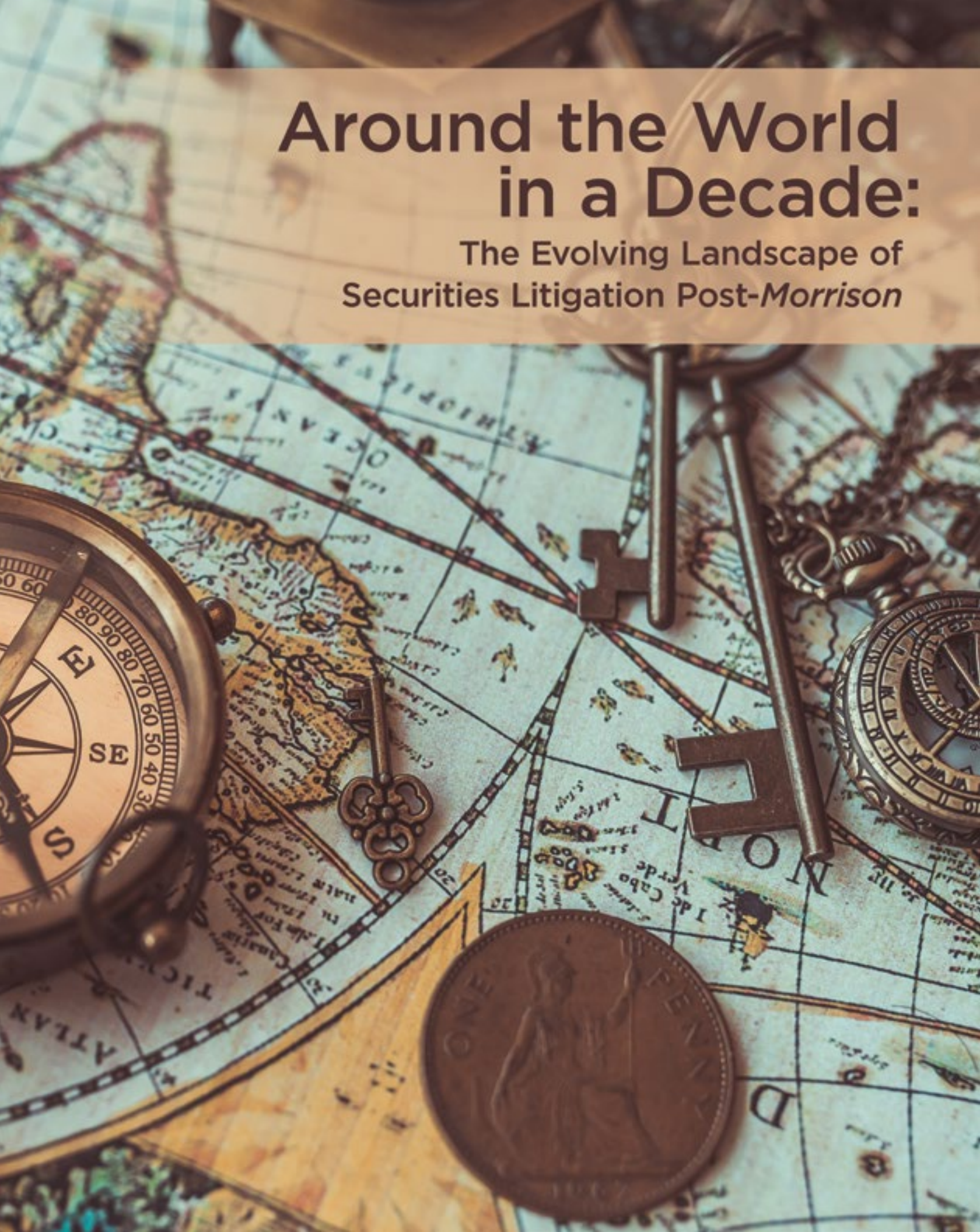
Around the World in a Decade:

The Evolving Landscape of Securities Litigation Post-*Morrison*



NAPPA

National Association of
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INTRODUCTION

Nearly ten years ago the Supreme Court of the United States, by its decision in *Morrison v. National Australia Bank,* Ltd., 561 U.S. 247 (2010), launched the institutional investor's odyssey into the developing world of non-U.S. securities law and regulation. Moreover, during this same decade, markets have continued to expand and globalize, and as investors have accordingly increased their exposure to international assets, worldwide securities litigation has become an increasing necessity for institutional investors seeking to recover losses from wrongdoing regarding securities purchased on foreign exchanges.

The NAPPA membership began many years ago to appreciate the implications of the *Morrison* ruling on an investor's ability to recover on foreign asset losses, and began to develop the tools and identify the resources necessary to conduct appropriate risk/reward analysis with respect to the uncharted waters of post-Morrison foreign securities litigation. In June 2012, NAPPA's Securities Litigation working group published a white paper entitled, "Living in a Post-*Morrison* World: How To Protect Your Assets Against Securities Fraud," which served as a first-of-its-kind guide to post-*Morrison* securities litigation outside of the United States. Several years later, the NAPPA working group updated the white paper with a publication in June 2016 entitled, "Post-*Morrison*: The Global Journey Toward Asset Recovery."

Institutional investors continue to seek opportunities to invest globally, and in the post-*Morrison* world it is critical for investors – particularly those of us who are fiduciaries and consider a litigation claim to be an asset of the fund to be treated just like any other asset of the fund in terms of risk, cost and return – to have an effective plan in place for the recovery of foreign assets in the event of a loss. Institutional investors have witnessed an increase in foreign group actions abroad for purposes of asset recovery, and a number of NAPPA members have participated in these cases. Accordingly, the Securities Litigation working group thought this would be a good time to further update the *Morrison* white paper, and is pleased to present this 2019 edition entitled "Around the World in a Decade: The Evolving Landscape of Securities Litigation Post-*Morrison*," prepared by a subcommittee of the group, assisted by attorneys from law firms outside the United States (these individuals are listed by name on the following page).

There are many challenges for investors seeking to litigate outside the Unites States, including understanding the laws in multiple foreign jurisdictions, engaging appropriately experienced and knowledgeable counsel in the foreign jurisdictions, and funding the litigation effort. This 2019 white paper update presents the current state of the law in 11 foreign jurisdictions that have seen a significant volume of post-*Morrison* foreign securities litigation involving U.S investors, as well as guidance to investors on factors to consider and the types of questions to ask before participating in foreign litigation, and it also provides a review of a select number of foreign case decisions.

I would like to thank each member of the subcommittee for their efforts this year in developing this 2019 white paper update, and in particular great appreciation to Karen Grenon, Assistant General Counsel for the Office of the Treasurer, State of Connecticut, for her excellent leadership of the group's effort. The research and tremendous work and dedication to this project by the subcommittee has produced a white paper that is extraordinarily valuable and instrumental in helping institutions and practitioners to better understand the state of the securities laws in the post-*Morrison* world, and the white paper serves as a valuable tool for investors as they navigate the foreign securities landscape.

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This white paper is for guidance only and is not intended to provide legal advice.

TABLE OF CONTENTS

I. OVERVIEW


Labrador Current
Gulf Stream
QUEBEC
SARGASSO SEA
WEST INDIES

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A. Slow Growth of Class Actions Around the World

For decades, institutional investors in the United States have viewed the class action lawsuit as one of the key protections against fraud. A recent joint letter from ten different state treasurers to the Chairman of the SEC aptly explains why, stating:

> Private shareholder suits play a critical role in helping to enforce securities laws, deter fraud, and compensate harmed investors. Both actions require expansive, expensive investigations and most shareholders are not positioned in a way to cover the costs associated with individual legal causes of action. Class action suits allow for the pooling of resources and causes of action to address all shareholders harms.[1]

This basic economic principle applies to purchasers of domestic and foreign securities alike. In part, for this reason, institutional investors in foreign securities historically sought recourse in the United States, where they could pursue a class action with relative ease.

The Supreme Court's 2010 ruling in *Morrison v. National Australia Bank Ltd.* changed that.[2] After *Morrison*, investors in most foreign securities must seek relief abroad under the laws of the countries where the securities are traded.[3] The practical ramification of *Morrison* is to increase the importance of foreign law, including the procedural norms and rules that govern claims arising under foreign law. This white paper addresses the key procedural question for many investors: Will a class action lawsuit be available?

Answering this question requires careful consideration of more than just the formal rules for grouping claimants and appointing representative plaintiffs. As scholars have noted, the potency of the American class action derives not only from Federal Rule of Civil Procedure 23, but also from procedural and ethical rules relating to attorneys' fees, including those permitting contingent fee arrangements and requiring both sides to bear their own litigation expenses.[4] The expansive rules of civil discovery in the United States ("U.S.") also bolster the ability of shareholders to prove their claims, since defendant issuers typically employ most of the key fact witnesses and possess most of the documents and communications relating to an alleged fraud.

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Aside from a handful of common law countries (*e.g.*, Australia and Canada), most foreign jurisdictions have long resisted the rules and procedures that bolster the American class action, but the tide has begun to turn in recent years, particularly in the 2000s. As of 2011, 21

[1] Joint Letter Signed by the Treasurers of Kentucky, Indiana, Idaho, Arizona, Arkansas, Louisiana, Maine, Nevada, South Carolina, and Washington (November 13, 2018), *available at* https://secureoursavings.com/wp-content/uploads/2018/11/SFOF-Letter-to-SEC-Chairman-Clayton-1.pdf.

[2] 561 U.S. 247 (2010).

[3] *See id.* at 267 (holding that a private fraud claim under the Securities Exchange Act applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities").

[4] *See* Deborah R. Hensler, *From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally*, 65 U. Kan. L. Review 965, 976–978 (2017) (describing relationship between the viability of class action procedures, the contingent fee, and fee-shifting rules); John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 U. P. L. Rev. 1895, 1897–1900 (2017) (describing the opt-out class action, the contingent fee, and the general rule against fee-shifting as "the trio of legal rules that support and sustain entrepreneurial litigation in the U.S.").

countries had established some type of class action.[5] By August 2017, an additional 14 countries had followed suit.[6]

Despite these advances, class action procedures abroad often fall short of the American model in critical respects, usually by design.[7] Common departures from the American class action include:

1. Authorizing class actions for only certain types of substantive claims, such as securities, consumer or antitrust claims;
2. Requiring class members to affirmatively opt-in to class actions;
3. Permitting only classwide settlements instead of classwide judgments on the merits;
4. Strictly limiting who can serve as a representative plaintiff;
5. Restraining or prohibiting the use of contingent legal fees by plaintiff's counsel; and
6. Retaining "loser pays" rules that provide for the prevailing party to claim its costs or legal fees from its adversary.

These and other restrictions on class action procedures will be discussed in a survey of 11 jurisdictions in Section II below.

Setting aside the merits of these departures from the American model, navigating the varying class procedures is a daunting task for any institutional investor. Section III provides guidance on this process, including the following topics: (1) selecting the best jurisdiction(s) for pursuing recovery; (2) evaluating and managing the risks associated with cost-shifting rules; (3) deciding whether and how to proceed with group or individual litigation; (4) using third-party litigation funders; and (5) retaining counsel for foreign litigation.

Finally, Section IV discusses five recent case studies of complex international securities litigation. These case studies include the shareholder litigations against (1) the Scottish Royal Bank of Scotland, (2) the Japanese Olympus Corporation, (3) the French Vivendi S.A., and (4) the Brazilian Petróleo Brasileiro S.A.

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[5] Deborah R. Hensler, *The Future of Mass Litigation*, 79 Geo. Wash. L. Rev. 306, 307 (2011). Professor Hensler also noted five other countries that had adopted group proceedings and three countries where the status of class and group procedures was under debate.

[6] Deborah R. Hensler, *From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally*, 65 U. Kan. L. Review 965, 966 (2017).

[7] *See* John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 U. P. L. Rev. 1895, 1899–1900 (2017) ("Much the rest of the world remains skeptical of American-style 'entrepreneurial litigation' . . . . [T]he opt-out class action, the contingent fee, and the 'American rule' under which each side bears its own legal expenses" "remain conspicuous by their absence."); Deborah R. Hensler, *From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally*, 65 U. Kan. L. Review 965, 978 (2017) ("As a result of legal financing regimes, the prospects for class actions in many jurisdictions seem grim, however friendly to claimants the class action procedures themselves may appear.").

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B. Discovery Abroad

1. Discovery in the U.S. Compared to Foreign Legal Systems

The availability and breadth of pretrial discovery in other countries is not as ample as it is within the U.S., whether due to a different legal system (*i.e.,* civil vs. common law), a stronger interest in privacy considerations, or various other factors. For an aggrieved investor seeking recourse, there is obvious appeal in bringing suit in a U.S. court. "No nation in the world allows pretrial discovery in the same manner as the U.S. Indeed, most foreign countries have an innate hostility towards the entire concept of pretrial exchange of documents and taking depositions."[8] A potential plaintiff may wish to take advantage of the "U.S. national interest in protecting plaintiffs' rights and preserving broad-based discovery,"[9] which "is unique in the world in its breadth and level of intrusiveness."[10]

Given the difficulty in obtaining discovery overseas in foreign litigation (as explained more fully in the country-specific sections to follow), many securities investors chose in the past to file suit in the U.S. However, the ability of a party whose claim has little or no connection to the U.S. to avail itself of the country's courts was restricted by *Morrison,*[11] in which the Supreme Court "determined the federal court system would no longer be host to essentially foreign disputes,"[12] and that the U.S. securities law under which the petitioner brought suit did not apply to "transactions conducted upon foreign exchanges and markets."[13] That is, the Court's decision is that U.S. jurisdiction should be applied only to purchases and sales of securities that took place in the U.S.

