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Morrison v National Australia Bank and its Progeny: US Capital Markets Become Safer and More Hospitable for Non-US Corporates

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Introduction

Morrison v National Australia Bank, 130 S. Ct. 2869 (2010), a US Supreme Court decision from June 2010, and more recent rulings interpreting and applying this decision in a variety of contexts, have limited dramatically the potential liability of non-US companies and their officers and directors pursuant to the basic anti-fraud provisions under the Securities Exchange Act of 1934 (the Exchange Act), Section 10(b) and Rule 10b-5 (the US anti-fraud provisions). This case law clearly suggests that the US capital markets are becoming safer and more hospitable to non-US corporates.

In response to the Supreme Court's decision in *Morrison*, the US Congress reacted quickly to reaffirm extraterritorial application of the US anti-fraud provisions in the context of enforcement and directed the US Securities and Exchange Commission (the SEC) to solicit public comment and publish a study to determine the extent to which private rights of action under the US anti-fraud provisions should be extended extraterritorially.

The SEC issued its Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934 (the SEC study) in April 2012. The SEC study did not, however, make a specific recommendation for a reaction to *Morrison*.

US legislative action to reverse the impact of *Morrison* and subsequent cases is possible, but the current outlook for such action is highly uncertain.

In *Morrison*, the US Supreme Court surprised many observers by overturning four decades of US federal case law interpreting the US anti-fraud provisions. This decision rejected decades of intricate "conduct and effects" analysis and imposed a stark new test of extraterritorial applicability. Finding that, because "there is no affirmative indication in the Exchange Act" that the US anti-fraud provisions apply extraterritorially, the Court declared definitively that they do not.

The Supreme Court explained this holding as a return to the plain language of the Exchange Act itself, announcing an apparently straightforward new "bright line" rule under which the US anti-fraud provisions are deemed to apply "only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."

REJECTION OF "CONDUCTS AND EFFECTS"

This decision rejected expressly and decisively the "conducts and effects" approach developed and applied by various US federal courts over the last half century. It explained this dramatic change in the interpretation of the US anti-fraud provisions as being based on several grounds. The "conducts and effects" approach, the Supreme Court said, is unpredictable and inconsistent in its application; is unjustified by the unambiguous legislative intent of the Exchange Act; and risks undue interference with non-US securities regulation abroad.

In reaching its decision, the Supreme Court also went out of its way to reject expressly the "significant and material conduct" approach (itself a kind of modified conduct and effects test) suggested by the SEC and the US Solicitor General in the case.

ANTIPATHY TOWARD CLASS ACTIONS

Underlying at least some of the Supreme Court's reasoning and rhetoric was apparent antipathy toward US-originated class action lawsuits aimed at non-US companies. As the Supreme Court stated when explaining its distaste for the practical impact of the "conducts and effects" approach, "one should also be repulsed by its adverse consequences."

> *While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets.*

Background

THE US ANTI-FRAUD PROVISIONS

Section 10(b) and Rule 10b-5 of the Exchange Act are commonly referred to as "catch-all" anti-fraud provisions of the Exchange Act. Historically, they are the provisions most commonly relied upon for claims based on misleading or incomplete disclosures by publicly-traded companies. The SEC has civil enforcement authority and the US Department of Justice (the DOJ) has criminal enforcement authority with respect to the US anti-fraud provisions, but private parties have also long been held to have private rights of action under them. Prior to *Morrison*, even in the case of non-US companies, private actions had long been recognised as an important supplement to SEC and DOJ enforcement.

The US anti-fraud provisions are drafted very broadly and for most of the past several decades have accordingly been interpreted very broadly by the US federal courts.

Specifically, Section 10(b) prohibits the use of "any manipulative or deceptive device or contrivance" in connection with "the purchase or sale of any security registered on a national securities exchange or any security not so registered."

