraud any entity to which the debtor was or became indebted.[100]

The *Picard* court then addressed the district court's holding that the focus of Section 550(a) was "on 'the property transferred' and 'the fact of its transfer'."[101] The district court had held that therefore "§ 550(a)(2) regulates the subsequent transfer of property; that from the initial transferee to the subsequent transferee."[102] The *Picard* court held instead that Section 550(a) regulates the debtor's initial transfer, and not a subsequent transfer, because the focus of the recovery action was instead "'merely the means by which the statute achieves its end of' regulating and remedying the fraudulent transfer of property."[103] Under the Second Circuit's interpretation, the focus of § 548(a)(1)(B) and § 550(a) taken together is the initial transfer.[104] To illustrate and justify this holding, the *Picard* court dwelled on the fact that the purpose of Sections 550(a) and 548(a)(1)(A) is to preserve the debtor's estate, and that the action diminishing the estate of property was not the subsequent transfer, but rather, the initial one.[105] Having established that the transfers at issue were the initial transfers, the *Picard* court went on to hold that the first transfers constituted domestic conduct because they came from a domestic entity.[106] Because the statute was regulating domestic conduct, the court held that the case involved a domestic application of the relevant bankruptcy statute and that the presumption against extraterritoriality did not hinder application of the statute.[107]

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99. 11 U.S.C. § 548(a)(1)(A).

100. *In re* Picard, 917 F.3d at 97; *see also* Bazian, *supra* note 4 ("Picard's general analysis can be summarized as follows. To determine § 550(a)'s focus, the court must look to the purpose of the underlying avoidance provision working 'in tandem' with § 550(a).").

101. *Picard*, 917 F.3d at 97 (quoting Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 513 B.R. 222, 227 (S.D.N.Y. 2014)).

102. *Id.*

103. *Id.* at 98 (quoting *WesternGeco*, 138 S. Ct. at 2138 (ignoring the reality that Section 550(a)(2) refers to any immediate or mediate transferee of such initial transferee, and that these were the transfers that the Trustee was seeking to avoid, and that he was doing so under this provision specifically)).

104. Bazian, *supra* note 4.

105. *Picard*, 917 F.3d at 98–100.

106. *Id*. at 100.

107. *Id*.

Problematically, the court justified the finding that the transfer was domestic for two reasons: "(1) the debtor is a domestic entity, and (2) the alleged fraud occurred when the debtor transferred property from U.S. bank accounts."[108] While appearing to rely more heavily on the fact that the initial fraudulent transfer was made domestically as the basis for determining that the transfer was domestic,[109] the court declined to hold "whether either factor standing alone would support a finding that the transfer was domestic."[110] In failing to hold that one or the other factor was sufficient on its own, the *Picard* court left this issue unresolved, and left creditors uncertain as to what might be reachable by bankruptcy law in further cases.

Perhaps most notably, the *Picard* court only sparingly addressed the actual application of the bankruptcy statute in the case to the facts at issue, namely that the transfer sought to be avoided by the trustee was an international transfer between the foreign feeder fund and a foreign investor.[111] The *Picard* court ultimately determined that a transfer at issue was a domestic one, and that the jurisdiction of the bankruptcy court should, therefore, not be curtailed by the presumption against extraterritoriality.[112] Part III will look more closely at whether a transfer made between two international parties that is one or more transactions separated from the initial domestic transfer will have international effect.

2. International Comity in *Picard*

Proceeding to the question of international comity, the Second Circuit again overturned the district court and the bankruptcy court decisions. The court initially stated that international application of the bankruptcy code's avoidance powers was a question of "prescriptive comity because it asks whether domestic law applies, rather than whether our courts should abstain from exercising jurisdiction."[113] The Second Circuit stated next that international comity should only be a concern if there is conflict between American law and applicable

108. *Id*. at 99 n.9.
109. Bazian, *supra* note 4.
110. *Picard*, 917 F.3d at 99, n.9.
111. *See id.* at 99–100.
112. *Id.* at 100.
113. *Id*. at 102.

