Routledge
Taylor & Francis Group

Journal of Corporate Law Studies

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rcls20

Extraterritorial jurisdiction of China's new securities law: policies, problems and proposals

Robin Hui Huang, Charles Chao Wang, Yuqi Zhou & Sunny Xiyuan Li

To cite this article: Robin Hui Huang, Charles Chao Wang, Yuqi Zhou & Sunny Xiyuan Li (2022): Extraterritorial jurisdiction of China's new securities law: policies, problems and proposals, Journal of Corporate Law Studies, DOI: 10.1080/14735970.2022.2107147

To link to this article: https://doi.org/10.1080/14735970.2022.2107147

JOURNAL OF CORPORATE LAW STUDIES
https://doi.org/10.1080/14735970.2022.2107147

Routledge
Taylor & Francis Group

Extraterritorial jurisdiction of China's new securities law: policies, problems and proposals

Robin Hui Huang[a,b,c], Charles Chao Wang[d], Yuqi Zhou[e] and Sunny Xiyuan Li[a]

[a]Faculty of Law, Chinese University of Hong Kong, Hong Kong; [b]University of New South Wales, Sydney, Australia; [c]McGill Law School, Montreal, Canada; [d]Economic Law School, East China University of Political Science and Law, Shanghai, People's Republic of China; [e]Department of Law and Audit, Chongqing Airport Group Co., Ltd., Chongqing, People's Republic of China

ABSTRACT

With the increasing internationalization of its securities market, China has recently introduced Article 2(4) of the 2019 Securities Law, in order to deal with the important issue of extraterritorial jurisdiction over cross-border securities transactions. While it represents an important development, the provision is couched in very broad terms, bringing uncertainties and difficulties to its application in practice. This article proposes a phased reform agenda for improvement: in the short run, the effect test under Article 2(4) should be clarified with more guidance; in the long run, China should go beyond the effect test to consider other relevant tests such as the conduct test and the transactional test. The recent high-profile case of Luckin Coffee is carefully studied to show the factors that China may consider in applying Article 2(4), including the test of national interests, the principle of international comity, and the issue of judicial recourse constraints.

ARTICLE HISTORY Received 28 January 2022; Accepted 25 July 2022

KEYWORDS Extraterritorial jurisdiction; securities regulation; Luckin Coffee case; Chinese securities markets; cross-border securities transactions

1. Introduction

With increasing economic globalisation and technological advancement, cross-border securities transactions have seen an upwards trend. Issues of conflicts of jurisdiction (and in some circumstances, also the attendant issue of conflicts of law) have been raised due to the cross-border nature of such securities transactions. For instance, one company may offer securities and have them listed in a foreign securities market; further,

CONTACT Robin Hui Huang huanghui93@tsinghua.org.cn

the securities of a domestically listed company can be traded amongst foreign investors. In such circumstances, disputes may arise as to whether the securities law of the home jurisdiction or that of the foreign jurisdiction should govern the transaction, including the various forms of related misconduct, particularly misstatements, insider trading and market manipulation.

The issue of jurisdiction for cross-border securities transactions is of great significance not only for a country's sovereignty but also for the interests of participating companies and investors. Hence, there is a great need to examine the issue of extraterritorial jurisdiction, which generally means that under legally given circumstances, domestic courts can have jurisdiction upon overseas matters and apply their own domestic laws to regulate them, albeit in a different jurisdiction altogether.[1]

Over the past four decades, the Chinese economy has seen impressive growth, and now ranks as the world's second largest. A growing number of Chinese companies have sought listings overseas, and simultaneously, more channels have become available for Chinese investors to access foreign securities markets.[2] China has also been considering the possibility of accepting the listing of foreign companies on the Chinese markets. These market developments present legal issues of extraterritorial jurisdiction which, if not properly addressed, would hinder the further opening-up and internationalisation of the Chinese securities market. Hence, in the recent overhaul of its securities law passed in December 2019 which has been in effect from March 2020 (PRC Securities Law)[3], China explicitly introduces a new provision on extraterritorial jurisdiction. However, due to the lack of detail, it is unclear how the extraterritorial jurisdiction of the Chinese securities law may be triggered and applied.

This article aims to critically examine the extraterritorial jurisdiction of Chinese securities law, and based on such examination, set out suggestions for improvement. Owing to the advanced development and global influence of its securities markets, the United States (US) is a pioneer in the theory and practice of extraterritorial jurisdiction, and therefore this article will draw upon the US experience in this regard. Section II briefly introduces basic concepts about jurisdiction and provides background. Section III discusses the problems of China's legal system and securities law, with a focus on the Luckin Coffee scandal as a case study. Section IV discusses the history, development and present situations of extraterritorial jurisdiction of US securities law. Section V provides a comparison between the two

[1]For a more detailed discussion of the concept and typology of jurisdiction, see below Section II.A.
[2]For official data on the upwards trend of cross-border securities transactions, see below Section II.C.
[3]Zhonghua Renmin Gongheguo Zhengquanfa (中华人民共和国证券法) [Securities Law of the PRC] (promulgated by the Nat'l People's Cong on12/29/1998, effective on 07/01/1999) (last amended on 12/28/2019, effective from 03/01/2020).

countries and policy recommendations for China. A conclusion is drawn in Section VI.

2. Background: concepts and developments

2.1. The concept and typology of jurisdiction

Under public international law, the term 'jurisdiction' is closely related to the notion of sovereignty.[4] Sovereignty means that each country has exclusive powers and rights to govern all matters within its borders.[5] In other words, 'jurisdiction' indicates the power of a country to regulate nationals and properties by adopting domestic laws within its territory. This concept also refers to the territorial principle, which is the most fundamental principle within the scope of jurisdiction.[6]

At the doctrinal level, however, the concept of 'jurisdiction' has long been subject to debate because of its inaccuracy. It is necessary to first discuss the typology of jurisdiction, as different types of jurisdiction have varying legal meanings and functions. Under traditional international law theory, there are three types of jurisdiction: legislative jurisdiction (prescriptive jurisdiction), judicial jurisdiction (adjudication jurisdiction) and executive jurisdiction (enforcement jurisdiction).[7] Legislative jurisdiction means that a country's legislative body has authority to enact and apply laws; judicial jurisdiction relates to the power of the courts to accept and hear cases; executive jurisdiction refers to a country's ability to exercise authority of administration in accordance with its laws. In general, a country can have legislative jurisdiction over extraterritorial matters without contravening international law (e.g. treaty law and customary law)[8], while judicial and executive jurisdictions are strictly limited within its territory.[9] Thus, a country can stipulate that a specific law or rule is applicable to overseas matters under certain conditions. The inconsistency between domestic law and international law does not necessarily violate international law[10], and it may constitute a violation only in special circumstances. By contrast, if the judicial and executive jurisdiction are directly enforced by countries beyond territorial boundaries, it would generally

[4]Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford Scholarly Authorities on International Law 2015) 5.
[5]Hannah L Buxbaum, 'Transnational Regulatory Litigation' (2006) 46 Virginia Journal of International Law 251, 268.
[6]Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford Scholarly Authorities on International Law 2015) 49.
[7]Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th edn, OSAIL 2008).
[8]*The case of S.S. Lotus (Fr. v Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, [18]–[19].
[9]ibid.
[10]Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008).

contravene the territorial principle and encroach the sovereignty of other nations. In practice, there are controversies on the scope and application of these two types of jurisdiction. The term 'jurisdiction' in this article is used to cover all three types and it will be specified which type is referred to in the relevant discussion.

In addition, there are several important principles governing the issue of jurisdiction in international law: the territorial principle, personality principle, protective principle and universality principle.[11] To start with, the territorial principle means that a country has the right to administer all affairs within its territory. Secondly, the personality principle can be further divided into the active and passive personality principle. The active component implies that a country has the power to govern its own nationals, regardless of whether the nationals act domestically or abroad.[12] By contrast, the passive component indicates that a country has jurisdiction on overseas conduct that prejudices its nationals' interests.[13] In other words, the active personality principle focuses on the nationality of perpetrators while the passive personality principle is concerned with the nationality of victims. Thirdly, the protective principle means that a country possesses rights to exercise jurisdiction over any behaviour that poses threat to its security or interests, even though those actions are conducted abroad.[14] Finally, under the universality principle, every country has jurisdiction on internationally recognised criminal behaviour such as war crimes, genocide and torture.[15] These principles are very important to ascertaining the nature and extent of extraterritoical jurisdiction in the specific context of securities law, which will be discussed below.

2.2. Extraterritorial jurisdiction of securities law

In general, extraterritorial jurisdiction refers to a situation where a country extends its legal power or applies its laws to other countries under particular conditions. Traditionally, private international law decides on the issue of 'extraterritoriality' by choosing one essential element and then examining the place where the essential element is found.[16] As an exception to the traditional territorial principle, extraterritorial jurisdiction is based on the personality, protective and universality principles. Extraterritorial jurisdiction was once expressly denied in

[11]Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford Scholarly Authorities on International Law 2015) 101.
[12]ibid 104.
[13]ibid 110.
[14]ibid 114.
[15]ibid 121.
[16]Anthony J. Colangelo, 'What is Extraterritorial Jurisdiction?' (2014) 99 Cornell Law Review 1303; This principle is also reflected in *Morrison v National Australia Bank Ltd* 130 S. Ct 2869 (2010), [2884].

international law. The court in *S.S. Lotus* held that a country could not exercise jurisdiction beyond its territory unless allowed by international custom or conventions.[17]

Nowadays, due to the increasing interconnectedness of securities markets, the extraterritorial jurisdiction of securities law has come to be applied by a growing number of countries, particularly the US. Extraterritorial jurisdiction of securities law can be applied to a broad range of securities activities relating to cross-border listing and/or trading of securities. As noted above, the personality, protective and universality principles provide theoretical underpingings for extraterritorial jurisdiction. For instance, extratertorical jurisdiction of securities law can be triggered by the personality principle where the nationals of a state are the perpetrator or the victim of secutities misconduct overseas; the protective principle may provide the basis for the exercise of extraterritorial jurisdiction in the name of protect national interests from securities misconduct overseas; the universality principle may be used to justify exercising extraterritorial jurisdiction in serious criminal securities offences such as insider trading. In practice, the issue of extraterritorial jurisdiction usually arises when there is a need to deal with cross-border securities misconduct such as misrepresentation, insider trading and market manipulation.