Rule 10b-5 famously provides

> *It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,*
>
> *(a) To employ any device, scheme, or artifice to defraud,*
>
> *(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or*
>
> (c) *To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,*
>
> *in connection with the purchase or sale of any security.*

PRIVATE ACTIONS

For many decades, US federal courts have held that private buyers or sellers of securities enjoy implied rights of action under the US anti-fraud provisions.

In order to recover in such a private action, plaintiffs must generally establish the following:

- A material misrepresentation or omission by the defendant
- That the defendant acted with scienter
- A connection between the misrepresentation or omission and the purchase or sale of a security
- The plaintiff 's reliance upon the misrepresentation or omission
- Economic loss
- Loss causation, meaning that the defendant's misrepresentation or omission proximately caused the plaintiff's loss

US FEDERAL CLASS ACTIONS

US federal securities claims alleging violations of the US anti-fraud provisions through misrepresentations or omissions in corporate disclosures are often brought against corporate defendants as class action lawsuits under US rules of civil procedure. A class action is a type of lawsuit in which multiple claimants join their claims together in a single lawsuit.

In a class action, one or more members of the class may be approved by the court to act as representative parties on behalf of all members of the class if:

- The class is so numerous as to make joining all members impracticable
- There are questions of law or fact common to the class
- The claims or defenses of the representative parties are typical of the claims or defenses of the class
- The representative parties can be expected fairly and adequately to protect the interests of the class

Where common questions predominate over individual questions, class certification permits a limited number of representative plaintiffs to assert the claims on behalf of the entire certified class.

US courts have been the primary venue for both US and non-US plaintiffs in shareholder class actions against both US and non-US companies under the US anti-fraud provisions. This is principally because US substantive and procedural rules:

- Permit contingency fee arrangements whereby plaintiffs' attorneys effectively finance litigation in return for a percentage of any damage award or settlement payment
- Generally do not permit the "loser pays" fee-shifting that is prevalent in other jurisdictions
- Require non-lead plaintiffs to incur essentially no burden or cost at all
- Provide for jury trials, perceived to raise significantly the risk of large, adverse verdicts against corporate defendants
- Encourage settlement of cases with large payments to plaintiffs

FRAUD ON THE MARKET

As US shareholder class actions under the US anti-fraud provisions grew increasingly common, these claims were generally based on the "fraud on the market" theory of liability. This theory is based on the notion that general corporate disclosures by publicly-traded companies, which contain material misrepresentations or omissions, affect the prevailing market price of their shares to the detriment of buyers or sellers in the market, without any necessary direct interaction between the companies and those buyers and sellers.

The fraud on the market theory can suffice to establish the element of reliance necessary for a successful private claim under the US anti-fraud provisions, as described above. The founding case in this regard is *Basic Inc. v Levinson*, 485 U.S. 224 (1988). In *Basic*, the Supreme Court addressed the manner in which class action plaintiffs could prove reliance through evidence common to members of the class by reference to fraud on the market, thereby allowing class certification under the relevant US federal rules.

In the *Basic* decision, the Supreme Court found that presumption of reliance on the basis of the fraud on the market theory was an appropriate solution to the practical problem of balancing required proof of reliance against the procedural requirements of federal class actions. The Court summarised its reasoning as follows:

> *The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.*

While the language and some of the reasoning of *Morrison* appears distinctly antagonistic to the theory and to class actions in general, the decision did not challenge the validity of the fraud on the market theory in any explicit way.[1]

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[1] Indeed, in an important decision handed down in June 2011, the Supreme Court rejected a requirement that class action plaintiffs prove "loss causation" at the class certification stage. See *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011). This unanimous decision is a rare victory for class action plaintiffs in recent years; it appears to reaffirm implicitly the fraud on the market theory introduced in *Basic*, reversing US federal appeals court precedent requiring class action plaintiffs to establish loss causation as a condition to obtaining class certification, which would have rendered class certification impractical or even impossible in many cases.

