Navigating the Extraterritorial Tightrope in the Bankruptcy Code

Maria Jose Cortesi, Esq., Sequor Law, P.A., Miami, Florida

During the 2022 term, the Supreme Court of the United States ("SCOTUS") revisited the concept of extraterritoriality in the case *Abitron Austria GmbH v. Hetronic International*, 600 U.S. 412, 418 (2023). Extraterritoriality refers to applying a country's laws and jurisdiction beyond its borders. Since at least 2010, United States law has held there is a presumption *against* the extraterritorial application of our laws. In other words, the presumption generally holds that United States laws apply only within the domestic boundaries of the United States unless a contrary legislative intent appears. *See, Morrison v. National*

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Australia Bank Ltd., 561 U.S. 247, 255, (2010). The presumption is rooted in respect for the sovereignty of other nations, notions of international comity, and the avoidance of conflicts of laws. While the Supreme Court has decided a handful of extraterritoriality cases over the last two decades, steadfast at the center of the discussion is the presumption against extraterritoriality and the framework developed to ascertain whether a particular UnitedStates law may reach into foreign territory.

In 2010, the SCOTUS, in the landmark case of *Morrison*, introduced a two-step analytical approach to clarify the extraterritorial application of United States statutes. This decision was a response to years of inconsistent and varying judicial approaches that created a lack of clarity and predictability in determining the reach of United States laws beyond the United States'. borders. In particular, the *Morrison* Court sought to cease the use of the "conducts and effects" tests applied by some courts and to provide much-needed guidance on the extraterritoriality question, putting an end to the era described as "judicial-speculation-made-law." *Morrison*, 561 U.S. at 261. In the *Morrison* approach, the initial step involves examining whether there is an "affirmative indication" from Congress intending to apply the statute extraterritorially, thereby overcoming the strong presumption against such application. *See, id.* at 265. If this initial analysis does not produce a clear outcome, the second step requires courts to ascertain the "focus" of the statute. The second step involves determining the location where the conduct central to the statute's focus occurred *See, id.* at 266-70.

In *Abitron,* the Supreme Court once again sought to reign in the extraterritoriality jurisprudence that had developed since *Morrison*. The Court looked to the "focus" of congressional concern to determine whether the claim sought a "(permissible) domestic or (impermissible) foreign application of the provision." *Abitron,* 600 U.S. at 418. However, identifying the focus of congressional concern does not end the inquiry. *See, id*. With regard to the second step of the presumption analysis, the *Abitron* Court clarified that the "focus" prong was "designed to apply the presumption against extraterritoriality to claims that involve both domestic and foreign activity, separating the activity that matters from the activity that does not." *See*, *id*. at 419.

The *Abitron* Court found that the two provisions of the Lanham Act that prohibit trademark infringement were not extraterritorial and could only extend to claims where the claimed infringing use in commerce was domestic. *See. id*. at 412. In reaching this conclusion, the Court expressly rejected the argument that while the provisions themselves did not, on their own, signal extraterritorial application, the link could be made through the Lanham Act's definition of "commerce," which applies to both provisions at issue. *See*, *id*. at 420. The argument proposed that "commerce" overcame the presumption, on the basis that Congress could regulate foreign conduct under the Foreign Commerce Clause, and further, because the Lanham Act's definition of "commerce" differed from "boilerplate" definitions of commerce in other statutes. *See, id*. at 420. The Court cited to its decisions in *Morrison*, *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325 (2016), and *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013), in saying that "it is well established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality." *See*, *id*. at 421.

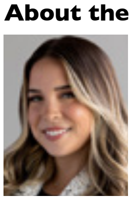
Abitron marks a shift of the presumption framework back to its pre-*Morrison* days, where conduct itself was relevant to the presumption analysis. *See,* William S. Dodge, *The New (Old) Presumption Against Extraterritoriality*, Transnat'l Litig. Blog (Sep. 6, 2023), **https://tlblog.org/the-new-old-presumption-against-extraterritoriality/**.