2.3. China's need to regulate cross-border securities transactions

With the impressive development of China's securities market and the general economic growth, the issue of extraterritorial jurisdiction of securities law has become increasingly significant for China. Since the early 1990s, China has gradually established a vibrant domestic securities market, which is now ranked the world's second largest in terms of market capitalisation.[18] Simultaneously, a large number of Chinese companies choose to get listed or dual-listed overseas for various reasons. For instance, many Chinese companies, particularly privately-owned companies, cannot get listed domestically and therefore, must seek listings overseas. China has traditionally adopted a merit-review regulatory system for securities offerings, under which securities offerings must receive approval from the securities regulator, namely the China Securities Regulatory Commission (CSRC).[19] In practice, the merit-review system favours

[17] *The case of S.S. Lotus (Fr. v Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, [18]-[19].

[18] China Securities Regulatory Commission, *2020 Annual Report of China Securities Regulatory Commission*, p22. China has a total of three national stock exchanges now: Shanghai Stock Exchange and Shenzhen Stock Exchange were established in the early 1990s while Beijing Stock Exchange was set up recently in September 2021.

[19] Robin Hui Huang, *Securities and Capital Markets Law in China* (Oxford University Press 2014), ch 3.

state-owned enterprises (SOEs), and many non-SOEs have no choice but to turn to overseas markets for listings.

Hong Kong and the US are the two most popular destinations for overseas listings of Chinese companies. As of June 2019, Chinese companies represented almost 60 percent of the companies listed in Hong Kong, over 70 percent of the market capitalisation and nearly 80 percent in terms of the volume of turnover.[20] For Chinese companies listed in the US markets, the majority (around 180 companies) are listed on Nasdaq, many of which are tech companies or smaller-sized companies. There are around 80 Chinese companies listed on the NYSE, which tend to be larger companies operating in more traditional industries.[21]

On the other hand, Chinese investors have more access to foreign securities markets both indirectly and directly. Due to China's policy of capital account control for foreign investment, Chinese investors cannot freely trade in securities listed in overseas markets. In order to broaden the investment choices for the Chinese public and to alleviate the problem of excess liquidity within China, the Chinese government announced on 18 April 2006 that Chinese investors can indirectly invest in overseas securities markets through the Qualified Domestic Institutional Investors (QDII).

In more recent years, China has tried to establish various mechanisms to allow Chinese investors to invest directly in overseas markets. In November 2014, the Shanghai-Hong Kong Stock Connect was set up to link the two stock exchanges in Shanghai and Hong Kong, so that investors from each side can have direct access to the other market; this was soon followed by a similar Shenzhen-Hong Kong Stock Connect in December 2016; and in June 2019, the Shanghai-London Stock Connect established links between the Shanghai Stock Exchange and the London Stock Exchange. These programmes open the door for the two-way traffic of cross-border securities trading, in the sense that Chinese investors can trade in securities listed overseas while foreign investors can trade in those listed in China.

While the above development has greatly facilitated the cross-border trading of securities and has improved the internationalisation of the Chinese securities market, it has also brought about a new challenge of regulating cross-border securities misconduct. In fact, the issue relates not only to the companies which are based in China and listed overseas, but may also cover purely foreign companies in which Chinese nationals have invested. To be sure, the securities regulatory regimes in the listing/trading places, such as

[20]Robin Hui Huang, 'The US-China Audit Oversight Dispute: Causes, Solutions, and Implications for Hong Kong' (2021) 54(1) The International Lawyer 151.
[21]ibid.

the US and Hong Kong, can be generally expected to provide adequate protection to Chinese investors dealing with securities there. However, there may be instances where the Chinese investors may prefer to bring litigation under the Chinese securities law in a Chinese court. For instance, China has established a regime for aggrieved investors to pursue compensation claims arising from securities misstatement, which is dubbed Chinese-style class action with the advantages of a light evidentiary burden and a high recovery rate.[22] By contrast, Hong Kong has no class action regime but rather relies on public enforcement of securies law to protect investors.[23] While the US has a robust regime for securities class action, Chinese investors may, in some cases, want to litigate in China due to factors such as litigation costs, prospects of success, recovery rates and the issue of cross-border judgement enforcement.

Moreover, with the increasing internationalisation of the Chinese markets, there is a growing risk that the order of the Chinese domestic securities markets may be disrupted by activities conducted overseas. Apart from the typical cross-border securities misconduct such as insider trading and market manipulation, a recent example is the unauthorised provision of overseas trading services to Chinese domestic investors. It was reported that some overseas securities firms provided online services for Chinese investors to trade securities in overseas markets such as the US and Hong Kong, without holding a license from the Chinese regulators.[24] In addition, these so-called 'internet cross-border securities firms' were also criticised for transferring the personal information of Chinese investors outside China in violation of the personal information protection law.[25] Due to various reasons such as resources constraints and lack of regulatory priority or political will, the regulators in overseas markets may not take action in a timely and adequate manner, and thus it would be necessary for the Chinese regulators to exercise extraterritorial jurisdiction over those issues.

In sum, owing to the growing number of cross-border securities transactions that may impact on Chinese investors, Chinese companies, and the Chinese domestic securities markets, there is a pressing need for China to deal with the issue of extraterritorial jurisdiction of securities law.

[22]Robin Hui Huang, 'Class Action in China: Opportunities and Challenges' in Brian Fitzpatrick and Randall Thomas (eds), *Cambridge International Handbook of Class Actions* (Cambridge University Press January 2021) 350–65; Robin Hui Huang, 'Private Enforcement of Securities Law in China: A Ten-year Retrospective and Empirical Assessment' (2013) 61(4) American Journal of Comparative Law 757.

[23]David C Donald and Paul WH Cheuk, 'Hong Kong's Public Enforcement Model of Investor Protection' (2017) 4 Asian Journal of Law & Society, 349.

[24]Wang Yuanyuan, '富途、老虎更大的金融安全问题还在后面 它们连合法经营资质都没有' (Futu and Tiger Securities have bigger problems of financial security including the lack of business qualifications), 16 October 2021, https://finance.eastmoney.com/a/202110162142602074.html

[25]ibid.

3. The Chinese law: progress and problems

3.1. The historical development

Over the years, in recognition of the need to regulate cross-border securities transactions, China made a series of legislative efforts. The current legal regime is comprised of several laws and regulations as follows.

As early as in 1994, the State Council issued the *Special Provisions of the State Council Concerning the Floatation and Listing Abroad of Stocks by Limited Stock Companies*, stipulating that the laws of PRC can apply to disputes involving Chinese companies listed in foreign securities markets.[26] However, this regulation is couched in very general terms without setting out clear and workable details.

In 2010, the *Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships*[27] was enacted to clarify the application of laws concerning foreign-related civil relations, including securities transactions. Under Article 39 of this law, the laws at the locality of the realisation of the rights of securities or other laws which have the closest relation with the securities shall apply to such securities.[28] As the provision relates to the application of law, it falls within the category of legislative jurisdiction. However, it does not provide guidance on how to determine important issues such as 'the locality of the realization of the rights' and 'the closest relation'.

The key legislation in this area is *the Civil Procedure Law of the People's Republic of China*[29], which lays down a set of provisions about judicial jurisdiction over cases involving contractual disputes, shareholders and company disputes, tort disputes, and other property disputes respectively.[30] Further, the Supreme People's Court (SPC) issued the *Judicial Interpretation on the Application of the Civil Procedure Law of the People's Republic of China*[31] to

[26]Guowuyuan Guanyu Gufen Youxian Gongsi Jingwai Muji Gufen Ji Shangshi De Tebie Guiding (国务院关于股份有限公司境外募集股份及上市的特别规定) [Special Provisions of the State Council Concerning the Floatation and Listing Abroad of Stocks by Limited Stock Companies], issued by State Council on 08/04/1994, effective on 08/04/1994, Art 29.

[27]Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falv Shiyongfa (中华人民共和国涉外民事关系法律适用法) [Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships], issued by Standing Committee of the National People's Congress on 10/28/2010, effective on 04/01/2011.

[28]Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falv Shiyongfa (中华人民共和国涉外民事关系法律适用法) [Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships], issued by SCNPC on 10/28/2010, effective on 04/01/2011, Article 39.

[29].Zhonghua Renmin Gongheguo Minshi Susongfa (中华人民共和国民事诉讼法) [The Civil Procedure Law of the People's Republic of China], issue by the National People's Congress on 09/04/1991, revised in 2007, 2012, 2017 and 2021.

[30]Zhonghua Renmin Gongheguo Minshi Susongfa (中华人民共和国民事诉讼法) [The Civil Procedure Law of the People's Republic of China], issue by the National People's Congress on 09/04/1991, revised in 2007, 2012, 2017 and 2021, Articles 24, 27, 29, 35, 266.

[31]Zuigao Renmin Fayuan Guanyu Shiyong <Zhonghua Renmin Gongheguo Minshi Susongfa> De Jieshi (最高人民法院关于适用《中华人民共和国民事诉讼法》的解释) [Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China], issued

provide more guidance on the various types of foreign-related civil cases which are subject to the jurisdiction of Chinese Laws. However, there is no provision specifically addressing judicial jurisdiction of securities disputes.

As a primary law to regulate the national securities markets, the Securities Law of the PRC was first enacted in 1998, and did not include any explicit provision on extraterritorial jurisdiction until the recent reform, which was passed on 28 December 2019 and took effect from 1 March 2020.[32] Article 2(4) is a newly added provision specifically addressing extraterritorial jurisdiction, stating that:

> Where the offering and trading of securities outside the People's Republic of China disrupt the order of the domestic market of the People's Republic of China and infringe upon the lawful rights and interests of domestic investors, the violator shall be punished in accordance with the relevant provisions of this Law and shall be subject to legal liability.

In sum, the extraterritorial jurisdiction of the securities law in China has a relatively short history and there is only one specific provision on the issue, namely Article 2(4) of the 2019 Securities Law. To be certain, Article 2(4) marks a critical watershed in the history of extraterritoriality of Chinese securities law, but it suffers from a number of problems, which will be discussed in the next section.

3.2. Article 2(4) of PRC securities law and its problems

As discussed above, under the 2019 reform of the Chinese securities law, Article 2(4) explicitly provides for extraterritorial jurisdiction for the very first time. Specifically, it is made clear that the law may apply to relevant securities activities even if they occur outside China. Extraterritorial jurisdiction covers both the offering and trading of securities outside China. Further, extraterritorial jurisdiction may arise when the relevant securities activities disrupt the order of the Chinese securities markets and infringe upon the lawful interests of the Chinese investors.