FOREIGN-CUBED CLAIMS

The claims addressed in *Morrison* were so-called "foreign-cubed" or "f-cubed" claims, involving claims by foreign investors against foreign issuers to recover losses from purchases on foreign securities exchanges. Prior to the *Morrison* decision, there was much discussion of the risks borne by non-US companies in the face of US-originated class action lawsuits alleging violations of the US anti-fraud provisions through misrepresentations or omissions in corporate disclosures, based generally on fraud on the market theories.

The concern generated by such lawsuits was that listing on a US securities exchange, or indeed any contacts with or activities within the United States, ran the risk of exposing non-US companies to potentially devastating liability in the event of any abrupt or dramatic decline in the market price of their shares. It was also understood that this liability could extend not only to US investors, but to a much larger worldwide class of shareholders who acquired their shares in transactions on non-US exchanges or otherwise in transactions outside the United States.

Foreign-cubed class actions of this type, involving very large numbers of non-US plaintiffs—and often huge potential damage claims—have, over the last decade, included actions involving global giants such as UBS, Toyota, Royal Bank of Scotland, Royal Ahold, Royal Dutch Shell, Parmalat, Nortel Networks and Vivendi.

Foreign-cubed class actions were particularly offensive to non-US companies for several reasons. The US-style class action based on the US anti-fraud provisions is unavailable in all but a very small number of non-US jurisdictions. Non-US companies traded in US markets generally have only a very small proportion of their total outstanding trading volume in the United States. US class actions are often tried before US juries, which non-US corporate defendants can find threatening.

THE CONDUCT AND EFFECTS TESTS

For several decades, US federal courts have interpreted the US anti-fraud provisions to permit private rights of action involving transactions with a range of transnational elements. This approach generally involved basic principles of statutory construction, including deciding whether the US Congress would have wished resources of US federal courts to be used to resolve any such claim. In practice, US federal courts tended to exercise jurisdiction under the US anti-fraud provisions where the underlying transaction involved either significant conduct or effects within the United States.

US federal courts articulated a range of conduct and effect analyses in these cases.

The effects-focused tests looked generally to whether a transaction outside the United States had a substantial adverse effect on US markets or US investors, with courts invoking jurisdiction over claims involving conduct abroad that significantly injured US markets or US investors. Courts in these instances often referenced public policy considerations.

The conduct-focused tests generally looked to the geographical location of the fraudulent acts giving rise to the claim. While some courts required all the elements required for a claim to have occurred within the United States, others required "more than mere preparatory conduct" within the United States and some causative link between the US conduct and the alleged loss. Still others looked to whether US conduct "contributed significantly" to the fraudulent scheme.

As the Supreme Court in *Morrison* described one leading federal court's development of the approach:

> *The Second Circuit had thus established that application of …*[the US anti-fraud provisions] *could be premised upon either some effect on American securities markets or investors (Schoenbaum) or significant conduct in the United States (Leasco). It later formalized these two applications into (1) an "effects test," "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens," and (2) a "conduct test," "whether the wrongful conduct occurred in the United States." * * * These became the north star of the Second Circuit's Section 10(b) jurisprudence, pointing the way to what Congress would have wished. Indeed, the Second Circuit declined to keep its two tests distinct on the ground that "an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court."*

The *Morrison* Ruling

NO EXTRATERRITORIAL APPLICATION

In *Morrison*, the Supreme Court considered the specific question of whether the US anti-fraud provisions apply extraterritorially in the case of a foreign-cubed or f-cubed claim.

Citing the long-established rule of statutory construction that when a US statute "gives no clear indication of an extraterritorial application, it has none," the Supreme Court found very simply and decisively that, as there is "no affirmative indication" in the Exchange Act that the US anti-fraud provisions apply extraterritorially, they do not.

The Supreme Court made much of the express language in various parts of the statute, declaring that:

> *…the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States. Section 10(b) does not punish deceptive conduct, but only deceptive conduct "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered."*

In addition, the Supreme Court rejected firmly the notion that the Exchange Act should be applied to conduct in the United States that has effects abroad (and along with it arguments in favour of any sort of "conduct and effects" or "significant and material conduct" test) because, as it stated:

> *The probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application "it would have addressed the subject of conflicts with foreign laws and procedures."*

NOT WHO BUT WHERE?

