Post-Morrison, State Law Rather Than Federal Supports Claims By Non-U.S. Investors for Alleged Securities Fraud

February 3, 2012 by Louis M. Solomon

We have been following the law's development since the U.S. Supreme Court's decision in the U.S. Supreme Court's decision in *Morrison v. National Australia Bank* (No. 08-1191). *Morrison* held that Section 10(b) of the Securities Exchange Act of 1934 did not provide a private cause of action in "foreign-cubed" cases—cases where *foreign* plaintiffs sue *foreign* defendants for misconduct in connection with securities traded on *foreign* exchanges (hence "foreign cubed"). The Court rejected over 40 years of lower-court jurisprudence – which focused on where "conduct" and "effects" occurred or would be felt to determine the reach of Rule 10b-5. Instead the Supreme Court held that Section 10(b) reaches frauds only where "the purchase or sale is made in the United States, or involves a security listed on a domestic exchange".

Since Morrison was decided, we have posted on the many decisions enforcing and expanding it (e.g., here and here). We have also commented on the use by plaintiffs of state courts (e.g., here) or non-U.S. courts (e.g., here) to keep claims alive that would otherwise fall prey to Morrison's holding were a federal securities claim be the hoped-for key to the court house door.

In *Dandong v. Pinnacle Performance Limited*, 10 Civ. 8086 (S.D.N.Y. 2011), the Court breathed life back into a federal forum, albeit on the basis of state law causes of action. The case involves claims by a group of Singapore investors assering various claims against Morgan Stanley and various affiliates alleged fraud and other state-law claims relating to credit-linked notes. The notes are credit derivative instruments not different from those dismissed on the basis of *Morrison* when the claims have been asserted under federal law. Here the District Court granted in part but denied much of defendants' motions to dismiss. The significant international practice rulings in the decision include:

First, the Court denied motions based on forum selection and forum non conveniens doctrines. As to the forum selection clause, the Court found the defendants' reading too broad. Recognizing that the forum non conveniens prong of the motions to dismiss granted the Court more discretion, the District Court weighed the relavant factors and determined that they balanced in favor of keeping the case.

Second, the Court directly addressed, and rejected, "international comity" as a ground warranting dismissal. The Court found that the existence of parallel actions in Singapore was not enough to warrant dismissal of the case here. The existence of such proceedings were not "exceptional" as defined by the controlling cases.

Third, the Court found no material differences in the substantive laws of New York and Singapore, reading against the moving defendants the fact that they elsewhere argued that "New York and Singapore law are neither materially different nor, when applied to the facts at hand, likely to result in different outcomes". The Court uphelp the fraud claims, dismissed certain of the non-fraud state law claims, and interestingly followed other recent federal authority to find that the law of New York was so uncertain that it was unable to determine if New York's Martin Act preempted the state law fraud claims.

Tagged Choice of Law, Comity, Forum Non Conveniens, Forum Selection & Challenges, Sequencing Dispute Resolution