No doubt, Article 2(4) is an important development in the area of extraterritorial jurisdiction, representing one of the most significant changes brought about by the 2019 reform of the Chinese securities law. It provides an important legal tool for China to protect Chinese investors and its securities markets from misconduct committed in relation to cross-border securities listings and transactions. However, the legal regime is not without

by Supreme People's Court on 01/30/2015, effective on 02/04/2015, revised in 2020 and 2022. It should be noted that under the Chinese legislative system, the judicial interpretation carries the force of law and can be cited as legal basis for adjudicating cases.

[32] Zhonghua Renmin Gongheguo Zhengquanfa (中华人民共和国证券法) [Securities Law of the PRC] (promulgated by the Nat'l People's Cong. on12/29/1998, effective on 07/01/1999) (last amended on 12/28/2019, effective from 03/01/2020).

problems. Indeed, there are several problems that may affect the application of Article 2(4).

To start with, there is a theoretical issue about the nature of extraterritorial jurisdiction under Article 2(4). Indeed, a literal reading of Article 2(4) does not clearly indicate which type of jurisdiction it refers to. Some commentators are of the view that Article 2(4) is regarding legislative jurisdiction, and thus expands the application of the PRC Securities Law beyond China's borders.[33] Others believe that Article 2(4) is about judicial and executive jurisdiction so that Chinese courts and the CSRC can have jurisdiction on securities activities outside China.[34]

Secondly, Article 2(4) is worded in broad terms with some expression vagueness, which may lead to uncertainties in relation to its application. For instance, what would constitute a disruption of the order of the Chinese markets? How do we determine the nature and extent of infringements of the interests of Chinese investors? In fact, while the English translation of Article 2(4) provided by a widely used Chinese law database, namely PKULAW, has an 'and' between the 'market dispution' prong and the 'investor infringement' prong,[35] there is no such conjunction in the original Chinese text. In other words, Article 2(4) is actually silent on the relationship between the two prongs. As a result, it is not fully clear whether the two prongs need to both be satisfied or whether only satisfying one prong would suffice to sustain extraterritorial jurisdiction.

Finally, there is a lack of clarity as to how Article 2(4) interacts with other relevant laws and rules. Under Article 2(4), the essential test of extraterritorial jurisdiction is the effect of the relevant securities transactions on the Chinese market and investors. As noted above, it is not fully clear how the effect test is structured on article, let alone how it will be applied in practice. Much discretion is left to courts and relevant authorities, thereby causing legal uncertainty and conflicts of jurisdictions. Further, as discussed earlier, some relevant laws and regulations in China refer to other elements of extraterritorial jurisdiction such as conduct.[36]

[33]Liu Xinyu (刘歆宇), 'Ruixing Caiwu Zaojiaan Wuda Falv Jiaodian: Zuiduo Faduoshao, Shifou Shiyong Changbiguanxia (瑞幸财务造假案五大法律焦点：最多罚多少，是否适用长臂管辖) [The Five Major Legal Focuses of Ruixing's Financial Fraud Case: What the Maximum Penalty is and Whether Long-arm Jurisdiction Applies]' (*Pengpai Xinwen (澎湃新闻) [The article]*, 03 April 2020) <https://www.thearticle.cn/newsDetail_forward_6824214>.

[34]Chen Yixin, Tangxin (陈一新，汤欣)，'Woguo Zhengquanfa Yuwaiguaxia Tiaokuan De Shiyong – Yi Ruixing Zaojia Shijian Wei Zhongxin我国证券法域外管辖条款的适用 —以瑞幸造假事件为中心 [The Application of the Extraterritorial Jurisdiction of Chinese Securities Law – Focus on Luckin Coffee Fraud].

[35]Zhonghua Renmin Gongheguo Zhengquanfa (中华人民共和国证券法) [Securities Law of the PRC] (promulgated by the Nat'l People's Cong. on 12/29/1998, effective on 07/01/1999) (last amended on 12/28/2019, 03/01/2020). Art 2(4).

[36]See above Section III.A.

Hence, there is a great need to conduct a holistic and contextualised examination of the Chinese regime for extraterritorial jurisdiction over foreign-related securities cases.

3.3. A case study: Luckin Coffee

The recent high-profile case of Luckin Coffee has generated a heated debate on when and how Article 2(4) should be applied in practice. Luckin Coffee is a China-based company which was listed on the US market in 2019. On 2 April 2020, this company revealed that its revenue was inflated by around RMB 2.2 billion (US$310 million) from the second quarter to the fourth quarter of 2019.[37] As a result, the market value of Luckin Coffee plummeted, with a spillover effect that damaged the general reputation of Chinese companies listed overseas. The CSRC communicated with the SEC about the case of Luckin Coffee and conducted an investigation into it.[38] As Luckin Coffee was listed on the US securities markets, this investigation was technically the first time the CSRC had exercised extraterritorial executive jurisidcition under Article 2(4).[39] Some Chinese investors reportedly attempted to bring a civil suit to recover their investment losses before the Intermediate People's Court of Xiamen City (where Luckin Coffee's operational headquarters are located); however, the court only requested these investors to provide supplementary evidence but did not indicate whether it would accept this case.[40] As the case arises from securities misstatements of an overseas-listed company, the key issues are whether Chinese courts have extraterritorial jurisdiction under the 2019 Securities Law, and if so, how should they exercise their jurisdiction in this case?

Before discussing PRC courts' jurisdiction, it is worth noting the non-retroactivity principle of the law, whereby a law can only apply to matters occurring after its promulgation. Because the PRC Securities Law came into effect on March 1st, 2020, while the Luckin Coffee scandal happened on January

[37]Liu Yujing and Louise Moon, 'Luckin Coffee's founder says sorry as Nasdaq prepares to kick out his stock for fraud, in the first expulsion of a Chinese company' (*South China Morning Post*, 19 May 2020) <https://www.scmp.com/business/companies/article/3085132/nasdaq-readies-delist-luckin-coffee-chinas-answer-starbucks>.

[38]Brenda Goh and Zhang Yan, 'China says to penalise Luckin Coffee for accounting fraud' (*Reuters*, 31 July 2020) <https://www.reuters.com/article/us-luckin-coffee-investigation-idUSKCN24W1XF>.

[39]Sun Tingyang (孙庭阳), 'Zhongguo Zhengjianhui Changbiguaxia Shouxiu, Hecha Ruixingkafei (中国证监会'长臂管辖'首秀，核查瑞幸咖啡) [The "Long Arm Jurisdiction" Debut of CSRC, Inspecting Luckin Coffee]' (*Jinjing Wang*经济网 *Ceweekly*, 27 April 2020) <http://www.ceweekly.cn/2020/0427/295412.shtml>.

[40]ZhouYing (周莹) 'Ruixingkafei Susong Jinzhan Zhuizong: Jingnei Susong Rengzai Zhunbei Lian Cailiao Jieduan, Jingwai Jiti Susong Yiyou Touzizhe Shenqing Shouxiyuangao (瑞幸咖啡诉讼进展追踪：境内诉讼仍在准备立案材料阶段 境外集体诉讼已有投资者申请首席原告) [The Litigation Progress of Luckin Coffee: Domestic Litigation is still in the stage of filing materials while investors in overseas class-action lawsuits have applied for chief accuser]' (*21Shiji Jingji Baodao (21*世纪经济报道*)* [*21st Century Business Herald*] 29 June 2020) <https://m.21jingji.com/article/20200629/herald/f25b0b8c29b8bd075333c7d8ca5ec418.html>.

31st, 2020, some scholars believe that Article 2(4) cannot be applicable to this case.[41] However, in China, substantive law follows the doctrine of observing old laws, while procedural law follows the doctrine of observing new laws.[42] In other words, if Article 2(4) is considered as a substantive rule, then the non-retroactivity principle should apply to prevent its application to the case of Luckin Coffee. On the other hand, if Article 2(4) is treated as a procedural rule, it can be applied retrospectively to the case of Luckin Coffee. Assuming that Article 2(4) has retrospective effect, the issue boils down to whether the requirements of Article 2(4) are satisfied so as to give the Chinese courts extraterritorial jurisdiction over the case. As discussed earlier, however, the wording of Article 2(4) is very general, and it falls short of providing clear guidance.

In sum, the case of Luckin Coffee demonstrates the importance of the extraterritorial jurisdiction of Chinese securities law as a practical issue. There is a pressing need to solve the various problems with the relevant Chinese law, as discussed earlier. Thus, the following sections will examine the experiences of other jurisdictions, notably the US, with a view of finding appropriate ways to improve the Chinese legal regime.

4. The US experience: law and practice

4.1. Overview

4.1.1. The presumption against extraterritoriality and its exception

To understand the extraterritorial jurisdiction of the US securities law, it is necessary to first look at the presumption against extraterritoriality. This presumption means that domestic laws or regulations cannot be applied to overseas activities unless there are clear provisions allowing this.

The history of this presumption can be traced back to *United States v Palmer*.[43] The most famous case explaining this presumption is *American Banana Co v United Fruit Co*.[44] In this case, the Supreme Court refused to exercise its jurisdiction – despite the fact that both the plaintiff and the defendant were American companies, on the grounds that the alleged misconduct occurred outside the US.[45] Thus, the key point of this case is that the operation and effect of domestic laws should be confined to within US

[41] Deng Jianping, Mou Wenhui (邓建平, 牟纹慧), 'Ruixing shijian yu xin zhengquanfa de yuwai guanxiaquan (瑞幸事件与新《证券法》的域外管辖权) [The Luckin Case and the Extraterritorial Jurisdiction of the New Securities Law]' (2020) Caikuai yuekan (财会月刊) [Finance and Accounting Monthly] 135, 138.

[42] Zhu Ting (朱婷), 'Xin Zhengquanfa Changbiguanxia De Shijinshi (新《证券法》'长臂管辖'的试金石) [The Touchstone of "Long-arm Jurisdiction" in the New Securities Law]' (28 April 2020) <https://www.sohu.com/a/391748169_120032> accessed 10 June 2020.

[43] [1818] 16 US 610, [611].

[44] [1909] 213 US 347.