Having swept away several decades worth of judge-made law on the subject, the Supreme Court created an apparently straightforward new standard under which the US anti-fraud provisions apply to two (and only two) distinct categories of securities transactions. First, transactions "in connection with the purchase or sale of a security listed on an American stock exchange," and second, transactions involving "the purchase or sale of any other security in the United States."

Courts interpreting the Supreme Court decision have made themselves very clear that the identity, citizenship or residence in the United States of a plaintiff or defendant is by itself not relevant to the *Morrison* analysis. Rather, under *Morrison*, what matters is where the securities transaction takes place. As the Second Circuit stated recently, while securities transactions occurring in the United States may be more likely to involve parties residing in the United States, "citizenship or residency does not affect where a transaction occurs; a foreign resident can make a purchase within the United States, and a United States resident can make a purchase outside the United States."

NON-US COMPANIES "AVAILING THEMSELVES" OF THE US CAPITAL MARKETS

For many years, non-US companies have properly been advised that the scope and nature of their contacts and activities in the United States would have a significant effect on the likelihood of becoming subject to a successful claim under the US anti-fraud provisions. The basic principle was that the more the non-US company "availed itself" of the benefits of the US capital markets (for example by listing shares for trading on a US exchange, by setting up a sponsored ADR program, by conducting US-focused "road show" meetings with investors, *etc*.), the more likely such a company would be to find itself subjected to the jurisdiction of US courts in a case based on the US anti-fraud provisions.

Morrison decisively put an end to this approach.

THE DODD-FRANK ACT AND THE SEC STUDY

A month after the Supreme Court's decision in *Morrison*, the US Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) passed into law. Section 929P of the Dodd-Frank Act responded directly to *Morrison* by amending the Exchange Act effectively to overrule *Morrison* with respect to SEC and DOJ enforcement actions by codifying a version of the long-standing conducts and effects test. The Dodd-Frank Act made similar changes to the Securities Act of 1933 and the Investment Advisers Act of 1940. With respect to private rights of action under the US anti-fraud provisions, however, the Dodd-Frank Act mandated the SEC to conduct a study to determine the extent to which they should be similarly extended to cover transnational securities fraud.

The SEC study summarises comprehensively the case law since June 2010 and the various alternatives to the bright-line rule set down in *Morrison*. It falls far short, however, of offering the US Congress a straightforward recommendation to change the law with respect to private rights of action.

Indeed, one of five SEC commissioners published a detailed and sharply worded dissent to the SEC study. In this statement, the dissenter criticised the SEC study for not taking a stronger line against *Morrison*, as well as speaking out strongly against the decision itself and its recent progeny interpreting and applying it, asserting that these decisions are increasingly:

> *making it clear that the anti-fraud protections of the Exchange Act will not be restored to those US investors who purchase securities listed on non-US exchanges, regardless of the extent of the fraudulent conduct in which foreign companies engage in the United States, or the effect of such conduct in the United States or on US citizens.*

In a US Presidential election year, the issue of what to do about *Morrison* is likely to remain controversial.

Morrison's Progeny

In the two years since the Supreme Court issued its decision in *Morrison*, numerous lower federal courts have interpreted and applied its holding in cases involving a wide array of situations.

SECURITIES LISTED ON US EXCHANGES

The first branch of the *Morrison* rule covering purchases or sales of securities "listed on an American stock exchange" may have seemed straightforward on face value, but plaintiffs focused quickly on the following ambiguity: in the case of non-US companies cross-listed on US exchanges and on non-US exchanges (whether in the form of so-called "global shares" or in the form of ADRs), the entire class of global shares or ordinary shares underlying the ADRs is registered under the Exchange Act for trading purposes on the US exchange.