foreign law in a case.[114] The court then noted that international proceedings liquidating the feeder funds would not address the Trustee's claims.[115] Then the court referred again to the focus of Section 550(a), and noted that it seeks to regulate the domestic transfers to the feeder funds, and not the international transfers.[116] Furthermore, the court noted that while avoiding subsequent transfers due to problems with the initial transfer does "affect subsequent transferees, that consequence should not unfairly surprise them."[117] To justify this assertion, the court argued that investors "knew where their money was going" when they made the decision to invest in BLMIS, and therefore could have foreseen such avoidances.[118] For all these reasons, the court held that comity considerations did not limit the reach of the Bankruptcy Code in this instance, and therefore the court remanded the case to the Bankruptcy Court.[119]

Interestingly, in the closing paragraphs of the decision, the *Picard* court touched on the confusing nature of its holding. While stressing repeatedly the domestic nature of the Bankruptcy statute at issue, the court echoed the District Court's observation that "the defendants have no direct relationship" with BLMIS, or, put alternately, no direct connection to a domestic entity.[120] Perhaps realizing the vulnerability of its decision, the *Picard* court made an appeal to public policy, arguing that, had it held otherwise, a trustee might never be able to recover property from any subsequent transferee, foreign or domestic.[121] In essence, the Second Circuit's argument was that if a party could fraudulently transfer money to a foreign entity, and that foreign entity in turn did the same, no bankruptcy court would be able to recover assets from such transfers. While this might be true insofar as some foreign transfers are concerned, this would not bar a trustee from recovering property from all subsequent transferees. Indeed, regulation of a transfer between a domestic subsequent transferee and a domestic intermediate transferee would not invoke any consideration of extraterritoriality or

114. *Id*.
115. *Id*. at 104.
116. *Id*. at 105.
117. *Id*. at 105.
118. *Id*.
119. *Id*. at 105–06.
120. *Id*. at 105.
121. *Id*.

international comity. Such a transfer would be firmly within the jurisdiction of a United States Bankruptcy Court.

D. SUBSEQUENT HISTORY OF THE SECOND CIRCUIT'S DECISION

Responding to an appeal of the decision in *Picard*, the Supreme Court denied certiorari[122] after requesting and considering an initial opinion from the Solicitor General,[123] rendering the Second Circuit's decision final. Therefore, for the time being, further decisions consistent with *Picard* may be issued, and the reach of U.S. Bankruptcy Courts' jurisdiction over international subsequent transfers may be established in other cases. As a result, certain assets that were previously thought to be unreachable by U.S. bankruptcy law are now in a more tenuous position. Internationally transferred assets are potentially at risk of being ordered by U.S. Courts to be turned over to a trustee who succeeds in avoiding their initial or subsequent transfer.

III. THE INTERNATIONAL IMPLICATIONS OF *PICARD*

Despite the perplexing nature of the extraterritoriality analysis in the *Picard* decision, its ramifications are substantial. *Picard* is "the first circuit-level decision to address the extraterritorial reach of § 550(a)," and may therefore be the basis for further decisions on whether § 550(a) can be used to recover foreign transfers.[124] Because *Picard* allows for U.S. courts to reach transfers made between two international parties, so long as a court finds the initial transfer was domestic, investors who previously thought their money secure from the reach of U.S. courts may have assets at risk. This Part will propose a modification to the *Picard* ruling that would limit its ability to reach some foreign assets, and will argue that this modification is justified in light of the long jurisdictional reach created by the ruling in *Picard*.

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122. *HSBC Holdings PLC, et al., v. Irving H. Picard, et al.*, 140 S.Ct. 2824 (2020) (denying certiorari in an order dated June 1, 2020).

123. *HSBC Holdings PLC v. Picard*, 140 S. Ct. 643 (2019) (requesting the Solicitor General file a brief in the case expressing the opinion of the United States on Picard).

124. *See* Bazian, *supra* note 4.