Though *Morrison* may now hamper an aggrieved investor's ability bring its securities claim in U.S. courts, it is still possible for a party to file suit in an overseas court while also making use of U.S. law to obtain document discovery in the U.S. This option is provided by Title 28, United States Code, Section 1782, titled "Assistance to foreign and international tribunals and to litigants before such tribunals."[14]

2. Obtaining Materials in the U.S. for Proceedings Abroad Using Section 1782

28 U.S.C. § 1782, or "Section 1782," allows a party to apply for an order to take discovery for use in foreign proceedings. Section 1782(a) provides that:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international

[8] Michael M. Baylson, *Cross-Border Discovery at a Crossroads*, Judicature, Vol. 100 No. 4 (Winter 2016), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/judicature/judicature-100.4-baylson.pdf.

[9] Vivian Grosswald Curran, *U.S. Discovery in a Transnational and Digital Age and the Increasing Need for Comparative Analysis*, Akron Law Review: Vol. 51: Iss. 3, Article 9, at 867. http://ideaexchange.uakron.edu/akronlawreview/vol51/iss3/9.

[10] *Id*. at 860.

[11] *Morrison*, 561 U.S. 247, 130 S. Ct. 2869 (2010).

[12] Carol Zacharias, *Class Action Goes Global*, Leader's Edge Magazine (September 2016), https://leadersedgemagazine.com/articles/%202016/08/class-action-goes-global.

[13] *Morrison* at 263.

[14] 28 U.S.C.A. § 1782 (West).

> tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.[15]

"The US statutory procedure known as 'section 1782' can allow a litigant in non-US proceedings to obtain what is tantamount to full US-style discovery from a US based entity, for use in the foreign proceedings. This can be particularly valuable to litigants in jurisdictions that have limited procedures for disclosure of evidence, such as many civil law countries. However, it can also be a useful weapon in the armoury [sic] of litigants in other jurisdictions. This is particularly the case in relation to obtaining evidence from third parties, but also potentially to obtain from an opponent evidence not as readily obtainable (or not at a particular time) under the domestic jurisdiction's own disclosure procedures."[16]

Section 1782 is driven by "U.S. courts' preference for discovery under the Federal Rules, [which] reflects their deep respect for the plaintiff's right to access discovery. Discovery has gained the stature of a constitutional or quasi-constitutional right. A strong interest of the United States is the vindication of U.S. plaintiffs' rights and providing a forum to adjudicate their claims. Under § 1782, U.S. courts have also in general shown a great inclination to honor the petitions for U.S.-style discovery, only here the petitioners are not U.S. parties, but foreign litigants, courts, and other interested persons, and the information they request is for use in foreign litigation occurring in another nation."[17] "Section 1782 is designed to allow U.S. courts to provide assistance in foreign litigation. In these cases, a U.S. court in its discretion is agreeing to assist a foreigner in obtaining information that will be produced within the U.S. court's jurisdiction, and to do this despite the fact that the information sought would generally not be discoverable in the foreign forum in which the litigation is taking place."[18] Section 1782 discovery demonstrates how "U.S. law's commitment to wide discovery as a fundamental right of litigants" extends even to litigation that takes place beyond its borders.[19]

Section 1782 Case Law and Trends. The U.S. Supreme Court ruled on the use of Section 1782 in *Intel Corp. v. Advanced Micro Devices, Inc.*[20] The Court articulated four non-exclusive discretionary factors for a district court to consider in its decision on whether to grant Section 1782 discovery once the statute's requirements are met:

1. Whether "the person from whom discovery is sought is a participant in the foreign proceeding," in which event "the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad";
2. "The nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance";
3. "Whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and
4. Whether the request is "unduly intrusive or burdensome."[21]

Various cases decided since *Intel* should give an investor optimism about the likelihood of obtaining

[15] *Id.*

[16] Jan O'Neill, *Obtaining the Evidence from the United States: Section 1782 Orders*, Thomson Reuters Dispute Resolution Blog (March 16, 2017), http://disputeresolutionblog.practicallaw.com/obtaining-the-evidence-from-the-united-states-section-1782-orders/.

[17] Curran at 872.

[18] *Id.* at 872-73.

[19] *Id.* at 869.

[20] *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

[21] *Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 244 (2d Cir. 2018), quoting *Intel*.

discovery under Section 1782 once its statutory requirements are met. Courts have generally declined to apply any additional restrictions on the availability of Section 1782 discovery beyond those expressly stated in its text. The court in *In re: Accent Delight International, Ltd.*[22] stated that it "declined to read into Section 1782 categorical restrictions that lack textual support when district courts in their discretionary review adequately can address the concerns raised."[23] In addition, the *Accent Delight* court allowed that the discovery could be used in proceedings in a country other than the one for which it was initially granted, holding that "[s]ection 1782 does not prevent an applicant who lawfully has obtained discovery under the statute with respect to one foreign proceeding from using the discovery elsewhere unless the district court orders otherwise."[24]

In the wake of the *Accent Delight* decision, an American Bar Association publication commented that, "[l]itigants now have an enhanced resource to obtain discovery for foreign litigation. The federal statute allowing U.S. discovery for use in a foreign legal proceeding is not limited by the nature of relief sought in that proceeding and does not require limiting the use of such discovery to a specific foreign action."[25]

Another recent case, *U.S. v. Microsoft Corp.,*[26] while not dealing with a Section 1782 discovery request, indicates that documents need not be physically present in the U.S. or in the possession of a U.S. custodian to be considered discoverable, further expanding the universe of documents that might be made available to an aggrieved investor involved in overseas securities litigation. *Microsoft* indicated "an extraterritorial reach [which] potentially allows section 1782 to be used as a route to access documents held outside the U.S. by a non-U.S. company, on the basis of the company's affiliation with a U.S.-based company. This is provided that it can be established that the relationship was sufficiently close that the U.S. company had the requisite degree of control over the documents (under the normal control test applied in US domestic discovery)."[27]

A recent Second Circuit Court of Appeals case, *Kiobel by Samkalden* v. *Cravath, Swaine & Moore LLP,*[28] on first glance may seem to signal a move towards a more restrictive attitude on granting Section 1782 discovery. However, *Kiobel* involves a request for client documents within a law firm's possession,[29]and thus presents the added issue of attorney-client confidentiality. The Second Circuit found that the district court had abused its discretion in granting the petition for discovery because, among other factors, the requested documents were in the hands of counsel in the U.S. for the very purpose of obtaining legal advice.[30] In this particular case, the interest in protecting full and frank communications between attorneys and their clients was a consideration that worked against the granting of discovery.

[22] *In re Accent Delight Int'l Ltd.*, 869 F.3d 121 (2d Cir. 2017).

[23] *Id.* at 134.

[24] *Id.* at 135.

[25] Andrew J. Kennedy, *Court Expands Use of U.S. Discovery for Foreign Proceedings*, (March 8, 2018), https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2018/court-expands-use-us-discovery-foreign-proceedings/.

[26] *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018).

[27] O'Neill, *supra* note 16.

[28] *Kiobel v. Cravath, Swaine & Moore LLP*, 895 F.3d 238 (2d Cir. 2018), cert. denied sub nom. Kiobel ex rel. *Samkalden v. Cravath, Swaine & Moore LLP*, 139 S. Ct. 852 (2019).

[29] *Id.* at 240.

[30] *Id.* at 241.

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C. Multiple Competing Actions

With the U.S.'s declining significance for claims based on foreign securities, the expansion of class action procedures abroad, and the increasing globalization of securities markets, multi-jurisdictional securities litigation is on the rise. This trend will likely continue, since a number of landmark European cases in recent years have paved the way with historically large settlements, including a $350 million by Shell Petroleum N.V. and a $1.3 billion settlement by Fortis N.V./S.A. (now Ageas). These and other successful cases will serve as a playbook for both investors and lawyers, and instill confidence in the efficacy of foreign legal protections.

With the U.S.'s declining significance for claims based on foreign securities, the expansion of class action procedures abroad, and the increasing globalization of securities markets, multi-jurisdictional securities litigation is on the rise.

The continued rise of multi-jurisdictional litigation is readily observable today. When massive scandals erupt concerning large multinational issuers and evidence of an issuer's fraud is clear, multiple actions are commonly filed, both in competing courts within the same country, and in different countries. Typically, these competing actions are brought by different investor groups with different counsel, sometimes with support from different litigation funders. Pending cases (as of 2019) against Volkswagen and Danske Bank in Europe are two salient examples of this trend. The causes of action may vary as well as the relevant period, the defendants (whether to include officers, directors, accountants, advisers, for example), the litigation strategy (pressing for aggressive foreign proceedings versus assigning claims to another party pending settlement) and the commercial terms proposed by the lawyers and funders.

In many ways, this phenomenon closely resembles the state of affairs prior to the enactment of the Private Securities Litigation Reform Act (PSLRA), where multiple competing actions were filed in different states with jurisdiction over the matter. The PSLRA dealt with this perceived problem by providing deadlines within which competing lawsuits must be filed, procedures for appointing a lead plaintiff and counsel, and methods of consolidating cases in a single court.

But the potential for intersecting national laws in foreign securities litigation adds a new wrinkle never before encountered in the U.S., because transnational authorities (to the extent they exist at all) often lack the sweeping powers that the federal government has over the 50 states in the U.S. Without a common framework like the PSLRA (or, in some cases, even the power to establish common rules), courts presiding over international securities cases sometimes must make creative, ad-hoc case management decisions out of necessity. This dimension of international securities litigation may always be unpredictable.

More information on the rise of multiple actions and advice for shareholders in navigating the field of options can be found in Section IIIA. Information on deciding between types of group litigation vehicles can be found in Section IIIB. And information about analyzing competing funding agreements can be found in Section IIIC. Furthermore, the case studies in Section IV shed some light on the case management procedures courts sometimes use.

II. SURVEY OF FOREIGN LAW

All case names are italicized for consistency even though local country rules may vary.

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A. Argentina

Chapter 43 of the Argentinian Constitution authorizes "[a]ny person" to file "a summary proceeding . . . against any act or omission of . . . individuals which currently or imminently may cause damage, limit, modify, or threaten rights and guarantees recognized by this Constitution, treaties or laws." This summary proceeding can seek relief regarding "any form of discrimination and about rights protecting . . . users and consumers." Argentina's consumer protection law, as amended in 2008,[31] authorizes institutional plaintiffs (*i.e.*, NGOs) to advance consumer actions. However, it is generally understood that these actions require further legislation providing more precise procedural rules. Currently, the working blueprint for collective actions (*see* Francisco Verbic, El Anteproyecto de Ley de Procesos Colectivos Impulsado por el Ministerio de Justicia, LA LEY, 2018-C, p. 1236) has been promoted by the Argentinian Ministry of Justice.

In 2009, the Argentinian Supreme Court filled this statutory gap in the landmark case of *Halabi v. Executive Power* by interpreting Chapter 43 to authorize class actions. With regards to class actions based on property rights,[32] the Court noted, in *dicta*, that a class action must be permitted when "divisible rights are affected"

[31] National Law 24.240/1993 (as amended by National Law 26.361/2008).

[32] The Argentinian Supreme Court also held that a class action could be based on collective rights like an interest in the environment. These rights are not likely to form the basis of a shareholder claim, which is more accurately described as arising from ownership of securities.

by a "single or continuous fact that causes the injury to all of them" such that "a homogenous factual cause is identifiable," and that the judiciary had the responsibility to implement Chapter 43 in spite of legislative inaction. The Court concluded that, when there "is a factual and normative homogeneity" it can be "reasonable" to have "a single trial with expansive effects of res judicata" as to liability, even when damages must be individually decided.[33]

Halabi described at least three elements that must be satisfied for a class action based on similarly affected property rights:

1. First, a "single or complex event" must "cause[] an injury to a relevant plurality of individual rights. [34]
2. Second, "the claim must be concentrated on common effects."[35]
3. Third, "the individual interest considered in isolation [must] not justify the promotion of a claim." With respect to this element, the Court noted that exception should be made when public policies concerning "the environment, consumption or health take precedence" or when class members are "weakly protected."[36]

In defining the contours of class action procedures, the Supreme Court referred to "analogous characteristics and effects" to class actions "existing in American law."[37]

In later cases and decrees, the Supreme Court reaffirmed these requirements and expanded upon them to also require the representative plaintiff to:

1. Identify the proposed class;
2. Demonstrate the adequacy of representation; and
3. Inform the court of other class action suits that substantially resemble the proposed class action.[38]

New lawsuits that are deemed substantially similar to a pending class action can be prevented,[39] although, per *Halabi*, intervention in a pending similar class action should be possible. In effect, this procedure is analogous to court-ordered consolidation of related cases. Because there are no formal rules for selecting competing plaintiffs or counsel seeking to represent the same class, the presiding court presumptively has discretion to address any conflicts between the filing plaintiff and intervenors.

