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29 September 2009

Mr Gary Roberts
HM Treasury
1 Horse Guards Road
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Dear Mr Roberts,

Morrison v National Australia Bank

The remit of the Financial Markets Law Committee ("FMLC") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.

We have recently been made aware of the above case which is currently before the US courts. The case has been brought by Australian shareholders in National Australia Bank ("NAB"), an Australian institution, who had purchased stock in Australia in reliance upon misleading information in NAB's annual reports. They argue that the US federal courts have jurisdiction because these misleading statements had resulted from financial misreporting in an NAB subsidiary in Florida.

This case has raised the question whether it is proper for the US Federal Courts to assume subject-matter jurisdiction, under US securities laws, over what are called "foreign-cubed" securities lawsuits. A "foreign-cubed" securities lawsuit is said to be one in which a foreign claimant sues a foreign issuer for loss suffered outside the US but in respect of conduct which allegedly violates US securities laws. Although US domestic investors or markets are not affected as result of the actions giving rise to these lawsuits, US courts are able to obtain subject-matter jurisdiction over "conduct occurring predominately in the US that is related to a transaction in securities, even if the transaction takes place outside the US".[1]

The securities claims in *Morrison* have been dismissed by the US District Court (in an Opinion entered on 26 October 2004) and by a three-judge panel of the Second Circuit Court of Appeals on 18 July 2008, because these courts were unable to establish subject-matter jurisdiction over the Australian investors' claims. The Second Circuit held that the alleged wrongful conduct in the US must have directly caused the loss to the foreign investors in order for subject-matter jurisdiction to exist. In this case, the conduct which had caused the loss was the circulation by NAB of allegedly misleading financial statements in Australia, albeit that these statements incorporated information prepared by the company's US subsidiary.

The claimants have now petitioned the US Supreme Court for a writ of *certiorari* to review the judgment of the Second Circuit. They argue that the anti-fraud provisions of the US securities

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1 *Restatement (Second) of Foreign Relations of the United States*, 416(1)(d) (1987)

laws apply to transnational frauds that result exclusively or principally in overseas losses if the conduct in the US is "material" to the fraud's success and "forms a substantial component" of the fraudulent scheme; it is irrelevant for this purpose whether the conduct in question is directly causative of loss.

The Supreme Court is expected to consider in the autumn of this year whether to grant *certiorari* and, as part of this process, has requested the views of the US Government, represented by the Office of the Solicitor General. Thus a constitutionally appropriate channel exists through which HM Government might communicate, even at this early stage, its views on the extent and accessibility of US jurisdiction in foreign-cubed cases i.e. through the Solicitor General.

However, the FMLC does not think it appropriate to urge HM Government to intervene at this stage because the decision by the Second Circuit does not appear to give rise to any legal uncertainty. If, on the other hand, the claimants are granted *certiorari* by the Supreme Court, the FMLC may make a detailed submission to HM Government as to why its intervention in the proceedings is desirable in the interests of legal certainty. There is already precedent for intervention by HM Government in US litigation.[2] The FMLC is concerned that, if the US securities laws were given the very broad jurisdictional reach for which the claimants in *Morrison* are arguing, a far greater number of foreign-cubed securities lawsuits would fall within the jurisdiction of the US courts. This may create legal uncertainty in the UK because it is likely to encourage forum shopping, which would make the outcome of judicial proceedings less predictable, and also subject UK companies to the legal difficulty of having to apply both the UK and the US tests for fraud when they make information available to existing or potential investors, which may in turn result in practical uncertainty.

Yours sincerely

Lord Hoffmann

cc. Emil Levendoglou
cc. Stephen Parker

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[2] HM Government filed an *amicus* brief in proceedings before the US Supreme Court in *Hartford Fire Insurance Co. v California*, No. 91-1111, and *Merrett Underwriting Agency Management Ltd v California*, No. 91-1128, 509 US 764 (1993).