A. *PICARD* IS A LIMITED HOLDING, AND ITS USE SHOULD BE RESTRAINED IN SCOPE

The decision in *Picard* creates ambiguity as to its scope. Because *Picard* is predicated on the Second Circuit's holding which is limited to of the avoidance provision of § 548(a)(1)(A), it is not clear to what extent it will apply to other avoidance provisions or bankruptcy rules.[125] Unfortunately, the Second Circuit did not hold whether either of the two elements discussed in *Picard* would be sufficient alone to render a transfer domestic and thus within the jurisdiction of United States courts.[126] It is unclear whether a debtor's United States citizenship alone renders a transfer domestic, or alternately whether a transfer's having originated in the United States does so alone.[127]

Fortunately, other caselaw clarifies the relative importance of the two elements. The citizenship element is less determinative than the domestic origin of the transfer.[128] In *Loginovskaya v. Batratchenko*, in resolving whether U.S. law could be applied to certain fraudulent transactions made by international entities, the Second Circuit held that all that is needed to justify the extraterritorial application of a law is that the transactions occurred domestically.[129] Because of this apparent contradiction, and the Second Circuits' glibness on the issue in *Picard*, it is safer to assume that *Picard* should only be used to justify the reach of bankruptcy courts to international funds that originated from a domestic transfer. *Picard's* rationale appears to apply regardless of whether the transfer is a subsequent transfer or not. However, *Picard* does leave the door open to an interpretation where the citizenship of the debtor plays a role in analyzing the extraterritoriality question.

The decision in *Picard* is somewhat at odds with prior

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125. *Id*. ("The Second Circuit did not offer clear guidance as to what conduct must occur within the United States to render a transfer domestic and not extraterritorial").

126. *See Picard*, 917 F.3d at 99 n.9.

127. *See* Bazian, *supra* note 4.

128. *See* Loginovskaya v. Batratchenko, 764 F.3d 266, 274 (2d Cir. 2014) (quoting Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 70 (2d Cir. 2012)); *see also Absolute Activist*, 677 F.3d at 69.

129. *See Loginovskaya*, 764 F.3d at 274 ("Loginovskaya alleges her claim arises from the purchase, sale, or placing an order for the purchase or sale of an interest or participation in a commodity pool. She must therefore demonstrate that the transfer of title or the point of irrevocable liability for such an interest occurred in the United States.") (citations omitted).

interpretations of the presumption against extraterritoriality, and is a novel interpretation that further develops the Supreme Court's own precedent. William S. Dodge asserts that the most coherent interpretation of recent Supreme Court precedent on extraterritoriality (as established in *Maxwell*[130] and *RJR Nabisco*,[131] is that "the presumption against extraterritoriality contains no separate conduct requirement."[132] Perhaps relying on the domestic origin of the transfer is the safest interpretation of *Picard*.

Nevertheless, the ramifications for transactions implicated by the *Picard* decision are great. *Picard* permits U.S. bankruptcy courts to recover from foreign investors who previously would have believed the relationship of their funds to U.S. jurisdiction severed due to subsequent non-U.S. transfers.[133] This principle is given no limitation by the court in *Picard*. Ostensibly, the holding in *Picard* justifies recovery of a purely foreign subsequent transfer, no matter how many times the assets have been transferred since the initial U.S. domestic transfer. This limitless interpretation arises because the Second Circuit held that the concern is not the subsequent transfers, but rather whether the initial transfer originated domestically.[134] Accordingly, it could be more practical to limit the number of transfers beyond the domestic transfer that the *Picard* doctrine can reach.

If the *Picard* standard is to persist and allow U.S. law to reach transfers between two non-U.S. parties at all, it should not reach individuals who have no reason to suspect the fraudulent nature of a transfer several transfers prior. A possible solution to this problem could be to limit how many transfers beyond the initial fraudulent transfer may be reached under *Picard*, thereby ensuring that only those likely to know of and participate in the fraudulent activity would be at risk of losing control over their assets in an avoidance action. The provision of a clear standard would provide more predictability to the law, and would allow individuals to know with greater certainty what transfers would be within the reach of U.S. jurisdiction.

