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HelbizCoin Litigation Lives On After Unanimous Second Circuit Decision

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The Second Circuit weighed in this month that the Supreme Court's presumption against the extraterritorial application of the federal securities laws, as announced in *Morrison v. National Australia Bank Ltd.* cannot be used to toss state law common law claims, even if they arise in connection with an allegedly fraudulent initial coin offering or "ICO." *Barron v. Helbiz*, No. 21-278, 2021 WL 4519887 (2d Cir. Oct. 4, 2021). *Helbiz* presented the Second Circuit with a unique opportunity to consider the apparently sua sponte application of *Morrison* by Judge Louis Stanton of the U.S. District Court of the Southern District of New York to dismiss common law claims that sounded in fraud. The plaintiffs in *Helbiz* claimed they were deceived into purchasing cryptocurrency as part of the company's "pump and dump" investment scheme, but did not allege violations of the federal securities laws. In a unanimous opinion, Judges Debra Ann Livingston, Denny Chin and William Nardini breathed life back into *Helbiz*, vacating the district court's judgment and allowing plaintiffs to amend their complaint to satisfy the jurisdictional requirements from *Morrison* by adding a claim under §10(b) of the Securities Exchange Act of 1934 (Exchange Act).

The Territorial Limits of Federal Securities Laws: 'Morrison' and Its Progeny. Section 10(b) of the Exchange Act applies to fraud "in connection with the purchase or sale" of a security. 15 U.S.C. §78j(b). Yet the face of the Exchange Act is unclear on whether it applies extraterritorially, an issue grappled with by the courts of appeals for decades after the act's passage. In 2010, the Supreme Court resolved the issue in the landmark *Morrison* case, where the court held that §10(b) of the Exchange Act permits claims brought by a plaintiff (1) transacting in "securities listed on domestic exchanges" or (2) entering into "domestic transactions in other securities." 561 U.S. 247, 267 (2010). Put another way, the Supreme Court concluded that the Exchange Act does not provide a cause of action to plaintiffs who sue in federal court in connection with a foreign securities transaction. See id. at 250. Although *Morrison*

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dealt exclusively with the Exchange Act, courts promptly broadened its application. The Southern District of New York—as affirmed by the Second Circuit—held in *In re Vivendi Universal, S.A., Sec. Litig.*, 842 F. Supp. 2d 522, 529 (S.D.N.Y. 2012), that *Morrison* should apply equally to the Exchange Act and the Securities Act of 1933 (the Securities Act). The Second Circuit further expanded on *Morrison* in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 66-67 (2d Cir. 2012), where the court interpreted the second *Morrison* prong, which permits securities claims relating to "domestic transactions in other securities," to mean transactions where "irrevocable liability is incurred or title passes within the United States." In other words, a "domestic transaction" under *Morrison* requires evidence that the plaintiff became bound to the deal and lost the right to revoke within the United States. See id. at 70.

At least one court has applied *Morrison* to consider whether to dismiss Exchange Act claims that allegedly arose from an ICO. See *In re Tezos Sec. Litig.*, No. 17-CV-06779-RS, 2018 WL 4293341 (N.D. Cal. Aug. 7, 2018) (declining to dismiss action where ICO transaction occurred within the United States). What made the *Helbiz* appeal unique, however, is that the claims did not arise under either the Securities Act or Exchange Act; they were merely state common law claims dealing with a foreign security.

Judge Stanton Makes It Interesting: Can 'Morrison' Be Expanded To Dismiss State Common Law Claims That Sound in Securities Fraud? In *Helbiz*, a group of plaintiffs sued Helbiz, Inc. and other defendants, alleging that the defendants' ICO of "HelbizCoin" was a "pump and dump" scheme. *Barron v. Helbiz*, No. 20 CIV. 4703 (LLS), 2021 WL 229609, at *1 (S.D.N.Y. Jan. 22, 2021). According to the complaint, the defendants marketed HelbizCoin as the "native token for Helbiz transactions," and promised that they would become the exclusive payment method of a smartphone-based transportation rental platform to be developed by Helbiz. See id. at *1, 3. U.S. residents were precluded from participation, and the HelbizCoin terms and conditions stated that it was not a U.S. securities offering. Id. at *1. The ICO raised $38.6 million. *Helbiz*, 2021 WL 4519887, at *1.