In Argentina, injured individuals are not the only parties that can file class action suits. Consumer organizations (or NGOs) or individuals can file class action suits related to financial matters (against, *inter alia*, banks, saving and loan entities and insurance companies.)[40] Chapter 43 of the Argentinian Constitution expressly authorizes non-governmental organizations with a germane mission (such as a consumer association) and the Argentinian Ombudsman (akin to an official public advocate) to bring the same type of lawsuit.

[33] Halabi Ernesto c/ Poder Ejecutivo Nacional, 1536/04, at ¶12, 24/02/09.

[34] *Id.* at ¶13.

[35] *Id.*

[36] *Id.*

[37] *Id.* at ¶19.

[38] Decree 12/2016. Prior to this decree, the Supreme Court issued a regulation establishing a public registry of class actions to aid in the identification of similar class action. *See* Decree 32/2014. In 2016, the Argentinian Supreme Court also enacted the Collective Process Rules (http://cij.gov.ar/nota-20757-La-Corte-Suprema-aprob--un-reglamento-de-actuaci-n-en-procesos-colectivos.html), that complements *Halabi*.

[39] Francisco Verbic, *A 10 años de Halabi*, Palabras del Derecho (Feb. 24, 2019), *available at* http://www.palabrasdelderecho.com.ar/articulo.php?id=429.

[40] *See* "Unión de Usuarios y Consumidores y otro v. Cordial Compañía Financiera S.A.," 9/13/18, La Ley 2018-F, p. 42; "Asociación por la Defensa de Usuarios y Consumidores v. Banco Comafi S.A.," 06/15/18, La Ley Online, AR/JUR29594/2018; "Consumidores Financieros Asociación Civil para su Defensa v. Banco de la Provincia de Buenos Aires," 06/08/17, AR/JUR/47283/2017; "Prevención, Asesoramiento y Defensa del Consumidor v. BBVA Banco Francés S.A.," 06/16/2015, AR/JUR/24255/15; "Consumidores Libres Coop. Ltda v. Bank Boston S.A.," 05/05/2015, La Ley 2015-C, p. 635; "Adecua v. Banco Privado de Inversiones S.A.," 09/29/14, AR/JUR/36597/14; "Asociación ADUC v. Banco de Galicia," 06/03/14, La Ley 2014-E, p. 463.

Once a class action is deemed appropriate, "adequate notification" to absent class members must be provided "in order to assure them both the option of opting out of the lawsuit and to appear in it as a party or counterpart."[41] Classwide settlements in the securities context would likely be governed by Article 54 of Argentina's Law of Consumer Protection, which requires the parties to obtain approval from the Public Prosecutor's Office and for class members to be permitted to opt-out of a settlement.

Based on the above, the general ability to bring a class action in Argentina is clearly established at this point. It is less clear whether or how an institutional investor could bring a securities class action, and Argentinian counsel is not aware of one having been brought. The first threshold issue is whether an institutional investor would properly be considered a "consumer or user" under Chapter 43 of the Constitution. Although debatable, it seems likely that institutional investors would be considered "consumers," since one of Argentina's key investor protection decrees, Executive Decree 677/2001, was enacted under the Government's constitutional authority to protect the rights of "consumers and users of goods and services." This Decree refers to investors in its preamble as "financial consumers," and prohibits issuers, officers, and directs from manipulating the price of securities.[42]

Another threshold issue is whether an institutional investor's damages would "justify promotion of the claim" without a class action.[43] It is possible that an Argentinian court would hold that losses worth hundreds of thousands of dollars (or more) would justify filing suit as an individual. If so, the investor would have to persuade a court that a policy exception applies.

Assuming these hurdles could be overcome, Argentina does not have any rules preventing lawyers from charging a contingency fee or using a litigation funder. In this sense, it closely resembles the U.S.

Discovery is the only area where the Argentinian class action appears to fall meaningfully short of its American counterpart. In Argentina, there is no formal discovery. Obtaining documents from the opposing party requires moving the court and persuading the judge that information in the defendant's possession is truly indispensable. That said, if the defendant does not produce the documents allegedly in its possession, its denial may be adjudged against it (if other documents give some indication about its existence and content).[44] The documents sought must be described with specificity, and general categories of relevant documents usually cannot be obtained.[45]

[41] *Halabi*, *supra* note 33, ¶ 20.

[42] Executive Decree 677/2001, Article 34.

[43] *Halabi*, *supra* note 33, ¶ 13.

[44] Article 388 Code of Civil and Commercial Procedure.

[45] *See* Gastón Dell'Oca & Federico Sánchez Cortina, *Class Actions*, Getting the Deal Through (December 2018), *available at* https://gettingthedealthrough.com/area/82/jurisdiction/4/class-actions-argentina/.

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B. Australia

1. Overview

Perhaps no other jurisdiction has experienced change to the class action regime as rapidly as Australia. Class actions have existed in the Federal Court of Australia for about 27 years, since March 1992. Australia was one of the first countries outside of the United States to introduce a class action regime, through the enactment of Section IVA ("Representative Proceeding Act" or the "Act") of the Federal Court of Australia Act 1976 (Cth), on March 4, 1992. In 27 years of allowing class actions, the number of cases filed each year has grown and the operation of class actions has evolved rapidly.

Given the size and strength of Australia's capital markets and the fact that the ASX is ranked among the top five exchanges globally,[46] it is not likely that investors will witness a decline in Australian shareholder class actions anytime soon.

2. Basics of Filing a Claim and Litigation

A proceeding under the Representative Proceeding Act may be commenced where: (a) seven or more persons have claims against the same person; (b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and (c) the claims of all those persons give rise to a substantial common issue of law or fact.[47]

Perhaps no other jurisdiction has experienced change to the class action regime as rapidly as Australia.

[46] ASX, *Corporate Overview*, available at https://www.asx.com.au/about/corporate-overview.htm.

[47] The Act Part IVA. Sec. 33C, http://www.austlii.edu.au/au/legis/cth/consol_act/fcoaa1976249/s33c.html.

The Act states that it is irrelevant: (a) whether or not the relief sought: (i) is, or includes, equitable relief; or (ii) consists of, or includes, damages; or (iii) includes claims for damages that would require individual assessment; or (iv) is the same for each person represented; and (b) whether or not the proceeding: (i) is concerned with separate contracts or transactions between the respondent in the proceeding and individual group members; or (ii) involves separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.[48]

Unlike the U.S. system, no initial class certification filing is required in Australia. Specifically, the burden is placed on the respondent to show that it is not appropriate for the claims of the plaintiffs to be pursued by way of the class action[49]. It is unlikely that Australia will adopt a certification procedure anytime soon. The Australian Law Reform Commission specifically investigated the utility of such a procedure and found it lacking. As a result, it recommended that the current procedure for class actions remain the same with no formal certification process implemented.[50] The counterbalancing factor to the absence of initial class briefing in Australia is the presence of a "loser pays" cost rule.[51] Another difference is that, although Rule 23(b)(3) of the U.S. Federal Rules of Civil Procedure requires that the issues common to the class must "predominate" over the individual issues, the Australian statute requires only that there exists a "substantial common issue of law or fact."[52]

To start the process, an application commencing a representative proceeding, or a document filed in support of such an application, must, in addition to any other information required to be included: (a) describe or otherwise identify the group members to whom the proceeding relates; (b) specify the nature of the claims made on behalf of the group members and the relief claimed; and (c) specify the questions of law or fact common to the claims of the group members. In describing or otherwise identifying group members for the purposes of application, it is not necessary to name or specify the number of the group members.[53] A group member may file an application to substitute another member as a representative party upon a showing that the current representative is not able to adequately represent the interest of the group members.[54] Trials are without a jury unless the Court orders otherwise.[55]

Over the past several years, there has been an increase in competition among law firms and litigation funders to prosecute class actions. Unlike in the U.S., there is no standard formal process for dealing with competing actions concerning the same subject matter nor is there a formal equivalent of the U.S. lead plaintiff motion. As a result, Australian courts have adopted a number of different approaches for dealing with competing class actions and the established law leaves Australian judges with ultimate discretion for managing the cases before them:

1. Competing law firm/funder groups may reach an agreement amongst themselves regarding joint case management.
2. The court may order the competing groups to form a litigation committee and jointly run the proceedings.[56]
3. The court may mandate that all actions proceed

[48] *Id.*

[49] Australian Government Submission to SEC, February 18, 2011, at 10; *see also* Act, Part IVA, Sec 33N http://www.austlii.edu.au/au/legis/cth/consol_act/fcoaa1976249/s33n.html.

[50] Australian Law Reform Commission Final Report on Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, ALRC Report No. 134, December 2018, p. 101-102, https://www.alrc.gov.au/sites/default/files/alrc_report_134_webaccess_2.pdf.

[51] Act, Sec 43 http://www.austlii.edu.au/au/legis/cth/consol_act/fcoaa1976249/s43.html.

[52] *Id.*

[53] Act, Sec. 33H, http://www.austlii.edu.au/au/legis/cth/consol_act/fcoaa1976249/s33h.html.

[54] Act, Sec. 33T, http://www.austlii.edu.au/au/legis/cth/consol_act/fcoaa1976249/s33t.html.

[55] Act, Sec 39, http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fcoaa1976249/s39.html.

[56] *See, e.g.*, Centro Properties Limited cases: *Kirby v Centro Properties Ltd.* (No 6) [2012] FCA 650; *Richard Kirby v Centro Retail Ltd.*: VID327/2008 (2010); *Nicholas Stott v PWC: VID1028/2010 Vlachos v Centro Properties Ltd.*: VID366/2008 (2010); *Vlachos v PWC*: VID1041/2010.

on a closed class or opt-in basis (i.e. only on behalf of specific group members who signed funding agreements).

4. The court may dismiss one or more of the cases in favor of one or more of the competing actions.
5. The court may stay one or more cases pending the outcome of one or more competing actions.
6. The court may order one case to proceed on an open class or opt-out basis and order any of the other actions to proceed on a closed class basis.[57] This would be similar to a situation in the U.S. in which you have the class action and one or more opt-outs on behalf of smaller groups of investors.
7. The court may conduct a "beauty parade" or carriage motion and select one of the law firms and representative plaintiffs to prosecute the action on behalf of all class members. The court would then subsequently stay or dismiss the competing groups.[58]

3. Funding the Litigation- Third Party Litigation Funding

Australia prohibits attorneys from remuneration through damages-based contingency fees, though it permits "no-win, no-fee" arrangements, and in some jurisdictions permits a success fee or "uplift" on professional fees of up to 25%.[59] "No-win, no-fee" arrangements require that the attorneys still keep track of their time and assess what their normal earnings would be, but they then only collect those fees if the litigation is successful. The attorneys cannot obtain any additional compensation for the risk they incurred aside from the potential "uplift" fees (which entitles them to up to an additional 25% of their normal hourly billings). "No-win, no-fee" and "uplift" arrangements do not allow the attorneys to advance any other litigation expenses on behalf of the clients. The expense of prosecuting a class action and the risk of adverse party costs (or the need to obtain after-the-event ("ATE") insurance) means that as a matter of practice, it is rare for attorneys to accept cases on a "no-win, no-fee" arrangement. Instead, class actions are typically prosecuted with the use of third-party litigation funding. It is not uncommon, however, to see arrangements where the litigation funder is only responsible for paying a percentage of the law firm's hourly fees (e.g., 60 – 75%) and for the law firm to only be paid the remainder of their hourly fees if the litigation is successful plus a 25% success fee on the portion of fees that were deferred.

As in the U.S., historically, litigation funding was prohibited in Australia as encouraging litigation (maintenance) and profiting from it (champerty). That began to change with laws abolishing litigation funding as a crime or as a tort in Australia's states and territories. In 1995, insolvency practitioners were allowed to contract for the funding of lawsuits, if the contract was characterized as property of the insolvent company--such as actions by the insolvent company against former officers and directors. The funder paid the costs of litigation (which included attorneys' fees) and accepted the risk of paying the defendants' costs in the event of a loss and indemnified the plaintiff for the same.

In *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd.,*[60] Australia's highest court considered the legality of litigation funding for the first time. The High Court held that litigation funding was not an abuse of process or contrary to public policy-- existing doctrines of abuse of process and the courts' ability to protect their processes would be sufficient to deal with a funder conducting themselves in a manner inimical to the due administration of justice. The Court did not decide the position for those states where legislation had not abolished maintenance and champerty as crimes and torts (e.g.,Western Australia, Queensland, Tasmania and the Northern Territory).

[57] *See, e.g.*, McKay Super Solutions Pty Limited (As Trustee for the *McKay Super Solutions Funds v. Bellamy's Australia Limited*).

[58] *See*, *e.g.*, *Perera v. GetSwift Limited* [2018] FCAFC 202; *Impiombato v. BHP Billiton Limited* [2018] FCA 2045.