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130. *See supra* notes 29–31.

131. *See supra* notes 34–40 and accompanying text.

132. William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AJIL UNBOUND 45, 50 (2016).

133. *See In re* Picard, 917 F.3d 85, 90 (2d Cir. 2019); *see also* Bazian, *supra* note 4.

134. *See Picard*, 917 F.3d at 96–97; *see also* Bazian, *supra* note 4.

B. *PICARD* IN LIGHT OF THE *UNCITRAL* MODEL LAW ON CROSS-BORDER INSOLVENCY

Another important consideration from *Picard* is its international effect. Although the Second Circuit suggested U.S. law should apply abroad in *Picard*, and that the decision would be allowed for reasons of international comity, the Second Circuit did not analyze what effect their order might have if the trustee attempted to seek enforcement or recognition of it in a foreign jurisdiction.[135] Indeed, the *Picard* decision would be inconsequential if there were no international effect because foreign courts refused to recognize such extraterritorial application of U.S. laws. U.S. courts may hold that they have jurisdiction, but, unless there is a genuine prospect that their orders will be respected abroad, such a holding would be toothless. The Second Circuit's consideration of international bankruptcy law is relatively limited.[136] Determining how the *Picard* decision might be at odds with the expectations of the international investors requires a closer look at how this decision interacts with international law and foreign jurisdictions.

The Model Law on Cross Border Insolvency holds that in granting or denying relief ordered by another court from an international jurisdiction, a court "must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected."[137] Furthermore, the Model Law specifies that if a court is not satisfied that the foreign jurisdiction has adequately considered the rights of the creditors, debtor, or other interested persons, it may "at its own motion, modify or terminate" the relief requested by the foreign court.[138] The BVI, home to two of the three main feeder funds in *Picard*, has incorporated substantial parts of the Model Law into its bankruptcy code, and therefore it contains similar

135. *See id.* at 104–06; *see also id.* at 103 ("[N]o such parallel proceedings exist here—the feeder funds, not Madoff Securities, are the debtors in the foreign courts.").

136. *See id.* at 100–05.

137. *See* Model Law on Cross-Border Insolvency, *supra* note 49, art. 22.1.

138. *Id.* art. 22.3. *See also* UNCITRAL, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, at 90–91, U.N. Sales No. E.14.V.2 (2014) ("Protection of all interested persons is linked to provisions in national laws on notification requirements . . . general publicity requirements" or local court rules).

language.[139] This incorporation of the Model Law language provides the very tool by which BVI courts might justify a refusal to honor the U.S. ruling.

The BVI courts could decide that the *Picard* ruling is improper, either because it fails to grant the foreign feeder investors due process, or because the investors were not sufficiently on notice. Under the 2003 BVI Insolvency Act, Part XIX, BVI courts are empowered "to make orders in respect of foreign proceedings in certain designated territories/countries [such as] the United States."[140] These powers include "facilitating the coordination of BVI and foreign insolvency proceedings . . . and delivering up property to the foreign representative."[141] However, under Part XVIII, 454(2) and 455(3), BVI courts may both terminate foreign orders for relief or modify them.[142] Irving Picard, the trustee in the *Picard* case, successfully filed as a foreign representative in the BVI for ongoing recovery actions, and may yet request enforcement of the *Picard* decision when an order is issued by the U.S. bankruptcy court pursuant to the Second Circuit's holding.[143] Pertinently, Part XIX considers the topic of assistance to a foreign representative in an international insolvency case, and provides in relevant part that a court may "make such order or grant such other relief as it considers appropriate."[144] Under this section of BVI law, the court would be at liberty to modify or

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139. British Virgin Islands Insolvency Act, Part XVIII, § 454(2), https://www.bvifsc.vg/sites/default/files/insolvency_act.pdf (providing that a BVI court will only agree to distribution of a BVI Debtor's property if the "Court is satisfied that the interests of the creditors in the Virgin Islands are adequately protected"); *id.* Part XVIII, § 455(3) ("The Court may, at the request of the foreign representative or a person affected by relief granted under section 452 or 454, or at its own motion, modify or terminate the relief."); *see also* Martin S. Kenney et al., *Utilizing Cross-Border Insolvency Laws to Attack Fraud: An Analysis of How it Could Work in the British Virgin Islands, the United States, and Germany*, 13 LAW & BUS. REV. AM. 569, 575–76 (2007).

