Drawing lines in a borderless world: applying *Morrison* to crypto

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As the number of litigations involving digital assets continues to rise, courts have increasingly grappled with how the U.S. securities laws apply to novel fact patterns that, in many instances, involve conduct occurring outside the U.S. Step one in this analysis is to determine whether they apply at all.

The Supreme Court's landmark decision in *Morrison v. National Australia Bank Ltd.* sets forth the test for determining which transactions are sufficiently "domestic" to fall within the scope of the U.S. securities laws. 561 U.S. 247 (2010).

The *Morrison* Court held that they apply in two circumstances: (1) for "transactions in securities listed on domestic exchanges"; and (2) for "domestic transactions in other securities" *Id.* at 267. Transactions are considered "domestic transactions" where "irrevocable liability" is incurred within the U.S. *See Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012).

As the Supreme Court explained, this test would help apply the general presumption against extraterritoriality in all cases going forward, "preserving a stable background ... with predictable effects." *Morrison*, 561 U.S. 247 at 261. Consistent with that principle, courts have held that even where transactions may fall under the categories enumerated in *Morrison*, they may be "predominantly foreign" so as to preclude application of U.S. securities laws. *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014); *Cavello Bay Reinsurance Ltd. v. Shubin Stein*, 986 F.3d 161, 166 (2d Cir. 2021).

The Supreme Court's test has not provided the predictability it promised in all circumstances, however. The digital asset space is a prime example. Given the inherently borderless nature of most digital asset related conduct and transactions, courts have taken different, nuanced approaches regarding how to apply *Morrison* in private civil litigation.

For example, in *In re Tezos Securities Litigation*, the court held that the sales of digital tokens to persons in the U.S. were sufficiently "domestic" where the complaint alleged that plaintiffs were located in the U.S., participated in the Initial Coin Offering ("ICO") through an interactive website hosted on a U.S. server, and participated in response to marketing that almost exclusively targeted U.S. residents.

The court additionally noted that, as alleged, purchasers' contribution of ether (the native crypto asset to the Ethereum network) to the ICO "became irrevocable only after it was validated by a network of global 'nodes' [i.e., computers running specified software] clustered more densely in the United States than in any other country." No. 17-cv-06779-RS, 2018 WL 4293341 (N.D. Cal. Aug. 7, 2018).

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Somewhat in contrast, another district court concluded that for transactions not occurring on domestic exchanges, the location of the purchasers or title passing over servers located in California did not control; rather, the transactions became "irrevocable" when the transaction was validated by a single node, and thus the location of the first node to validate the transaction was what mattered. *Williams v. Block one*, No. 20-cv-2809 (LAK), 2022 WL 5294189, at *5 (S.D.N.Y. Aug. 15, 2022).

Yet, in the high-profile enforcement action, *SEC v. Ripple Labs, Inc.*, the court held that token sales were sufficiently alleged to be "domestic" when they occurred on multiple digital asset trading platforms that were incorporated in, had principal places of business in, and were based in, the U.S. 2022 WL 762966 (S.D.N.Y. March 11, 2022). Moreover, the defendants' offers to sell tokens (as opposed to sales) were sufficiently alleged to be domestic where the defendants made the offers from the U.S. because they resided in California and "directed their offers and sales ... from within the United States ... by making offers on digital asset trading platforms directly ... and by making offers through [GSR], a global digital asset trading firm with an office in the United States." *Id.*

Plainly, despite the Supreme Court's goal of predictability, courts have applied *Morrison* to the facts and circumstances of a number of digital asset cases and have reached results that differ — likely

due to the complicated, amorphous and nuanced nature of the transactions at the core of these decisions.

Appellate guidance may be on the way. The 2nd U.S. Circuit Court of Appeals heard oral argument in April in *Anderson v. Binance*, a case in which plaintiffs allege that digital asset platform Binance sold "securities" without registering as an exchange or broker-dealer or filing a registration statement. The district court dismissed these claims because plaintiffs failed to allege facts sufficient under either prong of *Morrison*. *Anderson v. Binance*, No. 1:20-cv-2803 (S.D.N.Y. Mar. 31, 2022).

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Under the first *Morrison* prong, the district court held that "although Plaintiffs allege that much of Binance's infrastructure is based in the U.S., they only identify as U.S.-based infrastructure Amazon Web Services computer servers, which host Binance, and the Ethereum blockchain computers, which facilitate certain transactions on Binance. Such third-party servers and third parties' choices of location are insufficient to deem Binance a national securities exchange." *Id.* at *4.

Under the second *Morrison* prong, the court explained that plaintiffs must provide more than conclusory allegations such as "plaintiffs bought tokens while located in the United States and that title passed in whole or in part over servers located in California that host Binance's website." *Id.*

The *Morrison* question was heard on appeal. At oral argument, plaintiffs argued that they viewed this case as different from other cases where trades occurred on-chain. Because Binance trading purportedly occurred within its own, off-chain system, plaintiffs urged the court to look at where Binance's infrastructure was located to determine domesticity. Plaintiffs further argued that because Binance's servers allegedly are located in California and are tended by U.S. employees, the plausible inference is that U.S. securities law covers the transactions.

Meanwhile, defendants argued that the case presents a straightforward application of *Morrison*, consistent with the district court's decision. They contended that servers or orders being located in the United States is not the test, and that plaintiffs' conclusory allegations that title to the tokens passed in whole or in part in the United States is not enough.

The anticipated decision may provide guidance in an area that presents novel fact patterns. As the law around digital assets continues to develop, the need for predictability on these questions will only grow in importance.

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