[59] "The Push To Reform Class Action Procedure In Australia: Evolution or Revolution?" Melbourne University Law Review, Vol. 32 No. 3, December 2008.

[60] *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd*., (2006) 229 CLR 386.

4. Opt-In vs. Opt-Out

Technically, affirmative action at the inception of a case is not required to be a group member in a representative proceeding. All class actions in Australia are in principle "open class" or "opt-out" class actions. A member may opt-out by written notice by a date fixed by the Court. Except with leave of the Court, the hearing of the representative proceeding may not be commenced before that date. Until recently, due, in part, to the "loser pays" rule and the lack of contingent fees, most cases historically proceeded on a "closed class" basis and have required an "opt-in." Would-be class members were required to enter into a funding arrangement with commercial litigation funders before the action is filed.

The closed model, opt-in, class action developed as a way to address the concern that the class action regime as an "opt-out" process would inevitably result in "free riders," i.e. claimants who chose not to sign a funding agreement but who would benefit from the outcome of the class action without having to contribute towards its cost. In *Multiplex Funds Management Ltd v. P. Dawson Nominees Pty. Ltd.*,[61] the Full Federal Court of Australia rejected respondents' attack on the "closed class" and permitted the use of a "limited group" or "closed class" that existed at the time the suit was commenced and provided that members could opt-out. The "sub-group" would be identified as those who entered into the funding agreement.

Recently, the Australian courts have begun to implement various procedural mechanisms that allow more class actions to proceed on an "open class" basis while eliminating the free rider problem. For example, the Australian courts have implemented "common fund" or "cost equalization" orders. Common fund orders are a mechanism that require all class members, regardless of whether they have executed a litigation funding agreement, to contribute equally to the costs of prosecuting an action (and assuming any adverse party cost risk).[62] In a funded class action, the result is that all class members are usually subject to the same funding fee percentage. The reimbursement of costs to the funder and the funding fee percentage are deducted first before proceeds are distributed to all registered class members. Beginning with a court order in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited*[63] (Money Max), the court approved an application by a third-party litigation funder to charge a lower funding commission to the whole class and not just those who signed a funding agreement. In the order, the *Money Max* court noted:

> The proposed orders have the additional benefit that they will enhance access to justice by encouraging open class representative proceedings. If litigation funders are permitted to charge a commercially realistic but reasonable percentage funding commission to the whole class, it is less likely that funders will seek to bring class actions limited to those persons who have signed a funding agreement.[64]

A number of courts have followed suit and expressly recognized that the Australian courts have the inherent discretion to implement common fund orders in the interest of justice.[65] And in its 2018 Report on Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, the Australia Law Reform Commission proposed statutory reforms that would expressly provide for the use of common fund orders in class actions.[66]

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[61] *Multiplex Funds Management Ltd v. P. Dawson Nominees Pty Ltd.,* (2007) 164 FCR 275.

[62] Australian Law Reform Commission Final Report on Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, ALRC Report No. 134, December 2018, p. 96, https://www.alrc.gov.au/sites/default/files/alrc_report_134_webaccess_2.pdf.

[63] *Money Max Int Pty Ltd. (Trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191.

[64] *Id.* at 205.

[65] Australian Law Reform Commission Final Report on Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, ALRC Report No. 134, December 2018, p. 97, https://www.alrc.gov.au/sites/default/files/alrc_report_134_webaccess_2.pdf.

[66] *Id.*

As an alternative to a common fund order, the claimants may seek and the court may grant a "funding equalization order." In a "funding equalization order," the court takes steps to equalize the amount of recovery that funded and unfunded group members receive by taking into account the amount that funded class members must pay for costs and commission to the litigation funder. This mechanism, unlike the common fund order, essentially results in a lower effective funding fee percentage.

The result of courts adopting these two mechanisms is that over the past few years, more and more class actions have been commenced on an open class basis and shareholders more frequently have the option of signing a funding agreement at the inception of litigation or waiting until a later stage when the court issues a "class closure"[67] order and sets a deadline by which class members must register their interest in participating in a given case. Registration as part of the class closure notice is similar to filing a claim in U.S. class actions except that the timing for registration in Australia typically occurs prior to any settlement or judgment.

5. Loser Pays Model

Australia is a "loser pays" jurisdiction. In the class action context, the representative party, who brings the action, has the formal responsibility for running the case and for complying with any orders made by the court and is liable for any costs awarded in favor of the class action defendant. Costs may not be awarded against absent group members.[68] Potential adverse cost liability is often guarded against with the use of ATE insurance. ATE insurance is often obtained after litigation has commenced and is designed to cover any liability to pay adverse party costs if litigation is unsuccessful.[69] A third party funder typically covers the cost of ATE insurance premiums (and other costs) upfront and then seeks to recoup those costs if the litigation resolves in the class' favor. In closed class actions, the group members who sign a litigation funding agreement agree, if the litigation is successful, to each pay a pro rata percentage of the costs associated with ATE insurance premiums (and other costs) out of any recovery they receive. With the use of common fund orders and cost equalization orders, absent class members now indirectly share in the cost of obtaining ATE insurance because the insurance premiums are one of the expenses paid from any recovery before the proceeds are distributed to all eligible class members.

A defendant may seek a court order for security for adverse costs. Such an order is not granted to defendants as a matter of course but is instead in the discretion of the court.[70] In order to make a successful application for security for costs, a defendant must demonstrate a reasonable basis for believing that the representative plaintiff will not have the ability to pay if they do not prevail in the litigation and make arguments to the court why it should exercise its discretion.[71] If the defendant's application is granted, it must provide periodic estimates to the court of the costs it incurred and is likely to incur going forward in defending the litigation.[72] Plaintiffs who fail to comply with any order to provide security for costs risk having their lawsuit stayed or dismissed.[73] Proof that plaintiffs have obtained ATE insurance can be considered adequate cover for adverse cost risk.

6. Fraud on The Market Theory

There is no statutory presumption of reliance under Australian law. There is some limited case precedent that suggests a willingness by Australian courts to accept theories of indirect causation. For example, a decision of

[67] The "class closure" mechanism developed as a way for courts to encourage settlement between the parties. Once the court issues a class closure notice and requires registration, the claimants and defendants know how many investors are seeking to participate in a case and the size of the group's damages. Settlement negotiations can thus be tailored to reflect only those investors who registered as opposed to including other investors who have not appeared.

[68] Act, Sec. 43(1A), http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/fcoaa1976249/s43.html.

[69] Australian Law Reform Commission Final Report on Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, ALRC Report No. 134, December 2018, p. 27, https://www.alrc.gov.au/sites/default/files/alrc_report_134_webaccess_2.pdf.

[70] *Id.* at 159.

[71] *Id.* at 159 – 160.

[72] *Id.*

[73] *Id.*

a single judge on the New South Wales Supreme Court involving HIH Insurance Limited,[74] held that the principle of "indirect causation" or "market-based causation," which is similar to the fraud on the market theory, applies to the proof of causation in shareholder claims. In the HIH Insurance case, the shareholder plaintiffs admitted that they had never seen any of the misleading documents issued by the company. HIH Insurance was in liquidation and the liquidators rejected the proofs of claim submitted by the plaintiffs on the basis of that admission. The plaintiffs appealed the rejection and argued that although they did not directly rely on HIH Insurance's misrepresentations, the misrepresentations artificially inflated the market price of the shares and that the shareholders had therefore purchased at an inflated price. The court agreed with the shareholders' position and reasoned that an investor is induced to purchase shares based on the state of the market and that an investor should be able to, "reasonably assume that the market reflects an informed appreciation of a company's position and prospects, based on proper disclosure." It is therefore not necessary for a shareholder to have direct reliance on a company's actions. Instead it is enough that a shareholder made a purchase at what was considered market value if the shareholder also did not have reason to believe that market value was wrong. This is the first trial court decision on the merits to accept market-based causation in a shareholder suit. Although the HIH Insurance case dealt with liquidation proceedings and not shareholder class action, its holding has potentially broad application. Similarly, the Full Federal Court of Australia also considered 'indirect causation' in a strike-out context (i.e., similar to motion to dismiss proceedings) in the *Caason Investments Pty Ltd. v. Cao*[75] case. There the Court held that indirect causation can be pleaded in shareholder actions.

The court's acceptance of market-based causation in the *HIH Insurance* and *Caason Investments Pty Ltd.* cases may have important consequences. Some in the Australian legal community predict that plaintiffs will be more likely to demand larger settlements, or will push their cases farther to trial, rather than settling at a discount in recognition of the risks of proving individual reliance.[76] The holding in HIH Insurance, however, could be tested later by appellate courts. Until the appellate courts weigh in on the issue, uncertainty as to the application of indirect causation to shareholder suits will remain.

7. Quantification of Damages

Like issues of causation and reliance, the proper approach to quantifying damages has been an area of uncertainty for class action litigators in Australia. Plaintiffs have generally employed several damages models, given that they do not know which one the court will ultimately accept. Most damage models are different ways of assessing the inflation on the market price of the shares given the defendant's alleged conduct. Three main models include: (1) the "what's left in the hand" approach, which compares the share purchase price to the market price on a particular date (if the shares are held) or to the sale price (if sold), but any factors that may have affected the share price beyond the unlawful conduct are ignored; (2) the difference between the purchase price and the price that would have been paid had the defendant's conduct not occurred; and (3) the difference between the purchase price and the true value of the shares.

8. Causes of Action in Securities Litigation

Most securities class actions in Australia are heard by the Federal Court of Australia, which has jurisdiction over matters concerning Commonwealth legislation, including legislation that serves as the basis for most securities class action claims. Such actions typically arise out of the Corporations Act 2001 (Cth), the Competition and Consumer Act 2010 (Cth) (which, prior to January 2011, was the Trade Practices Act 1974 (Cth)), and/or the Australian Securities and Investments Commission Act ("ASIC Act") 2001 (Cth), all of which provide specific legislative mechanisms to enable aggrieved shareholders to seek redress arising from corporate misconduct.[77]

[74] *Re HIH Insurance Limited (in liquidation)* [2016] NSWSC 482.

[75] *See, e.g.*, *Caason Investments Pty Ltd. v. Cao* [2015] FCAFC 94.

[76] *See* Mariana Papadakis, HIH court decision means companies face more risks in shareholder actions, The Australian Financial Review, Apr. 21, 2016, at http://www.afr.com/business/legal/hih-court-decision-means-companies-face-more-risks-in-shareholder-actions-20160421-gobs9r.

[77] *Corporations Act* 2001 (Cth), § 674 (continuous disclosure),

Shareholders have standing under both the Corporations Act and the ASIC Act to bring private actions and seek compensation. These actions can be either derivative actions, seeking compensation for the benefit of a given company, or direct compensation actions, seeking compensation for aggrieved shareholders. More specifically, shareholders can bring claims alleging that respondent company violated its continuous disclosure obligations or that it engaged in misleading or deceptive conduct. Civil actions under the Corporations Act and the ASIC Act can be brought in a federal court or the courts of an Australian state or territory having jurisdiction over the defendant(s). Appellate review is available in each jurisdiction.

Chapter 7.10 of the Corporations Act contains prohibitions relating to insider trading, market manipulations, and various other types of fraudulent and misleading conduct. Prohibited conduct includes: (i) market manipulation (s.1041A); (ii) false trading and market rigging (creating a false or misleading appearance of active trading) (s.1041B); (iii) artificially maintaining trading price (s.1041C); (iv) dissemination of information about illegal transactions (s.1041D); (v) false or misleading statements (s.1041E); (vi) inducing persons to deal (s.1041F); (vii) dishonest conduct (s.1042G); and (viii) misleading or deceptive conduct (s.1041H). With the exception of misleading or deceptive conduct (s.1041H), for which there is civil liability only, these types of conduct are all criminal offenses and breaches are subject to both criminal prosecutions and civil actions. The Corporations Act also provides statutory backing for the continuous disclosure requirements imposed on listed entities by securities markets (s.674) and enables courts to order compensation in relation to breaches (s.1317HA).[78]

§1041H (misleading conduct); *Australian Securities and Investments Commission Act* 2001 (Cth), §12(DA)(misleading conduct); *Trade Practices Act* 1976 (Cth) § 52 (misleading conduct); *Competition and Consumer Act* 2010 (Cth); and Australian Consumer Law § 18 (misleading conduct).

[78] Brief of the Government of The Commonwealth of Australia as Amicus Curiae in Support of the Defendant-Appellees attached to Australian Government Submission to the SEC, February 18, 2011 at 9-10. http://www.sec.gov/comments/4-617/4617-34.pdf.