140. Charlotte Caulfield, *British Virgin Islands: Restructuring & Insolvency Comparative Guide*, MONDAQ § 1.2 (Apr. 26, 2021), https://www.mondaq.com/insolvencybankruptcyre-structuring/939066/restructuring-insolvency-comparative-guide.

141. *Id*.

142. *See* BVI Insolvency Act, Part XVIII, 454(2); Part XVIII, 455(3).

143. *See Madoff Litigation*, LEXOLOGY (Mar. 22, 2011) (citing BVI Insolvency Act, Part XIX), https://www.lexology.com/library/detail.aspx?g=c2834ea1-1ec3-4722-aaca-436e49694e87; Andrew M. Thorp & David Herbert, *British Virgin Islands: Enforcing Orders Made in Foreign Insolvency Proceedings*, AM. BANKR. INST. (Oct. 25, 2012), https://www.abi.org/feed-item/british-virgin-islands-enforcing-orders-made-in-foreign-insolvency-proceedings.

144. *See* BVI Insolvency Act, Part XIX, 467(3)(h).

disregard the U.S. ruling if it finds it inappropriate.

Alternately, the BVI court may decline to enforce the U.S. court's ruling as there is already an ongoing bankruptcy proceeding for the foreign feeder funds that are the originators of the transfers targeted in the avoidance actions.[145] BVI courts respect the principle of international comity in bankruptcy proceedings.[146] However, because there is an ongoing BVI proceeding concerning the feeder funds, and the BVI courts therefore have an interest in the funds at issue in the *Picard* decision, they could choose not to enforce the U.S. ruling, preferring to decide how to deal with the funds and address the transfers on their own terms.

It is well-recognized that courts may deny recognition to a foreign judgment or proceeding in an international insolvency case for "public policy" concerns.[147] Indeed, the BVI has incorporated the language from the Model Law concerning the public policy exception, which reads in relevant part: "[n]othing . . . prevents the Court from refusing to take an action . . . if the action would be contrary to the public policy of the Virgin Islands."[148] The public policy exception is notably vague, and "has been described as a 'safety valve' that allows courts to refuse recognition where enforcement conflicts with the forum State's fundamental concepts of justice."[149] It is this very public policy exception that the BVI courts might use to avoid extending comity to the U.S. courts, on the grounds that it would be against BVI public policy to remove funds that would eventually be distributed in a BVI case. BVI courts could argue that they have a greater interest in resolving the appropriate distribution of fraudulently acquired assets coming from the BLMIS meltdown, and for this reason refuse to honor the U.S. courts' rulings. Indeed, Judge Rakoff, the judge presiding in the

145. Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (In re Madoff), Adv. P. No. 08-01789 (SMB), SIPA Liquidation (Substantively Consolidated), Adv. P. No. 11-02732 (SMB), LEXIS 4067, *3–4, 33–35 (Bankr. S.D.N.Y. Nov. 21, 2016) (describing comity with respect to foreign insolvency proceedings), *vacated and remanded by* In re Picard, 917 F.3d at 85.).

146. *See* Caulfield, *supra* note 140, § 5.3.

147. Michael A. Garza, Comment, *When is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy?*, 38 FORDHAM INT'L L.J. 1587, 1596–1597 (2015) (noting that the BVI has adopted the public policy exception of article 6 of the Model Law); Didi Hu, Article, *Cross-Border Insolvency Regime in China: Finding the Most Pragmatic Interim Solution for Globalized Companies Under Localized Practices*, 92 AM. BANKR. L.J. 523, 538 (2018).