[45] ibid [355].

territory.[46] In 1949, a clear statement of this presumption was given in *Foley Bros., Inc. v. Filardo*[47], where the court stated that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'.[48]

There are two important points to note about the presumption against extraterritoriality. First, a legal presumption can be either an irrebuttable presumption or a rebuttable presumption. In the above quote from *Foley Bros., Inc. v. Filardo*, the phrase 'unless a contrary intent' indicates an exception to the presumption, leaving an opportunity to exercise extraterritorial jurisdiction. Consequently, the presumption against extraterritoriality is a rebuttable presumption. Second, the presumption against extraterritoriality in substance is concerned with legislative jurisdiction. Again, based on the quote from *Foley Bros,* this presumption deals with the issue of whether US laws can apply to behaviours outside the territorial jurisdiction of the US. This refers to the concept of legislative jurisdiction.

4.1.2. Legislative framework

The US has built up a comprehensive legal regime for its securities markets, with the Securities Act of 1933 ('Securities Act')[49] and the Securities Exchange Act of 1934 ('Exchange Act')[50] being at its core.

The Securities Act mainly regulates securities offerings, stipulating that the interstate commerce includes cross-border securities commerce or communication means among the US and any foreign country.[51] Under section 4A(c), an issuer using instruments of interstate commerce shall also be liable for material misstatements and omissions.[52] Further, section 17(a) is concerned with fraudulent or misleading conduct in offering securities with the use of interstate commerce.[53] Moreover, section 5 provides that as long as an issuer applies means or instruments in interstate commerce when offering one security, whether in domestic or overseas markets, they must follow the registration requirements under the Securities Act.[54] The foregoing sections are related to the extraterritoriality of the Securities Act.

The Exchange Act focuses on securities transactions and also applies to interstate commerce, which is defined in a similar way as the Securities Act.[55] Under the broad provision of section 10(b), any person shall be liable

[46]ibid [357].
[47][1949] 336 US 281.
[48]ibid [285].
[49]Full text available at <https://www.govinfo.gov/content/pkg/COMPS-1884/pdf/COMPS-1884.pdf>.
[50]Full text available at < https://www.govinfo.gov/content/pkg/COMPS-1885/pdf/COMPS-1885.pdf>.
[51]Securities Act (n 29), s2(a)(7).
[52]ibid, s4A(c).
[53]ibid, s17(a).
[54]ibid, s5.
[55]Exchange Act, s3(a)(17).

for making manipulative devices, provided that he uses instruments in interstate commerce.[56] Further, section 30(a) states that brokers or dealers will be liable if they affect American securities transacted in foreign countries and violate SEC's regulations through interstate commerce.[57] Section 30(b) indicates that only if the extraterritorial securities business contravenes SEC's rules for preventing traders from evading Exchange Act, can the Act be applied to monitor those businesses.[58]

In addition, Section 929P(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act[59] ('Dodd-Frank Act') added a new section of extraterritorial jurisdiction of anti-fraud provisions to Section 22 of the Securities Act. The provision states that US courts have jurisdiction over overseas transactions if the conduct in the US are crucial steps to the violation or such conduct will foreseeably affect the US.[60] Meanwhile, section 929P(b)(2) added a similar section about extraterritorial jurisdiction on anti-fraud rules to section 27 of the Exchange Act.

Finally, the SEC Rule 10b-5,[61] issued under section 10 of the Exchange Act, has long been a well-known catch-all anti-fraud provision in the US securities regulation. Another relevant provision is Regulation S under section 5 of the Securities Act.[62]

4.2. *Before the* Morrison *case of 2010*

Prior to the case of *Morrison* in 2010, the jurisprudence of extraterritorial jurisdiction of the US securities law was predominantly developed by the Second Circuit Court of Appeals.[63] At the relevant time, there were many securities actions brought under section 10(b) of the Exchange Act and Rule 10b-5, which could broadly be divided into two categories, namely the so-called Foreign-Squared and Foreign-Cubed cases. Foreign-Squared cases involve transactions where US investors buy securities of foreign companies on foreign securities exchanges[64], while Foreign-Cubed cases arise from transactions where foreign investors purchase foreign securities on

[56]Exchange Act s10(b).
[57]ibid s30.
[58]ibid s30(b).
[59]Full text available at <https://www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf>.
[60]ibid s929 P(b)(1).
[61]Code of Federal Regulations, Title 17, s240 10b-5, text available at <https://www.ecfr.gov/cgi-bin/text-idx?SID=133fd1aae548e8fcd69f3a1fafc67362&mc=true&node=se17.4.240_110b_65&rgn=div8>.
[62]Sara Hanks, *Regulation S: The Safe Harbor for Offshore Securities Transactions* (Bureau of National Affairs 2006).
[63]Roberta S. Karmel, 'The Second Circuit's Role in Expanding the SEC's Jurisdiction Abroad' (1991) 65 St John's Law Review 743.
[64]Jennifer Mitchell Coupland, 'A Bright Idea: A Bright-Line Test for Extraterritoriality in F-Cubed Securities Fraud Private Causes of Action' (2012) 32 Northwestern Journal of International Law & Business 541.

foreign securities exchanges.[65] The US courts used to exercise their securities law jurisdiction in these cases by applying three tests, namely the 'effects test', the 'conduct test', and the 'effects-conduct test'. However, in practice, the US courts tend to combine legislative jurisdiction with judicial jurisdiction. When such tests were satisfied, the US courts usually held that they had judicial jurisdiction, and then simply applied the US securities law.

4.2.1. Effects test

The effects test was first established in *Schoenbaum v. Firstbrook*.[66] The plaintiff was an American investor, while one of the defendants was a Canadian petroleum firm whose shares were registered in the US but all of its business activities were operated within Canada. The petroleum firm did not disclose the discovery of a large oil field until one year later. During this period, the petroleum firm allowed two other defendants to buy its shares at the then prevailing market price, and all such selling and buying activities occurred in Canada. The plaintiff suspected that the defendants did not fully disclose information and thus brought an action in the US. The Second Circuit held that although the unlawful acts occurred in Canada, the related securities were registered in the US, and thus those acts could have impacts on the American securities markets and investors.[67] In sum, if an act has a detrimental effect[68] or a sufficiently serious effect[69], then the presumption against extraterritoriality is rebutted and the US courts can exercise extraterritorial jurisdiction by applying its securities law.[70]

Nevertheless, the effects test is not without criticism.[71] Firstly, the standard of having 'effects or detrimental effects' is too vague and may lead to uncertainties in practice. Different courts may have different views regarding the 'effects' of the same unlawful conduct.[72] Further, under international law, it is inappropriate to exercise jurisdiction primarily based on an effect, especially when this effect is only a result instead of a component of a crime.[73] Some scholars consider that the *Schoenbaum* case adopted the effects test

[65] Kelley Morris White, 'Is Extraterritorial Jurisdiction Still Alive - Determining the Scope of U.S. Extraterritorial Jurisdiction in Securities Cases in the Aftermath of Morrison v. National Australia Bank' (2012) 37 North Carolina Journal of International Law 1187, 1199.
[66] 504 F.2d 200 (2d Cir 1968).
[67] *Schoenbaum v Firstbrook* 504 F.2d 200 (2d Cir 1968), [206]-[208]; See also James D Cox, Robert W Hillman and Donald C Langevoort, *Securities Regulations: Case and Materials* (Wolters Kluwer Law & Business 2019).
[68] *Strassheim v Daily*, 221 U.S. 280, 285, 31 S.Ct. 558, 560, 55 L.Ed. 735 [1911].
[69] *Schoenbaum v Firstbrook* 504 F.2d 200 (2d Cir. 1968), [209].
[70] *Schoenbaum v Firstbrook* 504 F.2d 200 (2d Cir. 1968).
[71] Raphael G Toman, 'The Extraterritorial Reach of the U.S. Securities Laws and Non-Conventional Securities: Recent Developments after Morrison and Dodd-Frank' (2018) 14 New York University Journal of Law & Business 657.
[72] Hannah L Buxbaum, 'Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict' (2007) 46 Colum J Transnat'L L 14, 42–43.
[73] Jennings (n 4) 335–36.

because the securities concerned were offered in the US and the transactions had impacts in the US securities market.[74] Thus, when the relevant securities are not registered in the US, but the transactions merely have effects on the US securities markets, would the effects test still be applicable?

In recognition of the above issues, the Second Circuit refined the effects test in *Bersch v Drexel Firestone*.[75] In this case, the Second Circuit clarified that there are several requirements of the effects test: firstly, the 'effects' should be substantial effects instead of general effects[76]; Secondly, the 'effects' must be on individuals who have interests in the related securities, instead of on the general economy and investors as a whole.[77] This case refines the standard of the Effect Test to a more reasonable and operative standard. Also, the Seventh Circuit held that the 'effects' must be substantial and foreseeable in *Kauthar SDN BHD v. Sternberg*[78] and *Tamari v. Bache & Co. S.A.L.*.[79]

4.2.2. Conduct test

While the effects test emphasises the effects of cross-border securities transactions, the conduct test focuses on the conduct of the transactions. The conduct test was formulated in *Leasco Data Processing Equipment Corp v Maxwell*[80], where an American plaintiff brought proceedings against a British defendant because the latter made many false statements which induced the former to buy its shares. The transaction was completed on the London Stock Exchange ('LSE'). The court declared its jurisdiction on the basis of two conditions: firstly, the conduct occurred within the US[81]; secondly, the conduct was substantial and not merely preparatory, constituting an important link of the casual chain in the impugned transaction.[82]

However, even though the conduct test has been followed in many later cases, different courts have applied it in different ways. On the one hand, the Second Circuit and the DC Circuit[83] strictly followed the conditions set up in *Leasco*. On the other hand, the Third Circuit, Eighth Circuit and Ninth Circuit in *SEC v Kasser*[84], *Continental Grain (Australia) Pty. Ltd v Pacific Oilseeds Inc*[85] and *Grunenthal GmbH v. Hotz*[86] respectively, applied a 'lenient' conduct test where by the US securities law has extraterritorial jurisdiction as long as

[74]Mark Roppel, 'Extraterritorial Applicatigon of Securities Laws Between The United States And Canada' (1988) 24 Gonzaga Law Review 391, 414.
[75]519 F.2d 974 (2d Cir 1975).
[76]ibid [992].
[77]ibid.
[78]149 F.3d 659, 665 (7th Cir 1998).
[79]730 F.2d 1103, 1108 (7th Cir 1984).
[80]468 F.2d 1326 [1970].
[81]ibid [1333].
[82]ibid [1338].
[83]*Zoelsch v Arthur Anderson & Co*, 824 F.2d 27, 31 (DC Cir 1987).
[84]548 F.2d 109, 114 (3rd Cir 1977).
[85]592 F.2d 409 (8th Cir 1979).
[86]712 F.2d 421, 425 (9th Cir 1983).

the defendant's conduct both relates to the fraudulent activity and negatively affects US securities markets.