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C. Brazil

Brazil is the largest securities market in Latin America but until recently minority shareholders have rarely pursued actions against an issuing company to recover investment losses. There are many reasons for this, including the perceived difficulty of pursuing litigation in Brazil and the potential for high adverse costs liability. However, the increasingly available and utilized arbitration system promoted by Brazil's stock exchange and other Brazilian regulatory bodies is making it easier for investors to pursue a remedy. Brazil's Ministry of Finance and the Comissão de Valores Mobiliários ("CVM"), which is the regulatory body responsible for overseeing securities and exchanges, recently launched a joint project aimed at improving and developing the mechanisms within Brazil that allow shareholders to seek private enforcement of rights and remedies with respect to public companies.[79]

The Brasil Bolsa Balcão S.A. ("B3") stock exchange was established in March 2017 when the Bolsa de Valores, Mercadorias & Futuros de São Paulo ("BM&F BOVESPA") (the largest securities exchange in Latin America at the time) merged with Cetip S.A. (a provider of financial services for the organized OTC market). B3 serves as the only securities, commodities, and futures exchange in operation in Brazil, and is the leading depository for fixed-income securities in Latin America and the leading clearinghouse for private assets in Brazil.[80]

The Brazilian CVM (the securities regulator) plays an important role in shareholder disputes. The CVM has the power to issue regulations and interpretive guidance consistent with the Brazilian Securities Act and the Corporation Law. It also has the authority to start administrative proceedings and impose penalties on

[79] Workshop on Strengthening the Enforcement of Shareholders' Rights, *Issues Note*, October 2018.

[80] B3 Profile and History, http://ir.bmfbovespa.com.br/static/enu/perfil-historico.asp?idioma=enu (last visited Apr. 10, 2019).

companies that violate the laws. The practice of financial fraud price manipulation and other unfair trade practices may result in administrative, civil, or criminal sanctions, including fines of up to 50 percent of the consideration associated with the wrongdoing, or three times the economic advantage or loss derived from the illegal trading and imprisonment from one to eight years.[81] The CVM does not have the authority to seek compensation for aggrieved shareholders but it can require investor compensation as part of settlement agreements it enters into with companies facing administrative proceedings and penalties.

1. Procedural Mechanisms Available to Investors in Pursuing Group or Class Recovery Actions

The main mechanisms for shareholder recovery are private actions that operate independently of the CVM's jurisdiction. Brazilian law offers the same judicial remedies to foreign entities as to Brazilian companies and citizens, such as injunctions, declaratory actions, collection procedures, actions for damages (compensation or indemnification) and actions for exhibition, among others. Private rights to recover damages for securities fraud can be pursued via individual actions, arbitration, class actions brought by regulators or associations, and new "repetitive action" procedures.[82] While Brazil also has separate statutes permitting certain types of collective or "class" actions, they do not allow individuals to bring claims on behalf of absent class members and the class. Only some public institutions (for example the office of the attorney general, states and municipalities, or certain non-governmental associations) are allowed to commence a class action. Individuals do, however, retain the ability to file their own lawsuits including as part of a joint action with other aggrieved individuals. For example, the law on Public Interest Civil Lawsuits (Law No. 7.347.85) allows class actions on environmental protection matters, consumer goods issues, rights related to artistic, aesthetic, historical, tourism, landscaping, infringement of the economic or urban order, and certain issues involving racial, ethnic or religious bias, as well as matters related to public property. Additionally, in some limited circumstances, class lawsuits can be filed by associations of investors to pursue recovery of investment losses.[83] In these cases, to establish standing, an investor association must have existed for at least one year prior to the complaint being filed (unless a judge agrees to waive such a requirement), and the association's institutional purpose must be to protect investors. Investors must affirmatively join the association in order to be included in any action the association takes and be represented by the association. Furthermore, members of the association must expressly deliberate and consent to filing a lawsuit in order for a class action to be filed.[84]

While there have been a few instances of investor associations filing class actions to establish liability for collective losses, there is an absence of precedent for using a class action to claim compensation due to disclosure violations or publication of misleading information.[85] A class action was filed in Brazil on behalf of investors in *Petróleo Brasileiro S.A.* ("Petrobras"). Petrobras securities, however, due to the existence of a mandatory arbitration provision in Petrobras' bylaws, that action

[81] Antonio Felix de Araujo Cintra and Crisleine Barboza Yamaji, *Securities Law in Brazil*, International Securities Law Handbook Third Edition edited by Marcus Best and Jean-Luc Soulier, Kluwer Law International, pp. 101-102.

[82] Brazil's New Code of Civil Procedure 2015 ("NCPC") Law No. 13.105/15 went into effect on March 16, 2015 and created this new process for the "resolution of repetitive actions." The aim is to assure that lawsuits with the same subject matter receive identical solutions, thus providing uniformity and coherence to decisions. Judges and parties will now have to follow precedent, and parties must indicate the applicable precedents to the case at the moment of filing the lawsuit. The NCPC includes a special procedure that allows parties, judges, the public attorney, and the public defender, among others, to request the Appellate Court to judge the legal controversy in the abstract, establishing its understanding about the legal issue, then applying it to other analogous cases. This proceeding commences with the selection of one or more of the pending lawsuits which represent the issue of law requiring a unanimous decision. After this selection, all other pending lawsuits involving the same issue of law will be suspended until the judge issues a decision in the representative case.

[83] Vivane Muller Prade, *Brazil: The Protection of Minority Investors and Compensation for Their Losses,* Global Securities Litigation and Enforcement edited by Pierre-Henri Conac and Martin Gelter, Cambridge University Press 2019, p. 206.

[84] *Id.* at 206 – 207.

[85] *Id.*

could not proceed before Brazilian courts and instead investors who were part of the "class" have to pursue arbitration. At this time, it is unclear whether Brazilian law will allow an investor association to commence "class arbitration."

Unless the bylaws of a listed corporation contain provisions requiring disputes between the shareholder(s) and the company to proceed in arbitration, private investors may file lawsuits to recover any losses they have suffered based on the general civil responsibility rules contained in the Brazilian Civil Code.[86]

If the bylaws of a corporation establish that any dispute between the shareholders and the corporation or between majority and minority shareholders should be resolved by arbitration, then investors may only bring legal action against the listed corporation by commencing an arbitration before the Câmara de Arbitragem do Mercado ("Market Arbitration Chamber" or "MAC"). Companies listed on the Novo Mercado, a listing segment of the B3 for companies that commit themselves to voluntarily adopt additional corporate governance practices beyond what is required by law, are required to include arbitration provisions in their bylaws as one of the preconditions for being included in the listing segment.[87]

2. Costs of Litigation and Arbitration and the Loser Pays Model

Parties to litigation (or arbitration) are responsible for paying the legal fees for their attorneys. The Brazilian Bar association allows for contingent fees.[88] Attorneys can either charge their clients on an hourly fee, flat fee, or contingency fee, or they can agree to a fee arrangement that is some combination of the above. Parties are also responsible for paying court fees (or fees for the MAC or arbitrators in an arbitration), translations, expert fees, and other routine litigation and arbitration expenses. Additionally, parties assume the risk of adverse party costs. According to Article 85 of the NCPC, a losing party is required to pay a fee to the attorney of the prevailing party in an amount equal to ten to twenty percent of the value of the dispute.[89] While there is no avoiding adverse costs in the context of civil litigation before the Brazilian courts, the NCPC is widely considered by Brazilian lawyers and legal experts not to apply to arbitration. The Brazilian Arbitration Act ("BAA") contains no specific provision regarding adverse costs. Instead, Article 27 of the BAA provides:

The arbitral award shall decide on the parties' duties regarding costs and expenses for the arbitration, as well as on any amount resulting from bad faith conduct, if applicable, complying with the provisions of the arbitration agreement, if any.

Accordingly, the appointed arbitrators have discretion to allocate costs and fees between the parties. Arbitrators generally do not, however, provide for adverse cost awards in the amounts outlined in the NCPC. Furthermore, the parties to arbitration may also agree as part of their preliminary negotiations at the commencement of arbitration to waive any adverse cost provisions.

[86] *See* Alexei Bonamin, Antonio Felix de Araujo Cintra, Fabiola Augusta Cavalcanti, Kenneth Antunes Ferreira, Rodrigro de Campos Vieira and Cláudio Coelho de Souza Timm, *Capital Markets 2016 – Brazil,* Latin Lawyer (last verified on Mar 3, 2017), https://latinlawyer.com/jurisdiction/1002934/brazil.

[87] Market Arbitration Chamber (CAM) Participating Companies, *available at* http://www.b3.com.br/en_us/b3/qualificacao-e-governanca/market-arbitration-chamber-cam/participating-companies/.

[88] Rogério Carmona Bianco, Fábio Peixinho Gomes Corrêa, Guilherme Gomes Pereira & Mônica Naomi Murayama, *Litigation and Enforcement in Brazil: Overview,* Practical Law (as stated Sept. 1, 2018), http://uk.practicallaw.thomsonreuters.com/9-502-2479.

[89] Lei No. 13.105/15, de 16 Marco de 2015, Diário Oficial da União de 16.3.2015, http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13105.htm, at Art. 85 (the judgment shall order the losing party to pay the fees of the prevailing party's counsel): § 2 The fees shall be set at between a minimum of ten and maximum of twenty percent of the amount of the award, of the economic gain obtained or, if it cannot be measured, of the value of the claim adjusted for inflation, in accordance with: I – the attorney's degree of dedication; II – the place where the service is rendered; III – the nature and importance of the claim; and IV – the work performed by the lawyer and the time taken to perform the services.

There are no specific rules or regulations in Brazil relating to third-party funding and third-party funding is generally accepted. There is not, however, an established market for obtaining insurance to guard against the risk of adverse costs in litigation.

3. Causes of Action in Securities Litigation and Arbitration

As a starting point, Brazilian Civil Code (Art. 927) provides that anyone who causes damages to others by committing an illicit act is liable for the damages caused.[90] The liability is limited to the extent of the damages suffered (Art. 944).[91] The Brazilian Corporation Law contains a comprehensive list of duties and rules for liability for officers, board members, and shareholders. For example, corporate officers are subject to duties of diligence and loyalty to the company and they are prohibited from abusing or misusing the powers of their office. Furthermore, Brazilian Corporations Law (Art. 159, ¶ 7) provides that shareholders directly harmed by acts of officers and board members have the right of legal action against them.[92] Companies are entitled to sue managers and corporate officers and seek compensation for illegal acts. Shareholders may also pursue derivative claims against the officers. Since that dispute would be between the company (as represented by the shareholders) and the officers, it is not subject to arbitration even if the company bylaws contain arbitration provisions requiring arbitration of disputes between the company and its shareholders. This type of derivative action is rare given the tremendous adverse cost risk that a shareholder would incur.

Brazilian Corporation Law also provides that controlling shareholder may be held liable for damages caused by acts that are considered an abuse of the controlling power.[93]

There are also laws in other Brazilian statutes that provide potential causes of action for shareholders against others, like auditors. Article 26, paragraph 2, of the Brazilian Securities Act (Law 6.385/76) provides that independent auditors or auditing firms shall be subject to civil liability for any losses caused to third parties as a result of negligence or fault (scienter) in the exercise of the functions provided for in this article.[94]

Whether a company can be held liable for shareholder losses is a grey area. Some legal experts in Brazil suggest that they cannot because there are no specific provisions establishing company liability in Brazil's securities and corporate laws. Other experts argue, however, that shareholders can still bring claims under the Civil Code when there is no specific provision on the issue in the corporate or securities laws.

In the U.S. Petrobras ADR shareholder litigation, the plaintiffs identified several possible causes of action under Brazilian law, including:

1. Violations of duties owed to shareholders under Brazilian Corporate Law Article 158 (Law 6.404/76). Article 158 provides that officers and directors are civilly liable to shareholders for damages caused to the corporation by virtue of negligence or willful misconduct, even within their powers; and for actions carried out beyond their authority, that is, exceeding the powers granted to them, or contrary to the provisions of the law or the company's bylaws.
2. Violations of the CVM's Instructions No. 358/02, which regulates the duties to report material acts and facts.[95]
3. General Tort, Violation of Good Faith and Customs and Negligence. Claims based on Articles 186, 187 and 927 of the Brazilian Civil

[90] Lei No. 10.406/02, de 10 de Janeiro de 2002, Diário Oficial da União de 10.1.2002, http://www.planalto.gov.br/ccivil_03/Leis/2002/L10406.htm.

[91] *Id.*

[92] Lei No. 6.404/76, de 15 Dezembro de 1976, Diário Oficial da União de 15.12.1976, http://www.planalto.gov.br/ccivil_03/leis/L6404consol.htm, at Art. 159, ¶ 7.

[93] *See supra* note 79.

[94] Lei No. 6.385/76, de 7 de Dezembro de 1976, Diário Oficial da União de 7.12.1976, http://www.planalto.gov.br/ccivil_03/LEIS/L6385original.htm., at Art. 26, ¶ 2.

[95] *Regulations of Interest to Foreign Investors*, CVM Instructions 358 (Jan. 3, 2002), http://www.cvm.gov.br/export/sites/cvm/subportal_ingles/menu/investors/anexos/CVM-Instruction-358.pdf.

Code, which provide that anyone, by action or voluntary omission, negligence or imprudence, violates rights and causes damages to others, even though exclusively moral, commits an illicit act and has an obligation to indemnify.[96]

4. Auditor Negligence. Claims based on Brazilian Securities Act (Law 6.385/76), Article 26, provides that only audit firms or independent auditors that are registered with the CVM may audit the financial statements of publicly held corporations and institutions, companies or corporations which compose the securities distribution and intermediation system.