In bankruptcy law, the analysis of extraterritoriality of United States bankruptcy proceedings has become pronounced as the bankruptcy courts increasingly find themselves navigating bankruptcies involving multinational corporations and individual debtors with far-reaching, intricate webs of contractual obligations, diverse legal systems, and conflicting creditor interests. This reality prompts a careful consideration of cross-border implications and raises questions about the scope of certain powers and remedies available in the Bankruptcy Code. A point of contention is whether the avoidance provisions of title 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Code") apply extraterritorially.

Certain provisions of the Code, such as §541(a), are widely recognized as having extraterritorial reach. *See, In re Ampal-American Israel Corp*., 562 B.R. 601,612 (Bankr. S.D.N.Y. 2017); *In re Lyondell Chem. Co.*, 543 B.R. 127, 151 (Bankr. S.D.N.Y. 2016); *In re Simon,* 153 F.3d 991, 996 (9th Cir. 1998). This acceptance is grounded in the text of §541(a), which includes in the bankruptcy estate all property of the debtor, "wherever located and by whomever held." *See also,* 28 U.S.C. §1334(e).

Thus, while it appears clear that some provisions of the Code—i.e., §§ 362, 541(a) and Chapter 15 of the Code —were intended to have extraterritorial reach, bankruptcy courts have yet to categorically agree on whether Congress intended §§ 548 and 550 (the "Avoidance Provisions") to have similar extraterritorial effect. Bankruptcy courts and district courts—sometimes within the same circuit—have taken opposing views on Congress' intent for the Avoidance Provisions to apply extraterritorially. Some courts have overcome the lack of direct extraterritorial signaling in the Avoidance Provisions and found congressional intent by virtue of §541(a)'s creation of a bankruptcy estate comprising of "all…property, wherever located and by whomever held." *See, In re FAH Liquidating Corp.*, 572 B.R. 117 (Bankr. D. Del. 2017); *In re French*, 440 F.3d 145 (4th Cir. 2006). Conversely, some courts have refused to read §548 and §550 in tandem with §541(a) for purposes of overcoming the presumption, finding the lack of explicit reference to extraterritorial application in the Avoidance Provisions indicative of Congress' intent to restrict their application to domestic transfers. *See, In re Sherwood Invs. Overseas Ltd., Inc.*, No. 6:10–00158, 2016 WL 4486470 (Bankr. M.D. Fla. July 22, 2015), *aff'd,* No. 6:15–1469,

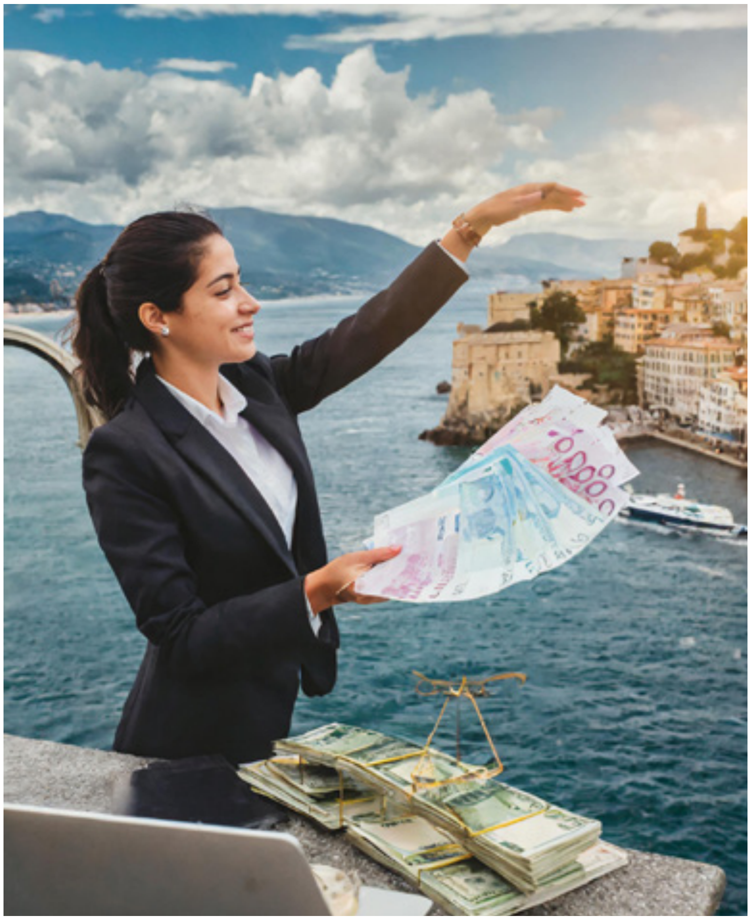
About the Author



Maria Jose Cortesi, an attorney at Sequor Law, focuses her practice on cross-border insolvency, asset recovery, and federal and state court fraud-based litigation.