4.2.3. Effects-conduct test

Some US courts have chosen to combine the aforementioned two tests when deciding on the issue of extraterritorial jurisdiction. For instance, *Itoba Ltd. V. Lep Group PLC*[87] developed the so-called 'effects-conduct test'. The plaintiff was a British company and its parent company offered and listed shares on the New York Stock Exchange ('NYSE'), while the defendant was a British company dual-listed on the LSE and NASDAQ. Based on the documents provided by the defendant to the SEC, the plaintiff bought shares of the defendant company listed on the LSE. However, after the transaction, the share price of the defendant company dropped sharply due to alleged misstatements in the SEC-registered documents, and as a result, the plaintiff brought an action in the US.

The District Court rejected this action at first instance because the transaction was conducted outside the US and it did not significantly affect the US securities markets. The Second Circuit overruled the district court's decision, indicating that a combination of the effects test and the conduct test may be applied to justify the exercise of jurisdiction.[88] In this case, the plaintiff relied on documents provided in the US securities markets to buy shares in the defendant company, causing direct losses to the plaintiff and indirectly to the shareholders of the plaintiff's parent company which was listed on the NYSE.[89] Thus, the effects-conduct test was satisfied to afford the US court jurisdiction in this case.

4.3. Transactional test (Morrison case)

Morrison v National Australia Bank Ltd[90] is a turning point in the development of extraterritorial jurisdiction of the US securities law. In this case, Australian investor plaintiffs brought action in the US court against the National Australia Bank, an Australian company listed in the Australian Securities Exchange, because the latter announced a significant write-down in assets due to an alleged fraud committed by its M&A target in the US. The US Supreme Court finally ruled that there lacked a cause of action and section 10(b) of the Exchange Act did not allow for extraterritorial jurisdiction in this case.

The Supreme Court distinguished between the extraterritorial judicial jurisdiction and the extraterritorial legislative jurisdiction.[91] Before the *Morrison*

[87] 54 F.3d 118 (2nd Cir 1995).
[88] ibid [124].
[89] ibid [123].
[90] 130 S Ct 2869 [2010].
[91] ibid [2877].

case, the Second Circuit confused judicial jurisdiction with legislative jurisdiction when dealing with the issue of extraterritorial jurisdiction. However, *Morrison* expressly distinguished these two types of 'jurisdiction', thus separating the following two questions: whether the US courts have the power to hear an extraterritorial securities case, and whether the case can be heard under the substantive rules of the US securities law.

The Supreme Court created a new 'transactional test', under which if key transactional activities (including offering, selling and purchasing) are carried out within a country's territory, the whole transaction would be regarded as occurring in that country, and thus its securities law should apply.[92] In other words, when transactional activities occur in foreign markets, the US courts would not apply relevant rules to adjudicate the case, even though certain unlawful conduct is carried out in the US and has effects on the US market. Under the transactional test, so-called 'foreign-cubed' claims (foreign plaintiffs, foreign issuer, and foreign transactions) can no longer be brought in US courts under the Exchange Act.[93]

4.4. Dodd-Frank Act

After *Morrison*, the US Congress passed the Dodd-Frank Act, which clarifies the effects test and the conduct test, and authorises their application to actions brought by the US government or the SEC.[94] The means that the extraterritorial effect of the US securities law may vary depending on whether the foreign-related case is brought by a private party or the US government.

In cases where the claimants are private bodies, the courts typically follow *Morrison* to apply the transactional test. One noteworthy case is *In re Vivendi Universal, S.A. Securities Litigation*.[95] Vivendi was a company listed in the Paris Bourse. Shareholeders of Vivendi from the US, the UK and France brought a class action against Vivendi before a US district court, claiming that Vivendi made misleading statements about its financial health and caused them to suffer losses. In this case, a jury decided that Vivendi violated section 10(b) of the Exchange Act. However, after the *Morrison* decision, the District Court dismissed the plaintiffs' section 10(b) claims on the grounds that the case fell outside the reach of section 10(b) according to the *Morrison* decision.[96] It is also important to note that the Second Circuit has changed

[92]ibid [2874].
[93]Genevieve Beyea, 'Morrison v National Australia Bank and the future of Extraterritorial Application of the US securities law' (2011) 72 Ohio St LJ 537, 539–74.
[94]Dodd-Frank Act, s929P(b).
[95]*In re Vivendi Universal SA Securities Litigation*, No. 02 Civ. 5571 (RJH) (S.D.N.Y. Feb. 23, 2011) 765 F. Supp. 2d 512 (S.D.N.Y. 2011).
[96]ibid [526]-[527], [533]-[534].

its previous approach and has followed *Morrison* to distinguish between judicial jurisdiction and legislative jurisdiction.[97]

As for cases that are brought by the US government or the SEC, the effects-conduct test has generally been applied according to section 929P(b) of the Dodd-Frank Act.[98] One interesting example is *SEC v Tiger Asia Management, LLC, et al*.[99] The defendant Tiger Asia was a US hedge fund based in New York and had securities trading activities in Hong Kong. The SEC brought proceedings against Tiger Asia on the basis of section 17(a) of Securities Act and section 10(b) of Exchange Act, because the defendant allegedly received insider information and carried out securities transactions in New Jersey. As noted above, the Dodd-Frank Act grants judicial jurisdiction over cases brought by the US government. Thus, the US District Court for the District of New Jersey accepted this case, and the key issue was whether US securities law can be applied. The court relied on the Dodd-Frank Act to apply the conduct test to allow extraterritotial application of US securities law.[100]

5. Comparative analysis and policy suggestions

5.1. General observations

Broadly speaking, the US regime for extraterritorial jurisdiction of securities law is probably the most developed in the world, having established various tests and corresponding supervision mechanisms. By contrast, the Chinese regime is still in its early stages of development. There is a great need for further guidance on the exercise of extraterritorial jurisdiction and for a more effective institutional framework to facilitate its development in China.

As for the issue regarding the typology of jurisdiction, there are important differences between the US and China. In the US, before *Morrison*, the courts always blended the concepts of legislative jurisdiction and judicial jurisdiction. As discussed earlier, when the Second Circuit dealt with cross-border cases, it used the effects test and the conduct test to decide the application of the US securities law. If those tests were satisfied, the US courts had the power to hear extraterritorial cases and simultaneously

[97]See e.g., *Absolute Activist Master Value Fund, Ltd v Ficeto*, 672 F.3d 143 (2nd Cir 2012), 66–67 (stating that if a US court has judicial jurisdiction on the relevant securities case according to s27 of the Exchange Act, then the court could decide whether s.10(b) of the Exchange Act is applicable); *Parkcentral Global Hub Limited v Porsche Automobile Holdings SE*, 763 F.3d 198 (2nd Cir 2014) 216–18 (refusing to apply s.10(b) and Rule 10b-5 extraterritorially, because 'the relevant actions in this case are so predominantly German').

[98]See e.g., *SEC v Scoville*, 913 F.3d 1204 (10th Cir 2019); *SEC v. Traffic Monsoon LLC*, 245 F.Supp.3d 1275 (D. Utah 2017); *SEC v Chicago Convention Center LLC*, 961 F.Supp.2d 905 (N.D. Ill. 2013).

[99]Civil Action No. 12-cv-7601 (The US District Court for the District of New Jersey, 2012).

[100]Civil Action No. 12-cv-7601 (The US District Court for the District of New Jersey, 2012), [3].

applied the US securities law. However, the US Supreme Court in *Morrison* changed this situation, drawing a clear distinction between legislative and judicial jurisdiction. After this case, the US courts have tended to discuss judicial jurisdiction, namely whether they have authority to adjudicate a case, and legislative jurisdiction, namely whether the US securities law can be applied, separately.[101]

In contrast, China has treated judicial jurisdiction and legislative jurisdiction distinctively from the very beginning in its development of the regime of extraterritorial jurisdiction. The judicial jurisdiction of Chinese courts over cross-border securities litigation is governed by the civil procedure law, while the application of Chinese securities law in those cases refer to corresponding substantive law. Specifically, on the one hand, the issue of whether Chinese courts have power to hear cross-border securities cases is addressed in sections 24, 27, 29, 35 and 266 of the Civil Procedure Law of the PRC; On the other hand, Article 2(4) of the PRC Securities Law is essentially about legislative jurisdiction, setting out the criteria for applying substantive provisions of securities law in the context of extraterritorial cases.

On 16 March 2021, the SPC issued a rule on the scope of judicial jurisdiction for the newly established Beijing Financial Court.[102] Under this rule, the Beijing Financial Court, established on 18 March 2021, has jurisdiction over cases brought by Chinese domestic investors who are aggrieved by securities activities conducted overseas.[103] Clearly, this rule is concerned about the aspect of judicial jurisdiction in relation to cross-border securities cases under China's new securities law.

Further, on 22 April 2021, the SPC issued the revised rule on the scope of judicial jurisdiction for the Shanghai Financial Court,[104] which was established on 20 August 2018 as the first specialist court for finance-related cases in

[101] After the case of *Morrison*, scholars also started to treat the two types of jurisdiction separately, examining the possibility of relying on U.S. courts to apply foreign securities law to foreign transanctions. See e.g., Hannah L Buxbaum, 'Remedies for Foreign Investors under U.S. Federal Securities Law' 75 Law & Contemp Probs 161, 183 (2012) ('[T]he prospects for asserting claims arising out of foreign transactions on the basis of foreign governing law seem slim.'); Wolf-Georg Ringe & Alexander Hellgardt, 'The International Dimension of Issuer Liability–Liability and Choice of Law from a Transatlantic Perspective' (2011) 31 Oxford Journal of Legal Studies 23, 50–51 (proposing that investors of cross-listed companies can choose securities liability rules). In fact, long before *Morrison*, Professor Roberta Romanno made the 'issuer choice' proposal under which issuers and investors choose the relevant securities law to govern their transactions in the international capital markets. See Roberta Romano, 'The Need for Competition in International Securities Regulation' (2021) 2 (2) Theoretical Inquiries 6–7. While this idea of choice of law is hard to implement in practice, it is conceptually appealing and shows the importance of separating jurisdictional and legislative jurisdiction.