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According to the plaintiffs, the HelbizCoin ICO was a scam. *Helbiz*, 2021 WL 229609, at *3. They claimed that Helbiz and the other defendants kept most of the money raised through the ICO for themselves, never completed the rental platform, and reneged on their promise that HelbizCoin would be the exclusive currency accepted on the platform. Id. at *1. The plaintiffs alleged that these actions caused the price of HelbizCoin to plummet. Id. at *3. The plaintiffs sued in federal court claiming diversity jurisdiction and bringing common law claims, including under the New York General Business Law, for "breach of contract, trespass and conversion of chattels, constructive trust, quiet title, and deceptive acts." Id. at *1.

Judge Stanton requested briefing on why the case should not be dismissed under *Morrison*. In a letter to the parties, he wrote that plaintiffs' claims appear to allege violations of the Exchange Act, hence "[i]t is important for us all to know whether relief can be granted" in light of *Morrison*. *Barron v. Helbiz*, No. 20 CIV 4703 (LLS), ECF No. 64 (S.D.N.Y. July 22, 2020). After receiving briefing, Judge Stanton concluded that HelbizCoin was a security under the Supreme Court's test in

SEC v. W.J. Howey Co. See *Helbiz*, 2021 WL 229609, at *1-2. He went on to conclude that HelbizCoin was not listed on a domestic exchange and was not purchased or sold in the United States and dismissed the complaint. Id. at *4-6.

The plaintiffs appealed to the Second Circuit, arguing that Judge Stanton erred in applying *Morrison* to dismiss their claims and abused his discretion by not permitting them to amend their complaint to allege additional facts regarding the domesticity of the transactions, including that lead plaintiff Ryan Barron was a U.S. citizen who purchased domestically. Brief and Appendix for Plaintiffs-Appellants, *Barron v. Helbiz*, 21-278, ECF No. 47 at 15-16 (2d Cir. April 13, 2021). Unsurprisingly, the defendants argued that Judge Stanton properly applied *Morrison* because the plaintiffs "disguise[d] their securities fraud claims as New York State claims." Brief for Defendants-Appellees, *Barron v. Helbiz*, 21-278, ECF No. 59 at 13 (2d Cir. May 17, 2021).

The Second Circuit Resuscitates the HelbizCoin Litigation. In a unanimous opinion, the Second Circuit sided with the plaintiffs and remanded the case. Of most importance to this commentary, the Second Circuit agreed that the district court erred in applying *Morrison* to the plaintiff's state common law claims. *Helbiz*, 2021 WL 4519887, at *3. The Second Circuit found compelling that in deciding *Morrison*, the Supreme Court did not assert that its jurisdictional test applied outside the context of §10(b) of the Exchange Act. Id. In analyzing the complaint, the Second Circuit declined to conclude that the plaintiffs' state law claims were federal securities laws claims in disguise, arguably leaving open the question as to whether *Morrison* could apply to claims that, although labeled as state law claims, are in reality federal securities laws claims. See id. Instead, the Second Circuit wrote, "[w]hile Plaintiffs' various claims might eventually fail for lacking adequate domesticity, that determination must be made pursuant to a more tailored approach that analyzes any Section 10(b) claims under *Morrison*, and separately, any state law claims under New York's rules for the extraterritorial application of its law." Id.

The Second Circuit also agreed that the plaintiffs should have been granted leave to amend their complaint, despite the fact that they never made a motion to do so; rather, the plaintiffs had expressed their willingness to amend the complaint to prevent dismissal and this was sufficient. Id. at *3-4. The Second Circuit vacated the district court judgment and remanded for further proceedings. Id. at *4.

The Takeaway: ICO Domesticity Still Matters. The HelbizCoin litigation remains one to watch. For example, if the lead plaintiff is a U.S. citizen who purchased domestically, what does this mean for both common law and federal securities laws claims in light of the fact that U.S. citizens were prohibited from participating in the HelbizCoin ICO? Will the plaintiffs bring claims under the Securities Act that the HelbizCoin ICO was an unregistered securities offering and try to prevail on a strict liability basis? Although these and other questions remain unanswered, the Second Circuit's *Helbiz* litigation makes it clear that the domesticity of an ICO matters. There is no support in the opinion that purchasers who participate in non-domestic transactions in foreign ICOs can avail themselves of federal, and likely New York state, courts.