Prior to joining Sequor Law, Maria worked at a boutique bankruptcy firm, representing trustees, debtors, and creditors, as well as negotiating settlements in student loan and credit card debt matters. Maria also practiced in the area of construction litigation, representing general contractors and subcontractors in multi-party actions.

Maria earned her law degree, *cum laude*, from the University of Miami School of Law.



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2016 WL 5719450 (M.D. Fla. Sep. 30, 2016), *appeal dismissed*, No. 16–16824, 2017 WL 5185307 (11th Cir. Apr. 24, 2017); *see also, In re Midland Euro Exch. Inc.*, 347 B.R. 708 (Bankr. C.D. Cal. 2006).

Interestingly, two circuits, the Second and Ninth Circuits, seem to have an internal split on the issue, with each circuit having at least one court on either side of the debate. *Compare In re Lyondell Chem. Co.*, 543 B.R. 127 (Bankr. S.D.N.Y. 2016) (finding congressional intent), *and SEC v. Bernard L. Madoff Inv. Sec. LLC*, 480 B.R. 501 (Bankr. S.D.N.Y. 2012), *with SEC v. Bernard L. Madoff Inv. Sec. LLC*, 513 B.R. 222 (S.D.N.Y. 2014) (finding no congressional intent), and *In re CIL Ltd.*, 582 B.R. 46 (Bankr. S.D.N.Y. 2018).

Under the *Abitron* holding, the extraterritorial application of the Avoidance Provisions would be in peril. Based on the Court's explicit rejection of the "commerce" argument in *Abitron* and the parsing of specific sections of the Lanham Act for separate analysis under the framework, a similar argument that §541(a)'s definition of property of the estate signals the extraterritorial application of §§ 548 and 550, may not find success with the Court. An *Abitron*-informed Court could easily agree with the *CIL Ltd*. Court that "when it desires to do so, Congress knows how to place the highs seas within the jurisdictional reach of a statute," *In re CIL Ltd.*, 582 B.R. at 92, and therefore, the lack of affirmative intent in the Avoidance Provisions settles the issue.

With the Avoidance Provisions in jeopardy of failing the first step of the framework, the analysis would proceed to step two—the congressional focus of the statute and conduct relevant to that focus—an analysis that could also yield a similar outcome as that in *Abitron*. The Supreme Court admonished the *Abitron* parties for centering the dispute on the "focus" of the statute "without regard to the 'conduct relevant to that focus'." *Abitron*, 600 U.S. at 2524 (quoting *WesternGeco*). According to the new, but in some way old, standard promulgated in *Abitron*, the applicability of a statute hinges on the location of the conduct relevant to its focus.

At least one court has held that the focus of the Avoidance Provisions is the "transfers sought to be avoided or the nature of the transaction in which property is transferred" rather than physical presence in the United States or the parties' relationship. Hadas Livnat, *Extraterritorial Application of Bankruptcy Code's Fraudulent Transfer Provisions (11 U.S.C. §§ 548, 550)*, 39 A.L.R. Fed. 3d Art. 5 (2019) (citing *In re Sherwood Invs. Overseas*, 2016 WL 4486470). It is in the "conduct relevant to" the congressional focus that the Avoidance Provisions find themselves in a bind. For the Avoidance Provisions, this would involve examining where the fraudulent transfers or relevant transactions occurred. In *In re FAH Liquidating Corporation*, the bankruptcy court applied a "center of gravity" test to determine whether the conduct regulated by the statute took place beyond the United States' border. 572 B.R. at 124. If these activities are primarily domestic, applying the Avoidance Provisions would be consistent with their intended scope. Conversely, if the activities occurred primarily outside the United States, applying these sections might constitute an impermissible extraterritorial application under the *Abitron* precedent.