[102] Zuigao Renmin Fayuan Guanyu Beijing Jinrong Fayuan Anjian Guanxia de Guiding《最高人民法院关于北京金融法院案件管辖的规定》(The Rule of the Supreme People's Court on the Scope of Jurisdiction of Beijing Financial Court) (issued by the Supreme People's Court on 16 March 2021). The Beijing Financial Court is the second specialist court to hear financial cases, with the first one being the Shanghai Financial Court which was established in August 2018.

[103] ibid art 2.

[104] Zuigao Renmin Fayuan Guanyu Beijing Jinrong Fayuan Anjian Guanxia de Guiding《最高人民法院关于上海金融法院案件管辖的规定》(The Rule of the Supreme People's Court on the Scope of

China. The revised rule expands the judicial jurisdiction of the Shanghai Financial Court to cover cases that are brought by Chinese domestic investors in relation to securities activities conducted overseas.[105] Hence, both the Shanghai Financial Court and the Beijing Financial Court have judicial jurisdiction over cases brought under Article 2(4) of the 2019 Securities Law.

In relation to the criteria for extraterritorial jurisdiction, the US has formulated a series of tests, including the effects test, the conduct test, the effects-conduct test and the transactional test. By contrast, the Chinese securities law in this area is at its infancy stage. At present, there is only one explicit provision about extraterritorial jurisdiction in Chinese securities law, which was introduced only three years ago and vaguely refers to only one standard similar to the US effects test. To date, no relevant cases have been heard.

Finally, the US and China each have a principal securities regulator which has the power to regulate securities transactions domestically and extraterritorially. In the US, the SEC has been very active in exercising extraterritorial jurisdiction and thus has contributed to the rich body of case law in the area. By contrast, the Chinese securities market watchdog, namely the CSRC, does not have significant experience in exercising extraterritorial jurisdiction. As China continues to open up its securities market with increasing cross-border transactions, there is a great need for China to provide more guidance on the issue of extraterritorial jurisdiction of its securities law.

5.2. Improving the tests for extraterritorial jurisdiction

As discussed earlier, Article 2(4) is the only provision in the PRC Securities Law specifically addressing extraterritorial jurisdiction. As important as it may be, it has several problems, including its vague language and insufficient guidance. Since the US has developed a rich body of experiences of statutory rules and court cases on extraterritorial jurisdiction of securities law, China can critically learn from them and carefully make adaptations to suit its local conditions.

To start with, it should be made clear that extraterritorial jurisdiction may arise if any of the two prongs under Article 2(4) is satisfied, namely the 'market disruption' prong and the 'investor infringement' prong. As discussed earlier,[106] due to the ambiguous wording of Article 2(4), the relationship between the two prongs is not fully clear. This would allow China to better protect its domestic securities market and investors, which is consistent with the overarching goal of the Chinese securities law and the US

Jurisdiction of Shanghai Financial Court) (issued by the Supreme People's Court on 7 August 2018, revised on 22 April 2021).

[105] ibid art 2.

[106] See above Section III.B.

experiences.[107] Moreover, in June 2021, China promulgated the Data Security Law, which also provides for extraterritorial jurisdiction when the relevant data processing activities outside China 'harm the national security, public interest, *or* lawful rights and interests of citizens and organizations of China'.[108] There is clearly a conjunction of 'or' between the triggering events of extraterritorial jurisdiction in the original Chinese text. Hence, it is consistent to clarify that extraterritorial jurisdiction can be triggered by any of the two prongs under Article 2(4) of the Chinese securities law.

Then, in principle, we suggest a phased reform agenda to improve the tests for extraterritorial jurisdiction under the Chinese securities law. In the short run, since the two prongs under Article 2(4) are very similar to the effects test in the US, efforts should be made to refine them in light of the effects test of the US securities law; in the long run, there is a need to go beyond the effects test to consider other relevant tests. These two phases of improvement will be discussed in more detail below.

In the short run, drawing on the rich body of US case law on the effects test, China can provide more guidance on what constitutes the standard of disrupting the market order or infringing individuals' interests. For example, Article 2(4) can be revised to be read as 'only when the effect or result of cross-border fraudulent conduct on Chinese securities markets is substantial, direct and foreseeable, can this law be applied to these frauds'. In addition, more guidance should be provided on the elements of 'substantial', 'direct' and 'foreseeable'.

Specifically, it can be made clear that the term 'substantial' requires two conditions: firstly, the interests of investors in China should have been harmed; secondly, illegal securities activities should have been mainly aimed at domestic investors in Mainland China. In other words, domestic investors whose interests are infringed account for a relatively large percentage of all victims. Moreover, the causation theory of tort law can be used to define the meaning of 'direct' since securities fraud is generally regarded as a form of tort.[109] Thus, the requirement of 'direct' can be specified in the following ways: first, unlawful acts are factual causes of domestic investors' damage, which shows these acts are indispensable conditions for the infringed interests; second, the damage caused must be a reasonably foreseeable result of the unlawful acts, not being too remote. As for the term 'foreseeable', it

[107] 2019 Securities Law, art 1 (stating that this law is enacted for the purposes of ' … protecting the lawful rights and interests of investors, maintaining the social and economic order and safeguarding public interest … ').

[108] Zhonghua Renmin Gongheguo Shuju Anquan Fa (中华人民共和国数据安全法) (Data Security Law of the People's Republic of China) (adopted at the 29th session of the Standing Committee of the Thirteenth National People's Congress of the People's Republic of China on June 10, 2021, effective September 1, 2021), Art 2 (emphasis added).

[109] Donald H J Hermann, 'Extraterritorial Criminal Jurisdiction in Securities Laws Regulation' (1986) 16 Cumberland L Rev 207, 228.

should be clarified that it focuses more on the perpetrators' perspective. The harm caused by the illegal behaviour to investors must have been foreseen by the perpetrators. If the harm is merely incidental or coincidental, or otherwise exceeds the reasonable expectation of the perpetrators, they should not be liable for the relevant losses.

In the longer run, on the basis of US experiences, China may introduce more tests, such as the conduct test and the transactional test, in order to provide for a more flexible extraterritorial jurisdiction regime to meet the needs of the market. As discussed earlier, the effects test has shortcomings, and thus the US has devised other tests.[110] In the US, the different tests can be used in a flexible way, depending on who initiates the action. As discussed before, the Dodd-Frank Act altered the outcome of *Morrison* to confer a right of action for the SEC or government actions, but not private actions. China is advised to make clear that there should be a different approach under Article 2(4) depending on who the plaintiff is: if foreign-related cases are raised by the CSRC and satisfy the broader tests such as the effects-conduct test, then Chinese courts can exercise jurisdiction; conversely, if those cases are raised by private investors, then Chinese courts should apply the stricter transactional test, focusing on where the trading behaviour occurred. The CSRC is the Chinese equivalent of the SEC in the US and should be given the same privilege as that of the SEC under the Dodd-Frank Act. Indeed, as a national securities market regulator in China, the CSRC generally aims to protect public interests and more importantly, represents the sovereignty of financial regulation. Hence, compared to private investors, the CSRC should have greater room to bring extraterritorial cases. These varied tests can bring more flexibility for China to consider different factors in achieving its legislative goals.

It should be noted that China needs to adopt a critical approach when borrowing US experiences to improve its regime for extraterritorial jurisdiction of securities law. As discussed earlier, the US law in this area is still evolving, despite already having built up a relatively comprehensive framework comprised of statutory provisions and cases.

There remains uncertainty and confusion over the meaning and application of the various tests for extraterritorial jurisdiction under the US law. The scope and effects of the various tests, particularly the transactional test under the *Morrison* decision, have long been the subject of intense debate in the US.

To start with, as noted before, the transactional test excludes 'foreign-cubed' claims, in which foreign plaintiffs sue foreign issuers for losses on

[110]Above Section IV.

transactions on foreign exchanges.[111] Under the prevailing view of the transactional test, the US securities law will not apply to foreign-cubed transactions even if they involve the underlying securities of a sponsored ADR listed on a US domestic exchange.[112] This would negatively affect the bonding premium for some cross-listed firms, to the extent that the more rigorous US law regime will only benefit the ADR traders in the US, but not the investors trading shares of the same company listed in the home market.

Second, the transactional test may also affect so-called 'foreign-squared' claims brought by domestic plaintiffs against foreign issuers for losses on transactions on foreign exchanges. The US District Court for the Southern District of New York has adopted this position, stating that the *Morrison* decision is applicable to foreign-squared cases as well.[113] This has attracted much criticism, as the US securities law may not afford protection to US investors who suffer from losses from purchasing the securities of foreign issuers in foreign stock markets.[114] As discussed earlier, many Chinese investors currently trade securities in overseas markets such as the US and Hong Kong, and one of the objectives of extraterriarity application of the Chinese securities law is to protect them. Hence, as noted earlier, this article makes the proposal that China adopts and improves the effects test in the short term.

Third, some commentators have pointed out that the US securities markets may risk becoming a 'safe harbor' for cross-border securities fraud as long as offering and purchasing activities are not within the US.[115] In fact, this concern was already voiced in the *Morrison* case. For instance, Justice Stevens concurred in the final judgment but disagreed with the Court's reasoning, stating that

> 'Imagine … an American investor who buys shares in a company listed only on an overseas exchange. That company has a major American subsidiary with executives based in New York City; and it was in New York City that the executives masterminded and implemented a massive deception which artificially inflated the stock price - and which will, upon its disclosure, cause the price to plummet … .[The] investors would, under the Court's new test, be barred from seeking relief under § 10(b).'[116]

[111] See above Section IV.C.

[112] Richard Painter, Douglas Dunham & Ellen Quackenbos, 'When Courts and Congress Don 't Say What They Mean: Initial Reactions to Morrison v. National Australia Bank and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act', (2011) 20 Minnesota Journal of International Law 1, 11.

[113] See e.g., *Cornwell v Credit Suisse Group*, 729 F. Supp. 2d 620 (S.D.N.Y. 2010); In re Royal Bank of Scotland Grp. PLC Sec. Litig., 765 F. Supp. 2d 327, 336 (S.D.N.Y 2011).