In that litigation, Professor Luiz Leonardo Cantidiano provided an expert opinion stating that the Brazilian Civil Code causes of action were superseded by Brazilian Corporate Law. He also opined that the Brazilian Corporate Law causes of action were infirm because Brazilian law only recognizes "effective" losses – meaning that the securities had to have been sold; his opinions were uncontested and did not cite to any authority other than his personal view of the text.[97] Other Brazilian lawyers, however, argue that shareholders can bring claims based on the Brazilian Civil Code against a corporation and that neither the Brazilian Securities Act nor the Brazilian Corporation Laws preempts such a claim. The current shareholder arbitration actions in Brazil against Petrobras should also help clarify the causes of action available to investors. Additionally Brazil's Ministry of Finance and CVM launched a joint project aimed at improving investor protection by further developing the private enforcement rights available to public companies.

[96] Lei No. 10.406/02, *supra* note 90.

[97] Expert Report of Luiz Leonardo Cantidiano, *In re Petrobras Secs. Litig.*, No. 14-cv-9662 (S.D.N.Y Aug. 21, 2015), ECF No. 198-2.

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D. Canada

1. The Canadian Provinces Recognize Opt-Out Securities Class Actions

Canada has no nationwide securities class action system akin to the federal securities laws in the United States. In Canada, matters involving securities relate to "property and civil rights within the province," and are thus governed by the legislature of each province and territory.[98] The superior courts in each province and territory have inherent and general jurisdiction to deal with securities claims for their jurisdictions.[99] Similarly, each province and territory has jurisdiction to establish procedures for class proceedings. Accordingly, each province has its own securities act enacting essentially the same statutory cause of action for misrepresentations in the secondary market.[100]

Canadian securities class actions really developed in the aftermath of a series of high-profile frauds carried out by publicly traded companies in the 1990s.[101] After these events, Ontario became the first province to adopt a new civil liability regime for secondary market purchases in its

[98] *See Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 (Can.).

[99] The Federal Court in Canada is a statutory court and its jurisdiction is limited generally by the *Federal Court Act* and other federal legislation that confers jurisdiction on that court. Generally, the Federal Court deals with such matters as claims against the Federal Crown, intellectual property, maritime and admiralty claims and national security.

[100] Legislation governing private rights of action for securities fraud are largely the same across Canada.

[101] Following these incidents, the Toronto Stock Exchange created the Allen Committee to examine the disclosure rules governing secondary market purchases. The Committee found the remedies available to investors lacking and recommended the creation of a statutory civil liability system to help investors sue issuers, directors and officers who violated their statutory disclosure obligations. *See Canadian Imperial Bank of Commerce v. Green (CIBC v. Green)*, 2015 SCC 60, [2015] 3 S.C.R. 801, paras. 63-65 (Can.); *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106, paras. 29-31 (Can.). These recommendations were then adopted by the Canadian Securities Administrators, an umbrella organization of the provincial and territorial securities regulators. *Id.*

securities laws, and it was also one of the first[102] to enact class action legislation.[103] Since then, all provinces have enacted similar civil liability laws for securities fraud and all but one province has adopted a class action statute.[104] The confluence of the enactment of both a statute for secondary market purchases and procedures governing class actions triggered a burgeoning of securities litigation in Canada.

Since 2006, approximately 87 cases regarding secondary market purchases (cases similar to Section 10(b)) have been filed in Canada and about 33 other types of securities cases have been filed for a total of 120 cases filed.[105] Securities class actions are filed primarily in Ontario, B.C., Quebec, Alberta and Saskatchewan. Where there are actions filed in more than one jurisdiction, issues arise regarding the coordination between counsel in one or more provinces, as discussed below.

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Since Ontario is, by far, the most active jurisdiction, this report focuses on securities fraud claims in Ontario.[106] It is worth noting that Quebec is the second most active province, and there has recently been an increase in the number of securities actions filed in Quebec on behalf of Quebec residents, many of which are also filed in Ontario or the U.S.[107] Interestingly, there is no mechanism for summary judgments in Quebec. Thus, if a case survives a motion to dismiss, the case will settle or go to trial.

Each of the class action statutes provide for opt-out classes, thus operating similarly to U.S. class actions.[108]

[102] Quebec was the first province to adopt class action legislation in 1979. *An Act respecting the Class Action*, S.Q. 1978, c 8, now Chapter C-25.01 of the *Code of Civil Procedure*, C.Q.L.R., c C-25.01.

[103] *Class Proceedings Act* ("CPA"), S.O. 1992, c 6. By way of background, the Ontario class action mechanism is similar to that in the U.S. with several important differences, including that: (i) there is no typicality requirement so the representative plaintiff need not have claims against all defendants; (ii) an Ontario court does not consider the merits when assessing whether to certify a class; and (iii) there is no requirement that common questions predominate over individual questions (it is sufficient if there are common questions that can be resolved through a class action). Other important procedural differences in securities class actions are that (i) there is no right to a jury trial in Canada; and (ii) formal discovery is still far more limited in Ontario than in the U.S.

[104] (British Columbia ("B.C.")) CPA, R.S.B.C. 1996, c 50; (Saskatchewan) *The Class Actions Act* ("CAA"), S.S. 2001, c C-12.01; (Newfoundland and Labrador) CAA, S.N.L. 2001, c C-18-1; (Manitoba) CPA, C.C.S.M., c C130; (Alberta) CPA, S.A., c C-16.5; (New Brunswick) CPA, R.S.N.B. 2011, c 125; (Nova Scotia) CPA, S.N.S. 2007, c 28; (Quebec) Code of Civil Procedure, C.Q.L.R. c C-25.01, arts. 571-604 (Quebec's class action rules were previously found in article 1003 of the Code of Civil Procedure); *An Act Respecting the Fonds d'aide aux actions collectives*, C.Q.L.R., c F-3.2.0.1.1.

[105] Bradley A. Heys and Robert Patton, *Trends in Canadian Securities Class Actions: 2018 Update*, NERA Economic Consulting (Feb. 13, 2019) ("NERA 2018"), at 2, https://www.nera.com/content/dam/nera/publications/2019/PUB_2018_Recent_Trends_Canada_0219.pdf.

[106] *See, e.g.*, Bradley A. Heys and Robert Patton, *Trends in Canadian Securities Class Actions: 2017 Update*, NERA Economic Consulting (Feb. 20, 2018) ("NERA 2017"), at 7, https://www.nera.com/content/dam/nera/publications/2018/PUB_2017_Recent_Trends_Canada_0218.pdf. This is not surprising since Ontario was the first province to implement these statutory civil liability provisions and the main stock exchange, the Toronto Stock Exchange (the "TSX"), is located in Ontario.

[107] *Id.*

[108] Prince Edward Island ("PEI") does not have any class action statute. However, although there is no legislation regarding class actions in PEI, the courts may have jurisdiction to certify class actions under existing rules of practice related to representative proceedings. Effective October 1, 2018, B.C. modified its CPA to provide that class actions would proceed as opt-out actions for both B.C. residents and non-residents. (B.C.)

Moreover, as discussed below, these often involve global classes. Accordingly, U.S. pension funds should ensure that they are submitting proofs of claims, where eligible, in Canadian class actions.

2. Claims Under Ontario Law

Common Law Remedies

Ontario has long recognized common law remedies stemming from the disclosure of misleading information, including misrepresentations made in connection with open market purchases.[109] However, as the Allen Committee concluded, the "common law remedies available to aggrieved investors for misleading disclosure in secondary trading markets were so onerous that they were 'as a practical matter largely academic.'"[110] Most notably, Ontario courts held that reliance cannot be presumed on a classwide basis for common law claims.[111] Today, common law claims are still prosecuted and Ontario courts will certify class actions for fraud in connection with open market purchases when such claims are coupled with the statutory claims discussed below. However, the common law claims are typically certified for common issues of liability only, with each investor's reliance being subject to individual proof.[112]

Statutory Liability for Primary and Open Market Purchases

The Ontario Securities Act ("OSA") has long provided a claim for primary market purchases—e.g., purchases made in public offerings.[113] However, it was only in recognition of the concerns outlined by the Allen Committee that, in 2005, the Ontario legislature provided a statutory claim for secondary market ("Secondary Market") (a.k.a. open market) purchases ("Secondary Liability Provisions").[114] Specifically, section 138.3 creates a "statutory cause of action [for a misrepresentation made in a document] for the benefit of those who acquired or disposed of a responsible issuer's securities between the time a document containing a misrepresentation is released by the responsible issuer and the time of its correction."[115] Importantly, to address the fact that courts did not recognize the fraud on the market presumption, the statute expressly provides that plaintiffs need not prove reliance on the misrepresentation.[116] This statutory claim supplements the common law rather than replaces it.[117]

The prevailing view is that it is easier to survive a motion to dismiss in Canada than it is in the U.S. This may stem from several key differences with U.S. claims. Whereas the U.S. Securities Exchange Act requires that the plaintiff prove "scienter" to obtain damages for open market purchases, the OSA generally does not require scienter for misrepresentations made in core documents (such as annual or interim financial statements) or in public oral statements.[118] It merely provides for a due diligence defense. Moreover, plaintiffs do not bear the burden of establishing that the fraud caused the damages. Rather, damages are generally measured as the difference between the price paid and the average market price following disclosure of the fraud—unless defendants can prove that the difference is attributable, in whole or in part, to factors other than the misrepresentation.[119]

These benefits are offset slightly by the fact that Ontario law caps each defendants' liability unless they acted with scienter—with the caps varying depending

CPA, R.S.B.C. 1996, c 50, s 4.1(1).

[109] *See CIBC v. Green*, 2015 SCC 60.

[110] *Id.* at para. 64.

[111] *Abdula v. Canadian Solar, Inc.*, 2015 ONSC 53, paras. 26-27 (Can. Ont. Sup. Ct. J.).

[112] *See, e.g.*, *CIBC v. Green*, 2015 SCC 60, para. 128; *Abdula v. Canadian Solar, Inc.*, 2015 ONSC 53, paras. 26-27, 61-63, 66.

[113] R.S.O. 1990, c S.5 (Can.).

[114] As the Ontario Court of Appeal has held, this claim was "intended to be remedial legislation with the twin goals of a) facilitating and enhancing access to justice for investors, and b) deterring corporate misconduct and negligence." *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, [2104] 118 O.R. 3d 641, para. 36 (Can. Ont. C.A.).

[115] *Goldsmith v. National Bank of Canada*, 2016 ONCA 22, para. 8 (Can. Ont. C.A.).

[116] *CIBC v. Green*, 2015 SCC 60, para. 11; R.S.O. 1990, c S.5, s 138.3(3).

[117] *Abdula v. Canadian Solar, Inc.*, 2015 ONSC 53, paras. 41, 44.

[118] R.S.O. 1990, c S.5, ss 138.1 & 138.4.

[119] R.S.O. 1990, c S.5, ss 138.5.

on the role of the particular defendant.[120] For example, an issuer's potential liability in a Secondary Market case is capped at the greater of $1 million or 5% of the issuer's market capitalization. If they acted with scienter, however, certain defendants cannot avail themselves of the limitation on damages.[121] As a practical matter, the National Economic Research Associates, Inc. ("NERA") reports that "[a]lmost all settlements in Statutory Secondary Market Cases to date appear to have been less than the damage limit for issuers set out in the provincial securities acts."[122]

Settlements involving smaller companies, however, have "tended to be closer to the statutory damage limit than have settlements involving larger companies."[123]

One hallmark of this Secondary Market statute is that the legislature requires that investors seek leave of the court to bring these claims.[124] In recent years, a main area of dispute has been the question of what is required for "leave" to bring a statutory securities fraud claim. The Canadian Supreme Court has addressed this question in two recent cases and has, arguably, raised the evidentiary threshold for plaintiffs to obtain leave to file claims under the Secondary Liability Provisions of the OSA.

In the first case, the Canadian Supreme Court addressed the same leave provision under Quebec law, which provides that the court should grant leave to file the statutory claims "if it deems that the action is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff."[125] The Supreme Court held that a "reasonable possibility" of success "requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim."[126] The Supreme Court warned, however, that the:

> authorization stage … should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial…. What *is* required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour.[127]

Since then, the Supreme Court has confirmed that this same threshold test applies to a leave motion under section 138.8 of the OSA.[128]

The lower courts are interpreting the rule as very stringent and denying leave motions. Recently, in *Goldsmith v. National Bank of Canada*, the Ontario Court of Appeal upheld an order denying leave, holding that there must be a "more stringent" evaluation and that courts must scrutinize the competing evidence.[129] On March 31, 2016, in *Bradley v. Eastern Platinum Ltd.,*[130] the Superior Court reaffirmed the position that the test

[120] R.S.O. 1990, c S.5, ss 138.1 & 138.7.

[121] R.S.O. 1990, c S.5, s 138.1, 138.7(1). The scienter exception does not apply to "responsible issuers." *See* R.S.O. 1990, c S.5, s 138.7(2).