Consequently, many commentators construed *Morrison* to include the world-wide outstanding float of a class of securities to be within the ambit of securities, the purchase or sale of which was covered by the US anti-fraud provisions. Lower federal courts considering this issue have been uniformly antagonistic to this view, however, holding consistently that the purchase or sale upon which any claim is to be based must take place over the facilities of the US exchange. See, *e.g., In re UBS Sec. Litig*., (S.D.N.Y. 2011).; *In re Vivendi Universal, S.A. Sec. Litig*. (S.D.N.Y. 2011); *In re Royal Bank of Scotland Group PLC Sec. Litig*. (S.D.N.Y. 2011); *In re Alstom SA Sec. Litig*. (S.D.N.Y. 2010); *In re Celestica Inc. Sec. Litig*., (S.D.N.Y. 2010); and *Sgalambo v. McKenzie*, (S.D.N.Y. 2010).

The practical effect of this approach, of course, is to exclude from the coverage of the US anti-fraud provisions any potential claimant who purchased securities on a non-US exchange, even where securities of the same class are also listed and traded on a US exchange.

Although they have used differing reasoning to explain their results, lower courts in these cases have focused consistently on the geographic element in *Morrison* and on *Morrison's* decisive break with the conduct and effect analysis. As one court noted succinctly in *Royal Bank of Scotland*, "the idea that a foreign company is subject to US securities laws everywhere it conducts foreign transactions merely because it has 'listed' some securities in the United States is simply contrary to the spirit of *Morrison*."

These courts have reached such conclusions without regard for where the transaction instruction originated, whether the securities at issue were registered under the Exchange Act, whether the non-US issuer of the securities had "availed itself" of the US capital markets in various ways (including by setting up a sponsored ADR program in connection with a US listing) or whether the listed securities were global shares or ADRs.

Courts have also generally confirmed that non-US investors who purchase on US exchanges are covered by the US anti-fraud provisions under *Morrison.* See, *e.g., Lapiner v Camtek Ltd*. (N.D. Cal. 2011) and *Foley v Transocean Ltd*. (S.D.N.Y. 2011).

To summarise this case law, where a non-US company has securities listed on a US exchange and on non-US markets, purchases and sales executed on the US exchanges are covered by the US anti-fraud provisions, while those executed over non-US exchanges are not covered by the provisions. This rule should apply generally, regardless of whether the purchaser or seller is a US or non-US resident.

TRANSACTIONS IN SECURITIES "IN THE UNITED STATES"

Lower courts seeking to apply the second branch of the *Morrison* test—which applies (in the case of securities not listed in the United States) to "the purchase or sale of any other security in the United States"—have struggled to determine for such purposes when a transaction occurs "in the United States."

The Supreme Court in *Morrison* recognised that under their test, many transactions would have some connections to the United States without being subject to the US anti-fraud provisions, noting:

> *For it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.*

A number of different approaches have been developed by the lower courts to deal with this issue. Some of these even suggest that a given transaction may occur in more than one jurisdiction.

So far, the apparent strongest approach, recently upheld in the US Court of Appeals for the Second Circuit, holds that an off-exchange transaction occurs in the United States for purposes of *Morrison* if either irrevocable liability is incurred within the United States or title is transferred within the United States (see *Absolute Activist Value Master Fund Ltd. v Ficeto* (2d Cir. Apr. 13, 2012)).

The Second Circuit based its decision on the construction of various key definitions under the Exchange Act. In reaching its decision, the Second Circuit considered and rejected expressly various other potential tests, finding that the location of the broker-dealer executing the trade was not dispositive and that the identity of the buyer, the seller or the issuer is not relevant to the fundamentally geographic determination of *Morrison*.

AMERICAN DEPOSITARY RECEIPTS

As noted above, lower courts interpreting and applying *Morrison* have found universally that purchases and sales of ADRs over the facilities of the formal US securities exchanges are covered by the US anti-fraud provisions.