[114] Nidhi M Geevarghese, 'A Shocking Loss of Investor Protection: The Implications of Morrison v. National Australia Bank', (2011) 6 Brook J Corp Fin & Com L 235.

[115] See e.g., Kelley Morris White, 'Is Extraterritorial Jurisdiction Still Alive - Determining the Scope of U.S. Extraterritorial Jurisdiction in Securities Cases in the Aftermath of Morrison v. National Australia Bank' (2012) 37 North Carolina Journal of International Law 1187, 1217.

[116] *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2888 (2010) (Stevens, J., concurring).

Moreover, the relationship between the *Morrison* decision and the Dodd-Frank Act needs further clarification. It has been argued that section 929P(b) of the Dodd-Frank Act intends to overturn *Morrison* because it gives legal effect to extraterritorial jurisdiction, which is an exception to the presumption against extraterritoriality.[117] However, there is a counterargument that section 929P(b) does not completely negate *Morrison*. As discussed before, the judicial jurisdiction is distinct from legislative jurisdiction. The 'jurisdiction' in section 929P(b) refers to judicial jurisdiction, which gives the US courts the power to hear cases. It is opined that the *Morrison* case does not cast doubt on the courts' judicial jurisdiction, but instead deals with the issue of the extraterritorial application of section 10(b) of the Exchange Act, which is essentially an issue of legislative jurisdiction.[118] Hence, *Morrison* should still apply in securities cases where a proceeding is initiated by a private person.

It should be noted, however, that perhaps due to the issue of ambiguity, the US courts seem to have more flexibility now in determining the issue of extraterritorial jurisdiction. As the relationship between the *Morrison* decision and the Dodd-Frank Act is not fully clear, the US courts have been divided over the extraterritorial effect of the securities law. In practice, despite the seemingly restrictive ruling of *Morrison*, the US securities law has continued to be frequently used extraterritorially. One recent empirical study examined 388 cross-border securities cases after *Morrison*, finding that it does not have a material impact on the situation of extraterritorial jurisdiction of the US securities law and the possibility of cross-border securities cases being governed by the US securities law does not decrease significantly.[119]

Hence, as discussed earlier, China is advised to take a staged approach to adopting the various tests in applying extraterritorial jurisdiction of securities law to advance both national and international interests. China needs to issue implementation rules to provide more guidance on the circumstances where extraterritorial jurisdiction of securities law may be triggered and exercised. In doing so, China should clearly distinguish between legislative jurisdiction and judicial jurisdiction. This can help avoid the issue of legal uncertainty that has long existed under the US law.

Last but not least, the legal transplantation process needs to take into account China's local conditions, such as the need for exercising extraterroital jurisdiction to protect Chinese investors, and the constraints of juridical

[117]Kelley Morris White, 'Is Extraterritorial Jurisdiction Still Alive - Determining the Scope of U.S. Extraterritorial Jurisdiction in Securities Cases in the Aftermath of Morrison v. National Australia Bank' (2012) 37 North Carolina Journal of International Law 1187, 1229.

[118]J. William Hicks, *International Dimensions of U.S. Securities Law* (2020, ed Thomson West) Section V, Ch 11, IV§ 11:50.

[119]Robert Bartlett et al., 'The Myth of Morrison: Securities Fraud Litigation against Foreign Issuers' (2019) 74 Business Lawyer 967.

resources in China. The next section will use the case of Luckin Coffee to provide a detailed analysis of the factors that China may consider in putting extraterritorial jurisdiction into practice.

5.3. Adopting multilateralism and pragmaticism: the case of Luckin Coffee

Reverting back to the case of Luckin Coffee, this article argues that the extraterritorial jurisdiction of Chinese securities law should not be exercised in this case. We will use this case study to illustrate the Chinese approach towards the extraterritorial application of securities law, and identify relevant factors which may affect the development of the Chinese approach. Further, we will make suggestions as to how China should exercise extraterritorial jurisdiction of securities law to achieve the purposes for which the laws were introduced.

On 30 April 2021, it was reported that some Luckin Coffee investors had filed a civil case for compensation before the Shanghai Financial Court.[120] However, according to our interview with a high-level judge of the Shanghai Financial Court, the case was received but not yet accepted, as the court is very cautious about the exercise of extraterritorial jurisdiction, especially considering that this would be the very first case of its kind if it were to be accepted.[121] Irrespective of the final fate of this case, it has already demonstrated the cautious attitude of Chinese courts towards extraterritorial jurisdiction. We argue that the Shanghai Financial Court's caution towards the case of Luckin Coffee is well justified due to the high level of political sensitivity and technical complexity involved. Below is a more detailed discussion on the specific reasons for our argument that the case of Luckin Coffee does not present a strong case for the exercise of extraterritorial jurisdiction of Chinese securities law.

5.3.1. Non-retroactive application of law

As discussed above, the PRC Securities Law came into effect on 1 March 2020, but Luckin Coffee allegedly committed misstatements before that. An issue thus arises as to whether the case of Luckin Coffee can be retroactively covered by the PRC Securities Law, particularly Article 2(4) which explicitly sets out extraterritorial jurisdiction.

Generally, non-retroactivity is a fundamental legal principle, which means a law cannot apply to cases that occurred before its promulgation. In China, there is also a principle that 'the substantive law follows 'the old law' while

[120]'瑞幸咖啡于境内被起诉 或为中概股首例 (Luckin Coffee was sued in China to probably become the first such case involving China-Concept Stocks)', available at https://www.163.com/dy/article/G8RMKP6605199LJK.html

[121]Wechat Interview, 30 April 2021.

the procedural law complies with 'the new law'.[122] As noted earlier, China differentiates legislative jurisdiction and judicial jurisdiction, which corresponds to the substantive law and procedure law respectively. Article 2(4) of PRC Securities Law is about legislative jurisdiction, which relates to a substantive rule. As a result, the principle that 'the substantive law follows 'the old law'' should apply. Therefore, the PRC Securities Law has no extraterritorial effect on Luckin Coffee case.

5.3.2. Not meeting the effect test

Even if Article 2(4) could operate retroactively, it would not apply to the Luckin Coffee case as the two criteria under Article 2(4) are not satisfied.

As for the first criterion of disrupting the order of the Chinese securities market, there is some difference of opinion over whether it is satisfied. On one view, although the main operations of Luckin Coffee were within China, the offering and trading of its shares occurred mostly in the US securities markets. It thus seems to follow that the case of Luckin Coffee does not meet the requirement of disturbing the market order.[123] However, a counter-argument is that Luckin Coffee's operation and development were dependent on domestic consumers and markets, therefore, its financial misstatements would have adversely affected the market order in China.[124] We argue that the Luckin Coffee case has a negative effect on the reputation of overseas-listed Chinese companies, but it does not seem to directly affect the order of the Chinese securities markets.

As for the second criterion of infringing upon the lawful rights and interests of domestic investors in China, Luckin Coffee's misrepresentation does not seem to meet this test either. Firstly, under the shareholding structure of Luckin Coffee, the top five shareholders including executives and institutions hold around 61 percent of shares[125] , which means Luckin Coffee's executives and some institutions account for a high proportion. In addition, as mentioned earlier, domestic investors in China cannot freely buy securities

[122]Yu Xi (余希), 'Minshi Susongfa Sujili Wenti Tantao (民事诉讼法溯及力问题探讨) [Discussion on the Retroactivity of Civil Procedure Law]' (2020) 3 Shoudu Shifan Daxue Xuebao (Shehui Kexueban) (首都师范大学学报 (社会科学版)) [Journal of Capital Normal University (Social Science Edition)] 151.

[123]Li Youxing, Pan Zheng (李有星, 潘政), 'Ruixing Kafei Xujia Chenshu An Falv Shiyong Tantao – Yi Zhongmei Zhengquanfa Bijiao Wei Shijiao (瑞幸咖啡虚假陈述案法律适用探讨—以中美证券法比较为视角) [Discussion on the Application of Law on Luckin Coffee False Statement Case: From the Perspective of the Comparison of the US and Chinese Securities Laws]' (2020) 9 Falv Shiyong (法律适用) [Journal of Law Application] 118, 128.

[124]Jiang Zheng and Wei Jie (蒋政, 魏婕), 'Rxuiing Shijian Fajiao Zhongmei Kuajing Zhengquan Jianguan Fengbao Kaiqi (瑞幸事件发酵 中美跨境证券监管风暴开启) [The Fermentation of Luckin Coffee Case, Cross-border Securities Regulatory Storm Begins]' (*China Business Journal*, 02 May 2020) <http://www.cb.com.cn/index/show/jr/cv/cv12518527247> accessed 15 June 2020.

[125]Han Hongling, Chen Shuaidi, Lu Xumi, Chen Hanwen (韩洪灵, 陈帅弟, 陆旭米, 陈汉文), 'Ruixing Shijian yu Zhongmei Kuajing Zhengquan Jianguan Hezuo: Huigu yu Zhanwang (瑞幸事件与中美跨境证券监管合作:回顾与展望) [The Luckin Coffee Case and Cross-border Securities Regulatory Cooperation between China and the US: Review and Outlook]' (2020) 9 Kuaiji Zhiyou (会计之友) [Friends of Accounting] 6.

listed on overseas markets. Instead, they can only invest in overseas securities markets through QDII. Furthermore, Luckin Coffee's prospectus indicates that it is listed in the US and its target investors are not Chinese investors.[126] Although there is no accurate data available on the proportion of Chinese public shareholders in Luckin Coffee, it may be safe to estimate that this proportion is very small, and thus the criterion of infringing the interests of Chinese investors may not be satisfied.

5.3.3. Adherence to the principle of international comity

In considering whether to exercise extraterritorial jurisdiction of its securities law, China should pay attention to the principle of international comity, which is a fundamental principle of private international law aimed at reducing conflicts of jurisdiction. Cross-border securities transactions may be subject to the jurisdiction of multiple countries, and thus, jurisdictional conflicts will inevitably arise. If the extraterritorial jurisdiction of the Chinese securities law were to be expanded excessively, it would lead to conflicts with other countries' jurisdiction.