[122] *See* Bradley A. Heys and Mark L. Berenblut, *Trends in Canadian Securities Class Actions: 2015 Update, Are we in Bear Territory?*, NERA Economic Consulting (Feb. 5, 2016) ("NERA 2015"), at 9, http://www.nera.com/content/dam/nera/publications/2016/2015_Recent_Trends_Canada.pdf.

[123] *Id.* at 10.

[124] R.S.O. 1990, c S.5, s 138.8(1). This provision reads "No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that, (a) the action is being brought in good faith; and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff."

[125] *Securities Act*, C.Q.L.R., c V-1.1, s 225.4.

[126] *Theratechnologies Inc.* v. *121851 Canada Inc.,* 2015 SCC 18, para. 39.

[127] *Id.*

[128] *CIBC v. Green*, 2015 SCC 60, para. 122.

[129] *Goldsmith v. National Bank of Canada*, 2016 ONCA 22, paras. 32-34 (to obtain leave, one must "offer both a plausible interpretation of the applicable legislative provisions and credible evidence sufficient to convince the court that there is a reasonable possibility that the action will be resolved at trial in the claimant's favour").

[130] 2016 ONSC 1903 (Can. Ont. Sup. Ct. J.).

for statutory leave to bring a Secondary Market securities class action "is not a low bar."[131]

While the statute provides a mechanism by which plaintiffs are entitled to limited discovery, there appears to be much concern in the investor community that the Ontario courts are allowing defendants to constrain the limited discovery to evidence helpful to their cause. Nevertheless, the Canadian courts have granted leave to pursue a Secondary Market case far more than they have denied leave. According to NERA, leave of the court has been granted in 20 and denied in 12 of the cases where the question was resolved.[132]

Another important issue that was recently resolved relates to the statute of limitations for bringing Secondary Market cases. The statute provides that Secondary Market claims must be commenced within the three-year limitations period set forth in section 138.14, which provides that claims are time-barred three years after the date of the alleged misrepresentation. Lower courts, however, were divided about whether this limitations period was tolled by the *filing* of an action notifying defendants of the intent to seek leave pursuant to section 28 of the CPA or the actual court order granting leave to pursue the Secondary Market claim. In a trilogy of cases (the "*Green Trilogy*"), the Ontario Court of Appeal held that pleading a statutory claim under section 138.3 was sufficient to trigger the suspension of the limitations period even though leave had not yet been granted. After this opinion, the Ontario legislature added section 138.14(2) to the OSA, specifying that the limitations period is suspended from the date of the filing of a notice of motion for leave under section 138.8. This new rule applies to newly filed cases.

Because section 138.14(2) did not have retroactive effect, the Canadian Supreme Court issued a ruling to address the interplay between the tolling provision and the leave requirement for the *Green Trilogy*. Although deeply divided, the Court's majority held that section 28 of the CPA operates to suspend the limitations period in section 138.3 of the OSA only after leave has been actually granted. However, the Court held that courts have the inherent jurisdiction to issue orders *nunc pro tunc* to allow plaintiffs to proceed with an action where leave is sought—but not granted—prior to the expiration of the limitations period.[133]

Courts have also recently opined on the liability of underwriting investment banks for misleading Secondary Market disclosures. Section 138.3(1) enumerates certain actors that can be held liable for misleading disclosures pursuant to these Secondary Liability Provisions. While underwriters are not enumerated, investors have argued that underwriters are liable as either "experts" or "promoters," both of which are enumerated. However, two courts have recently rejected these efforts to hold underwriters liable for Secondary Market purchases. In *LBP Holdings v. Allied Nevada Gold Corp.,* the Superior Court of Ontario held that the term "expert" in section 138.3(1) is not intended to include underwriters.[134] Moreover, in *Goldsmith v. National Bank of Canada,* the Court of Appeal held that the underwriters were not "promoters." While that Court left open the possibility that an underwriter could be a "promoter," it held that the investment banker must be something more than a professional adviser—it must have knowingly influenced the release of the misleading information.

3. Carriage Motions—That Is, Lead Plaintiff/Lead Counsel Motions

The decision about who should lead a class action is evaluated quite differently in Canada.

Unlike the U.S., there is no uniform test for determining who should be the lead plaintiff and lead counsel in Ontario. Notably, Ontario courts apply no presumption in favor of appointing the investor with the largest losses as lead plaintiff. Ontario courts entertain

[131] *Id.* at para. 51; *see, e.g.*, *Coffin v. Atlantic Power Corp.*, 2015 ONSC 3686 (Can. Ont. Sup. Ct. J.) (denying leave based on affidavits submitted by defendants).

[132] Nera 2018 at 7. Of the remaining 87 Secondary Market cases that have been filed (i) 26 settled prior to any decision regarding leave of the court; (ii) the question had not reached resolution by the end of 2018 in 23 cases; and (iii) the Secondary Market claims were discontinued in the other 6 cases.

[133] *CIBC v. Green*, 2015 SCC 60, para. 93.

[134] 2016 ONSC 1629, para. 63 (Can. Ont. Sup. Ct. J.).

fulsome motions, called "carriage motions," when multiple class actions are filed on the same matter. Based on these motions, courts analyze as many as 16 factors to determine which plaintiff, as well as which law firm, should be appointed as the representative plaintiff and class counsel, respectively.[135]

Over the years, different judges have engaged in different analyses. Thus, it is difficult to predict what factors a court might consider. In the *Sino-Forest* case, the court engaged in an extensive merits-based analysis and considered the characteristics of the plaintiffs and how each firm alleged its complaint. Specifically, the court considered the definition of class membership, the theory of the case, the causes of action, joinder of defendants and prospects of certification to assess which firm's theory the court preferred. The size of the plaintiffs' losses was considered but the court clearly did not view the fact that one shareholder had the largest loss necessarily as dispositive. While the court did think appointing institutional investors as lead plaintiffs could be beneficial, it favored a group that included both institutional investors and individuals.

In another recent carriage motion, one court awarded carriage to the lowest bidder—that is the firm that offered the best fee arrangement.[136]

By contrast, carriage of a class proceeding in Quebec is presumptively granted to the first claim to be filed and, therefore, there is typically a race to the Quebec courthouse every time a new claim arises. Thus, courts in Quebec generally do not engage in a factor-driven analysis.[137]

4. Extra-Territorial Reach of Ontario's Statute

In Canada, plaintiffs often bring securities fraud claims on behalf of a global class of investors—that is, any domestic or foreign investor who purchased securities on either its domestic exchanges or even on foreign exchanges. Canadian courts have certified such classes, and cases have been settled on this basis.[138]

Global Classes Are Allowed

Several reported opinions address the extraterritorial scope of the OSA, and Ontario courts seem to broadly interpret the territorial application of Ontario law. In particular, based on the language of the OSA, Ontario courts have adopted a test that considers whether there are substantial connections to Ontario as opposed to a *Morrison*-style test that focuses on the exchange where the securities were purchased.[139] Accordingly, Canadian firms file cases even where the issuer does not trade securities in Ontario. Rather, they focus on cases where the company in question has a significant tie to Canada. In fact, they have filed cases where the company in question is not even listed on a Canadian exchange but is effectively a Canadian company. One such example involved Canadian Solar Inc., a company registered in Canada but operated in China whose shares traded only on the NASDAQ.[140] Despite the fact that the company did not even have any continuous disclosure obligations under the Ontario securities laws, the court held that there was a "real and substantial connection" to Ontario because Canadian Solar had a registered office in the province, held its annual general meeting in the province

[135] *See*, *e.g.*, Eva Markowski, *Competing Class Actions: The Unsettled Law of Carriage Motions*, Siskinds Law Firm (Apr. 24, 2018), https://www.siskinds.com/competing-class-actions-carriage-motions/; *Smith v. Sino-Forest Corp.*, 2012 ONSC 24 (Can. Ont. Sup. Ct. J.) (a recent ruling on a carriage motion by an Ontario court considering applications by both Canadian and U.S. institutional and individual movants).

[136] *Chu v. Parwell Investments, Inc., et. al.*, 2019 ONSC 700 (Can. Ont. Sup. Ct. J.).

[137] *Hotte c. Servier Canada inc.*, [1999] R.J.Q. 2599 (Can. Que. C.A.); *Schmidt v. Johnson & Johnson Inc.*, 2012 QCCA 2132 (Can. Que. C.A.).

[138] *See, e.g.*, *Abdula v. Canadian Solar, Inc.*, 2015 ONSC 53, paras. 59-60 (holding that the statute clearly envisioned the extra-territorial application of the statutory claim to companies whose shares do not trade extra-territorially provided that the issuer has a "real and substantial" connection to Ontario).

[139] *See*, *e.g.*, *Abdula v. Canadian Solar Inc.*, 2011 ONSC 5105 (Can. Ont. Sup. Ct. J.) (holding that the Ontario *Securities Act* applies to a company that chooses to be incorporated in Canada, has its principal office in Ontario, and carries on business in Ontario), *affirmed on appeal*, 2012 ONCA 211, [2012] O.R. 3d 256 (Can. Ont. C.A.).

[140] *See id.*

and raised capital from Ontario investors. By contrast, in *Yip v. HSBC Holdings plc,* determined that the mere fact that a foreign issuer knows that Ontario investors would rely on investor information did not suffice to establish a substantial connection to the province.[141] Thus, it concluded, the long arm of Ontario's *Securities Act* did not extend to HSBC Holdings because its stock did not trade on any Ontario exchange and it did not conduct business in Ontario.

Recently, the Court of Appeal of Ontario addressed the extraterritoriality of the Securities Act in the securities class action against British Petroleum plc ("BP"), which concerned alleged misrepresentations related to the Deepwater Horizon oil spill disaster. Defendants argued that the Securities Act should not apply because BP, a U.K. corporation headquartered in London, does not own property in Canada, it does not conduct business in Canada, and its stock does not trade on any Canadian exchange. However, the Court of Appeal upheld the lower court's ruling that the Securities Act claims could be pursued in connection with shares purchased on foreign exchanges because it was a "reporting issuer" for a short period when its ADS traded on the TSX and, afterwards, BP continued to send relevant investor documents to its shareholders in Canada.[142] In an interesting turn, despite this ruling, the Court of Appeal ultimately dismissed the *BP* case on *forum non conveniens* grounds.

U.S./Canada Cross-Border Issues

In many instances, similar class actions against the same defendants are litigated simultaneously in the U.S. and Canada. According to NERA, of the 60 Statutory Secondary Market cases filed in Canada between 2011 and 2018, roughly half of the cases also involved parallel U.S. class actions.[143] NERA also reports that, between 2006 and 2016, approximately half of all U.S. filings against Canadian companies have seen a corresponding parallel claim in Canada.[144] But, in 2017 and 2018, only 29% of cases filed in the U.S. against Canadian issuers also involved a parallel filing in Canada. [145]

One key issue stemming from these parallel cross-border actions is how to handle class definitions that overlap between the Canadian and U.S. class actions. While Canadian attorneys have often limited their cases to exclude class members covered by U.S. cases, that is not always the case. In practice, at the settlement stage, U.S. and Canadian law firms often have cooperated to avoid problems with settling a case on behalf of a class that may include residents of the other country. However, problems can arise when there is a lack of cooperation. For example, in one case, the U.S. court approved a settlement of a class action involving Canadian residents, but the Canadian court refused to enforce the U.S. class action judgment on grounds that the U.S. court failed to meet the due process and procedural fairness requirements for notice to absent class members.[146]

Another important example of conflicts between Canadian and U.S. class actions is the IMAX Corporation litigation, which involved significant cross-border disputes spanning over six years. In the Ontario class action, the Ontario Superior Court initially certified a global class in 2009, which included all persons who purchased on either the TSX or the NASDAQ.[147] Because approximately 85% of the securities traded on NASDAQ, the Ontario judge was fully aware that this decision might later give rise to a "day of reckoning" if a settlement was reached in the related U.S. class action. When the U.S. class action later settled for $12 million on behalf of investors who purchased shares on the NASDAQ, Canadian counsel intervened to object to the scope of the release.[148] The U.S. settlement notice described how the "day of reckoning"

[141] *Yip v. HSBC Holdings plc*, 2018 ONCA 626 (Can. Ont. Sup. Ct. J.).

[142] *Kaynes v. BP plc*, 2014 ONCA 580, [2014] 122 O.R. 3d 162 (Can. Ont. C.A.). There, plaintiffs defined the proposed class to encompass only Canadian investors. *Id.* at para. 9. Plaintiffs also chose to expressly exclude all investors who purchased on the New York Stock Exchange and to not exclude themselves from the U.S. BP class action. *Id.* at para. 10.

[143] NERA 2018 at 2.

[144] *Id.*

[145] *Id.*

[146] *See, e.g., Currie v. McDonald's Restaurants of Canada Ltd.*, 74 O.R. 3d 321, [2005] O.J. No. 506 (QL) (Can. Ont. C.A.).

[147] *Silver v. Imax Corp.*, 2009 CanLII 72334 (Can. Ont. Sup. Ct. J.); *Silver v. Imax Corp.*, 2009 CanLII 72342 (Can. Ont. Sup. Ct. J.).