148. BVI Insolvency Act 2003, Part XVIII, § 439.

149. *See* Garza, *supra* note 147, at 1606 (citations omitted).

District Court case preceding *Picard*, argued for this very point, suggesting that "foreign jurisdictions have a greater interest in applying their own laws than does the United States."[150] It will ultimately be for the BVI and other foreign courts resolve the actions brought by Irving Picard, and decide whether or not they will extend comity to the U.S. orders.

CONCLUSION

The holding in *Picard* is novel because it tries to bring transactions between two non-U.S. entities under U.S. law under the argument that the assets at issue in the transactions originated in the U.S. The Second Circuit's decision arrives at this decision by interpreting the statute at issue differently from the underlying district and bankruptcy courts, and holding instead that the law seeks to regulate domestic conduct, namely the initial transfer. The Second Circuit's argument that what is at issue is the preservation of funds in the debtor's estate and what diminished the estate was the initial, domestic, transfer makes some sense.[151] Nevertheless, the result of the Second Circuit's interpretation is to say that an international transfer should be subject to U.S. law, because an earlier U.S. domestic transfer was subject to U.S. law. Furthermore, in coming to their conclusion, the *Picard* court muddied earlier precedent by holding that the citizenship of the debtor in the case is a relevant concern in resolving extraterritoriality questions.[152] Previously, courts have held that the citizenship of the transferor played no role in the extraterritoriality analysis.[153] Ultimately, the focus of the *Picard* holding, and therefore the clearest interpretation of *Picard*, is that a transfer is subject to United States law if the initial transfer of the funds originated in the United States, regardless of whether the transfer at issue is the initial transfer or a subsequent one.

As this Note has shown though, the issue of subsequent international transfers being within the reach of the U.S. courts is concerning. Indeed, it seems possible that, due to the novelty of the *Picard* decision, foreign courts might not accept it. For example, the BVI and Cayman courts may refuse to honor orders

150. Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, 513 B.R. 222, 232 (S.D.N.Y. 2014).

151. *See supra* note 104 and accompanying text.

152. *See supra* notes 127–129 and accompanying text.

153. *See id.*

enforcing the *Picard* decision as improper as a matter of notice or due process, or alternately decline to extend comity to the U.S. court's decision.[154] BVI law certainly gives BVI courts sufficient grounds for refusing to extend comity to United States courts.[155] The feeder fund transfers at issue would be ideal targets for the ongoing BVI and Cayman Islands bankruptcy proceedings concerning the feeder funds. It is for this very reason that the BVI and Cayman Islands courts may well decide they have a greater interest than U.S. courts do in deciding how the funds are distributed.

However, if the *Picard* ruling is to stand, and indeed it will for now because the Supreme Court denied certiorari, courts or legislators should take concrete action to give it more legitimacy. One way that the *Picard* ruling could be more tailored, and therefore made more acceptable to foreign courts, would be by limiting the number of subsequent transfers that are deemed to still represent domestic application of the law. Just as comity is used for the enforcement of laws from foreign jurisdictions, "American courts also use international comity to restrain the reach of domestic law."[156] Such an invocation of comity could serve to make the doctrine set forth in *Picard* more reasonable. Indeed, a second or third subsequent transfer is so far removed from the initial domestic transfer as to make any relation to the United States tenuous. Such a change would not accomplish much insofar as the *Picard* decision is concerned, as the subsequent transfer at issue is only one transfer away from the initial transfer. However, a limitation like this would give more legitimacy to a broad ruling from the Second Circuit. This could allow the novel statutory interpretation of the *Picard* decision to be more tolerable to foreign courts, create a doctrine more likely to be enforced internationally, and be less likely viewed as improper overreach of United States courts. For now, however, *Picard* seems to extend United States bankruptcy courts' jurisdiction indefinitely to any subsequent transfer, no matter how far from the original transfer it is.

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154. *See supra* notes 142–149 and accompanying text.

155. *See id.*

156. Dodge, *supra* note 5, at 2073 (citing F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004) (holding that principles of comity can be understood by U.S. courts to limit the reach of U.S. law)).