With more than thirty years of rapid development, the Chinese securities market has become increasingly connected with the rest of the world, and as such, it is important for China to establish good relationships with other markets to improve the efficacy of regulatory cooperation. Moreover, the US courts clearly have jurisdiction over the Luckin Coffee case and have already handled relevant cases against Luckin Coffee under the US securities law.[127] If China were to exercise jurisdiction over the Luckin Coffee case, it may cause jurisdictional conflicts. Thus, we argue that China should adhere to the principle of international comity and refrain from exercising extraterritorial jurisdiction over the Luckin Coffee case.

Of course, if required, China should endeavour to provide relevant judicial assistance, such as evidence gathering, the service of judicial documents, as well as recognition and enforcement of judgments.[128] Indeed, it seems sensible to allow the US courts to deal with the Luckin Coffee case, for three main reasons. First, the US courts are generally much more experienced to handle cases of extraterritorial jurisdiction. Second, as Luckin Coffee was listed in the US, it is more convenient for the US courts to collect relevant evidence. Third, it is fair to say that the US courts can adequately protect the Chinese investors who were harmed by the misstatements of Luckin Coffee.

[126]Luckin Coffee's Form of Prospectus, https://investor.luckincoffee.com/static-files/62ae7fff-d256-461e-9012-a47bfdc3a686

[127]On 26 October 2021, Luckin Coffee reached a settlement of the class action brought in the US. Jonathan Stempel, 'Luckin Coffee in $175 mln class action settlement over accounting fraud' https://www.reuters.com/business/retail-consumer/luckin-coffee-reaches-175-million-class-action-settlement-over-accounting-fraud-2021-10-26/

[128]2019 Securities Law, Article 177 (providing for cross-border regulatory cooperation).

5.3.4. The constraints of judicial resources

Exercising extraterritorial jurisdiction requires the consumption of judicial resources, which is a very practical factor to consider in formulating the policy of extraterritorial jurisdiction.[129] As cross-border securities disputes are usually more complicated due to the involvement of multiple jurisdictions, they may take up a significant amount of judicial resources. This can be a particularly acute problem for China where judicial resources are generally limited. Indeed, Chinese courts, especially basic-level courts, have long been under-resourced in terms of staff and funding,[130] due to various reasons such as the reform of the case-filing system, the significant increase in the number of cases adjudicated in recent years, and the slow increase in the number of judges. For instance, during the five-year period of 2015–2020, the number of concluded cases rocketed by about 40 percent from approximately 8.851 million to 12.397 million, while the number of judges increased from 189,000–197,000, representing only a small increase of 4.23 percent.[131]

Moreover, compared with other types of civil cases, securities civil cases are more complicated and thus, require a more demanding skillset of experience from judges. In 2001, the Chinese courts simply refused to accept securities civil cases on the grounds that those cases were too difficult for them to adjudicate; one year later, the SPC acceded to public pressure to accept such cases, and decided that the first trial of securities civil cases should be conducted by intermediate courts, rather than primary courts, as the former were more experienced and better-resourced to meet the challenge.[132] If securities civil cases in a purely domestic context pose significant difficulty for Chinese courts, the situation will only be worse when it comes to cross-border securities civil cases where there will be additional novel issues of extraterritorial jurisdiction and conflicts of law.

5.3.5. Future implications

As discussed above, there are four main factors which may play against the Shanghai Financial Court exercising extraterritorial jurisdiction of securities

[129]Daniel S Kahn, 'The Collapsing Jurisdictional Boundaries of the Antifraud Provisions of the U.S. Securities Laws: The Supreme Court and Congress Ready to Redress Forty Years of Ambiguity' (2010) 6 NYU JL & Bus 365, 409–10.

[130]Yang Lixin (杨立新), 'Jiceng Sifa Ziyuan Buzu de Kunjing ji Wanshanlujing (基层司法资源不足的困境及完善路径) [The Predicament of Insufficient Judicial Resources at the Basic Level and Its Improvement]' (2020) 5 Renmin Luntan (人民论坛) [People's Tribune] 112.

[131]Zuigao Renmin Fayuan Gongzuo Baogao (最高人民法院工作报告) [Work Report of the Supreme People's Court] (25 May 2020), http://www.court.gov.cn/zixun-xiangqing-231301.html; Zhongguo Fayuan Wang (中国法院网), 'Renzui Renfa Congkuan Zhidu Tuijin Anjian Fanjianfenliu (认罪认罚从宽制度推进案件繁简分流) [The System of Lenient Punishment for the Admission of Guilt and Acceptance of Punishment Promotes the Diversion of Complicated Cases]' (20 July 2020), https://www.chinacourt.org/article/detail/2020/07/id/5360734.shtml

[132]For a detailed discussion of the development of securities private litigation in China, see Robin Hui Huang, 'Private Enforcement of Securities Law in China: A Ten-year Retrospective and Empirical Assessment' (2013) 61(4) American Journal of Comparative Law 757–98.

law in the case of Luckin Coffee. This may provide a beacon of light for other courts to identify whether similar cases will be covered by Article 2(4) of the 2019 Securities Law. To be sure, some of the factors are more specific to the case of Luckin Coffee while others may have wider implications. For instance, the non-retroactive application of law may be less likely to impact on other cases, given that the new securities law has now been in effect for more than two years. Moreover, the constraints of juridical resources may become less important a factor to consider as China has continued to reform the judicial system and inject more resources into it.[133]

In July 2021, the General Office of the Chinese Communist Party Central Committee and the General Office of the State Council specifically pointed out the need to improve the system for extraterritorial application of securities law in a policy document issued in July 2021, stating that the development of judicial interpretations and supporting rules on extraterritorial application of securities law should be accelerated, and the specific circumstances for extraterritorial jurisdiction of securities law should be refined.[134] This article represents an attempt to make contributions in this regard by discussing extraterritorial jurisdiction of securities law in the *sui generis* context of China. In short, the nebulous expression of Article 2(4) causes uncertainties over the nature, scope and test of extraterritoriality jurisdiction of China's new securities law. China is advised to critically learn from the extensive experiences of the US law to clarify and enrich Article 2(4) in consideration of its local conditions.

6. Conclusion

In the recent overhaul of its securities law, China has explicitly introduced a provision on extraterritorial jurisdiction, namely Article 2(4) of the 2019 Securities Law. While this provision represents an important development, it is not without problems. Due to the simplistic expressions and broad terms used in the provision, there are worrying uncertainties over the nature, scope and test of extraterritorial jurisdiction of securities law in China. These problems, if left unaddressed, may adversely affect the capacity of the Chinese securities law to handle cross-border securities transactions and ultimately hamper the internationalisation process of the Chinese securities market.

[133]On 27 Feburary 2022, the Supreme People's Court formally submitted a plan to the National People's Congress that the third specialist financial court be established in the twin cities of Chengdu and Chongqing to hear financial cases in China's western region. Yue Hongbin and Niu Yong (岳弘彬、牛镛) · Woguo Ni Sheli Chengyu Jinrong Fayuan （我国拟设立成渝金融法院）[China Plans to Establish Chengdu & Chongqing Financial Court], http://politics.people.com.cn/BIG5/n1/2022/0227/c1001-32360674.html (27 Feburary 2022).

[134]Guangyu Yifa Congyan Daji Zhengquan Weifa Huodong de Yijia (关于依法从严打击证券违法活动的意见) [Opinions on Strictly Cracking Down on Illegal Securities Activities in accordance with the Law], issued by the General Office of the Chinese Communist Party Central Committee and the General Office of the State Council on 06 July 2021, Article 21.

In a search for solutions to the aforementioned problems, this article compares the Chinese law with that of the US, a leading jurisdiction in the area of extraterritorial jurisdiction of securities law. The US has extensive experience relating to extraterritorial jurisdiction of securities law, with a series of court-created tests in place such as the effects test, the conduct test, the effects-conduct test and the transactional test. In principle, Article 2(4) of the 2019 Securities Law is broadly similar to the effects test in the US, but it is not entirely clear how the test can be applied in practice. Using the recent Luckin Coffee scandal as a case study, this article highlights the factors China may consider in applying Article 2(4), including the tests of national interests, the principle of international comity and the issue of judicial recourse constraints. This article argues that China should draw upon US experiences to clarify and enrich the test for exercising extraterritorial jurisdiction under Article 2(4). In doing so, China must adopt a critical approach, as the US law has its own problems and there is a great need to properly consider China's local conditions. While the Luckin Coffee case may not present a good occasion for applying Article 2(4), it will only be a matter of time before China exercises extraterritorial jurisdiction of its securities law for the purposes of regulating cross-border securities transactions and protecting investors.

Acknowledgement

We are grateful for the valuable comments on an earlier draft of this article presented at the conference titled 'Securities Regulatory Cooperation for Cross-border Listings and Transactions' 11–12 December 2020, Chinese University of Hong Kong. Thanks also go to the anonymous reviewers for the very helpful comments.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Funding

This research is funded by Project Impact Enhancement Fund at Chinese University of Hong Kong.

Notes on contributors

Robin Hui Huang, Professor at the Faculty of Law, Chinese University of Hong Kong. He is a leading expert in corporate and financial law with a focus on Chinese and comparative issues. He is also Adjunct Professor of Law at the University of New South Wales, Li Ka Shing Visiting Professor of Law at McGill University, Honorary Professor at East China University of Political Science and Law, and Guest Professor at China

University of Political Science and Law. He is Specially-Invited Research Fellow of the Supreme People's Court of PRC and Expert Advisor of Shanghai Financial Court.

Charles Chao Wang is currently Lecturer, Economic Law School, East China University of Political Science and Law, Shanghai, China. He obtained Bachelor of Law from Shandong University, School of Law, China; Master in Law from China University of Political Science and Law, China-EU School of Law, China; Master in Law from University of Hamburg, Faculty of Law, Germany; PhD in Law from The Chinese University of Hong Kong, Faculty of Law, Hong Kong. He is also a Visiting Scholar at University of British Columbia, Peter Allard School of Law, Vancouver, Canada.

Yuqi Zhou, Legal Counsel in Chongqing Airport Group Co., Ltd, obtained Juris Doctor degree from the Chinese University of Hong Kong, Faculty of Law, and BBA degree (First Class Honours) in Finance from the Hong Kong Baptist University.

Sunny Xiyuan Li is currently a PhD candidate at the Chinese University of Hong Kong, Faculty of Law. He obtained BBA (Hons) in Management, The Hong Kong Polytechnic University; Juris Doctor, The Chinese University of Hong Kong, Faculty of Law.