On the other hand, there is a substantial body of case law from both pre- and post-*Morrison* decisions that have found non-exchange transactions in ADRs to be ''predominantly foreign'' in nature. See, e.g., *In re SCOR Holding (Switzerland) AG Litig.* (S.D.N.Y. 2008)); *Cornwell v Credit Suisse Group* (S.D.N.Y. 2009); *Copeland v. Fortis* (S.D.N.Y. 2010); *In re Société Générale Sec. Litig.* (S.D.N.Y. 2010).

Moreover, at least one federal district court, in *Société Générale*, considering the issue post-*Morrison*, held that transactions in ADRs that trade not over the facilities of registered US securities exchange but in the US over-the-counter (OTC[2]) market are not subject to the US anti-fraud provisions under *Morrison*.

The court's reasoning in *Société Générale* has charitably been called "somewhat ambiguous" and the holding has not generally been followed by other courts. The court stated (ostensibly following the cases cited above but without explanation or analysis) that because Société Générale's ADRs were not traded on an "official American securities exchange" but instead traded in the "less formal" OTC market with "lower exposure" to US-resident buyers, trade in such OTC ADRs is "a predominantly foreign securities transaction."

Other commentators have suggested that this decision may be based on the fact that ADRs traded OTC are often "unsponsored" and the issuer of the securities underlying the ADRs in those cases is completely uninvolved in the creation and trading of the ADRs in the United States. This analysis ignores the clear geographic focus of *Morrison*, and attempts to apply the now-obsolete concepts from the conduct and effects tests so clearly rejected by the Supreme Court in *Morrison*.

Various court rulings in the aftermath of *Morrison* can conclusively be read to indicate that this "predominantly foreign" approach to ADR transactions is no longer valid.

For example, the well-articulated recent decision by the Second Circuit Court of Appeals referenced above involved unlisted securities and therefore the second branch of *Morrison* and the question of what a transaction "in the United States" means. In *Absolute Activist Value Master Fund Ltd. v Ficeto* (2d Cir. Apr. 13, 2012), the Court found that the identity of the issuer or type and manner of issuance of securities may not properly be used to determine if a transaction is domestic to the United States. The second branch of *Morrison's* bifurcated test, the Court noted, refers to "domestic transactions in other securities" and not "transactions in domestic securities" or "transactions in securities that are registered with the SEC." Accordingly, the Second Circuit held, "we cannot conclude that the identity of the security necessarily has any bearing on whether a purchase or sale is domestic within the meaning of *Morrison*."

[2] Securities transactions that are not executed over the facilities of a registered securities exchange are considered over-the-counter (OTC) trades. These include private off-exchange transactions as well as those executed over alternative trading systems and other electronic trading platforms, such as OTCQX International or the OTC Bulletin Board.

The Aftermath of *Morrison*

Despite the apparent simplicity of the new test, the decision could have proved difficult in various respects. As interpreted and applied by a number of lower US federal courts so far, however, it appears to have reduced very dramatically the exposure and potential liability of non-US corporates cross-traded in US markets.

In fact, the logic of *Morrison* and of these later decisions suggests that, especially insofar as disclosure-related class action claims under the US anti-fraud provisions against non-US companies traded in US markets are concerned:

- The number of potential claimants and the size of potential claims has been reduced dramatically.
- The size of likely settlements and fee awards in such cases has been correspondingly reduced.
- Consequently, the likelihood of potential claims and, in particular, of weaker or less meritorious claims being pursued has also been correspondingly reduced.
- The potential liability of non-US companies traded in US markets no longer relates to their conduct and activities within the United States or in US markets, but only to the location of the transaction giving rise to the claim.
- Consequently, a sponsored American depository receipts (ADR) program probably involves little or no more risk of liability than an unsponsored ADR program.
- Owing to the fact-specific nature of the location of the transaction inquiry, formal cross-listings on US exchanges may involve incrementally more risk of liability than over-the-counter or other forms of off-market trading.

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