[148] *See In re IMAX Corp. Sec. Litig.*, No. 1:06-cv-6128 (NRB) (S.D.N.Y.).

had arrived, and told investors that they must choose whether to participate in the U.S. settlement and waive their rights in the Canadian class action, or opt out of the U.S. settlement. The U.S. settlement was conditioned on an order from the Ontario court excluding from the definition of the Canadian case all investors who do not opt out of the U.S. settlement. Concluding that the U.S. court had jurisdiction to approve the U.S. settlement and that the notice issued to investors was fair, the Ontario court acquiesced and amended its certification order to exclude from the definition of the Canadian class all persons who do not opt out of the U.S. settlement.[149] Ontario counsel appealed, arguing, among other things, that a determination of the issues in Ontario would result in a far more substantial award for the class, but the appeal was denied.[150]

Because of potential difficulties arising from cases on both sides of the border, there have been some efforts to set up class action protocols for cross-border class actions.[151] On August 8-9, 2011, the ABA issued a resolution adopting as best practices the (1) Protocol on Court-to-Court Communications in Canada-U.S. Cross-Border Class Actions and (2) Notice Protocol: Coordinating Notice(s) to the Class(es) in Multijurisdictional Class Proceedings (together, the "Protocols"). On August 14, 2011, the Council of the Canadian Bar Association (i) approved as best practices the Canadian Judicial Protocol for the management of Multi-Jurisdictional Class Actions, and (ii) endorsed the ABA's Protocols.

With respect to Canada-U.S. cross-border cases, the Protocols provide (i) standardized mechanisms to notify counsel, parties and the courts of overlapping actions, and to conduct settlement proceedings with the goal of ensuring that notice to class members is provided in a meaningful way that will be understood by all affected persons in the differing jurisdictions (the "notice protocol"); and (ii) that courts should communicate with other courts where there is commonality among substantive or procedural issues (the "communication protocol"). The purported objective of the Protocols is to ensure that U.S.-Canada cross-border class actions be prosecuted in a coordinated and efficient manner. However, the Protocols are non-binding. Before a court applies the Protocols (with or without modifications), counsel must be given notice and an opportunity to be heard regarding what sections of the Protocols to apply.

Provincial Cross-Border Issues

While most Canadian cases are filed in Ontario, a certain percentage of cases involve multiple actions in different provinces.[152] Because each province broadly interprets the territorial application of its respective laws and because there is no equivalent mechanism to the U.S. multidistrict litigation procedures for federal courts, Canadian attorneys routinely struggle with the problem of class cases being filed in multiple jurisdictions, each purporting to represent classes with overlapping members.[153] A recent solution proposed by an Ontario judge was for a Quebec plaintiff to move in the other action for an inter-jurisdictional stay.[154]

[149] *Silver v. IMAX Corp.*, 2013 ONSC 1667, para. 190 (Can. Ont. Sup. Ct. J.).

[150] *Silver v. IMAX Corp.*, 2013 ONSC 6751, [2013] 117 O.R. 3d 616 (Can. Ont. Sup. Ct. J.).

[151] Several years ago, several groups were created to tackle such cross-border issues including (i) the American Bar Association ("ABA") Canada/U.S. Class Action Protocol Project; (ii) the Canadian Bar Association National Task Force; and (iii) the International Bar Association's Task Force on International Procedures and Protocols for Class Actions.

[152] NERA reports that "[a]pproximately 26% of all cases involve claims filed in more than one province." NERA 2017 at 7. NERA also notes that, "[h]istorically, approximately 78% of all securities class actions from 1997 have involved a filing in Ontario and 27% have involved a filing in Quebec. Only 12% of all cases have not involved a filing in either Ontario or Quebec (a majority of these were filed in Alberta)." *Id.*

[153] *See Tiboni v. Merck Frosst Canada Ltd.*, 295 D.L.R. 4th 32, [2008] O.J. No. 2996 (QL) (Can. Ont. Sup. Ct. J.), and *Wuttunee v. Merck Frosst Canada Ltd.*, 312 Sask. R. 265, [2008] S.J. No. 324 (QL) (Can. Sask. Q.B.), *rev'd*, 324 Sask. R. 210, [2009] S.J. NO. 179 (QL) (Can. Sask. C.A.). *See also* Scott Maidment, *Exclusive Forum Selection In National Class Actions: A Common Issues Approach*, 5 Canadian Class Action Review 133 (Irwin Law, Canada, Aug. 2009). In *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, para. 57 (Can.), the Supreme Court urged the provincial legislatures to develop a legislative framework for national class actions.

[154] *Kowalyshyn v Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819, para. 270 (Can. Ont. Sup. Ct. J.).

As a practical matter, parties in the various provinces generally work cooperatively to manage these cases. Sometimes, the class action in one province will be limited to expressly exclude investors covered by a related class action in a different province.[155] To the extent a global settlement is reached, the parties often present the settlement for approval in their respective provinces with an understanding that the court in each province must approve the settlement for it to take effect. In some instances, the parties will agree that one or more judges can sit together to supervise nationwide settlement proceedings or that one court alone will have jurisdiction for determining any issues related to the interpretation and implementation of the agreement.

The Supreme Court of Canada recently issued a decision that facilitates the management of national class actions by clarifying that provincial judges have broad, but not unlimited powers, to determine procedures to facilitate the fair and expeditious decision making in nationwide class actions. In what is known as the "tainted-blood" case, the parties in all provinces except B.C. and Quebec agreed to defer to the jurisdiction of the Ontario courts to resolve nationwide settlements of related cases. The parties then proposed that the judges from B.C., Ontario and Quebec jointly hear the motions while sitting together in Alberta, where they were all assembled. The question then arose whether the B.C. and Quebec judges have jurisdiction to exercise their supervisory oversight outside of their home province. The issue made its way up to the Canadian Supreme Court, which confirmed that the judges do have the authority to rule extra-provincially.[156]

The CPAs in B.C. and Saskatchewan were recently amended to provide that if a multi-jurisdictional class proceeding involving the same matter has been commenced elsewhere in Canada, the court must determine whether it is preferable for the claims to be resolved elsewhere.[157] It also provides that the court may choose to divide the class into resident and non-resident subclasses. By contrast, the Quebec Code of Civil Procedure provides that the "court cannot refuse to authorize a class action on the sole ground that the class members are part of a multi-jurisdictional class action already under way outside Quebec." It further states that the "court is required to have regard for the protection of the rights and interests of Quebec residents" if asked to stay an action or decline jurisdiction.[158]

5. Monitoring of Canadian Cases and Potential Scope of Class

Unlike the U.S., there are no services tracking all Canadian securities class action filings. This is, in part, because there is no nationwide scheme, the court filing systems are not all electronic and there are far fewer cases brought in Canada. There is a nationwide class action database maintained by the Canadian Bar Association.[159] However, it is essentially a voluntary pilot project and, thus, is not comprehensive. The website states that the database will list all class actions filed in Canada after January 1, 2007 that are sent to the CBA. Once posted, a class action proceeding will remain on the database unless and until it is dismissed as a class action by the court. Counsel can request that proceedings filed prior to January 1, 2007 be posted on the CBA website. These 'archived' class actions will be posted as soon as time permits."[160] However, since Canadian securities class actions are increasing in number, there may be increased tracking of securities cases.

[155] *See, e.g.*, Order (Settlement Approval), *The Trs. of The Labourers' Pension Fund of Cent. & E. Canada v. Sino-Forest Corp.*, No. CV1143115300CP (Can. Ont. Sup. Ct. J. Mar. 29, 2016).

[156] *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 SCR 162 (Can.).

[157] (B.C.) CPA, R.S.B.C. 1996, c 50, ss 4(3), 4(4) & 4.1; (Saskatchewan) CAA, S.S. 2001, c C-12.01, ss 6(2) & 6.1.

[158] (Quebec) Code of Civil Procedure, C.Q.L.R. c C-25.01, art. 577.

[159] *See* http://www.cba.org/Publications-Resources/Class-Action-Database.

[160] *See* http://www.cba.org/Publications-Resources/Class-Action-Database/About.

6. Hiring Counsel

All provinces that allow class actions also permit lawyers to be paid by a contingency fee in such cases.[161] That is, attorneys can advance all fees and expenses in a class action and plaintiffs are not liable for any payment of fees and reimbursement of expenses if there is no recovery in the case.

Usually, Ontario firms will enter into retention agreements that provide for contingent fees comprising 20 to 30 percent of recovery in any class action or, alternatively, for fees based on a specific multiplier of the lodestar. Retention agreements are generally the same for all types of class actions, including securities class actions. The attorneys must file a motion for attorneys' fees to receive payment from a settlement.

Canadian courts have not established a specific standard for assessing the reasonableness of an award of fees and reimbursement of expenses in class actions.[162] In Ontario, courts will review counsel's fee request to determine whether it is "fair and reasonable," and the CPA expressly adopts the lodestar plus multiplier metric.[163] Similar to the U.S., some Ontario courts consider both reasonableness of a percentage award and the lodestar approach. The courts consider essentially the same factors as U.S. courts consider, such as (i) the results achieved; (ii) the risks undertaken; (iii) the time expended; (iv) the complexity of the matter; (v) the degree of responsibility assumed by counsel; (vi) the importance of the matter to the client; (vii) the quality and skill of counsel; (viii) the ability of the class to pay; (ix) the client and class expectation; (x) avoiding inconsistencies with awards in similar cases in other jurisdictions; and (xi) fees in similar cases. Some Canadian courts also consider the agreed-upon fee arrangement in a retention agreement.[164] With respect to the lodestar approach, a 2007 report indicates that the average multiplier applied is 2.5.[165]

7. Loser Pays Provisions

For the most part, Canada traditionally has been a "loser pays" regime. Canadian courts have considerable discretion to award costs and will generally only assess an award based on what is "fair and reasonable" for that person to pay.[166] In addition to the "fair and reasonable" requirement, Ontario recently revised its Rules of Civil Procedure to provide that the court must consider proportionality when making a costs award:

> In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.[167]

Over the years, however, some provinces have shifted away from this regime in the context of class actions. The following Canadian provinces are "no-way costs" jurisdictions in class actions—that is, generally each party bears its own costs (unless there is vexatious, frivolous or abusive conduct): B.C., Manitoba, and Newfoundland.[168]

The following Canadian provinces are "loser pays" jurisdictions even in the class action context: Alberta, Ontario, New Brunswick, Nova Scotia, and

[161] *See*, *e.g.*, the *Solicitors Act*, R.S.O. 1990, c S.15 and *Contingency Fee Agreements*, Ont. Reg. 195/04; *see also* Erik S. Knutsen & Janet Walker, *Litigation Funding and Costs in Canada*, 7 (July 2009), http://docplayer.net/918116-Litigation-funding-and-costs-in-canada.html.

[162] Courts apply the same standard for all class actions, securities or other.

[163] S.O. 1992, c 6, s 33(7).

[164] *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2018 BCSC 2091 (Can. B.C. Sup. Ct.).

[165] *See* Benjamin Alarie, *Rethinking the Approval of Class Counsel's Fees in Ontario Class Actions*, The Canadian Class Action Review, Vol. 4, No. 1 (July 2007), pp. 15-46, at p. 16.

[166] *See Celanese Canada Inc. v. Canadian National Railway Co.*, 196 O.A.C. 60, [2005] O.J. No. 1122 (QL) (Can. Ont. C.A.) (costs fixed by a court must be fair and reasonable); *Courts of Justice Act*, R.S.O. 1990, c C.43, s 131(1) ("[s]ubject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid").

[167] Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 1.04(1.1). In an effort to encourage settlement, Ontario has implemented special cost rules related to offers of settlement. *Id.* at r. 49.10.

[168] (B.C.) CPA, R.S.B.C. 1996, c 50, s. 37; (Manitoba) CPA, C.C.S.M., c C130, s 37; (Newfoundland and Labrador) CAA, S.N.L. 2001, c. C-18.1, s 37.

Saskatchewan.[169] In most of these provinces, the legislature provides that many factors go into the cost award determination, including the stage of the litigation, the context of the case (*i.e.*, novel issues of law), the complexity of the matter and the conduct of the parties.[170] Moreover, as discussed more fully below, an Ontario court recently considered the source of funding in assessing what costs to order against a losing plaintiff.[171] The level and nature of the costs vary across each province. Even more interesting, these costs are often evaluated and awarded on a motion-by-motion basis.

Even when "loser pays" applies, it is very rare for the court to order the unsuccessful party to pay the full amount of the prevailing party's costs. Rather, the courts award costs on different scales: partial indemnity, substantial indemnity and full indemnity.[172] Courts typically award costs based on partial indemnity, which generally ranges from 40 to 75 percent of the actual, reasonable fees.[173] Substantial and full indemnity awards are rare and are reserved for situations in which the unsuccessful party conducted itself in a manner deserving of sanctions.[174] Substantial indemnity awards are typically 90 percent of the actual legal costs, and full indemnity is 100 percent of the actual costs, as the name implies.[175] The wide discretion of the courts has left litigants unable to predict their exposure to adverse costs awards. Lest there be any doubt, the Ontario CPA expressly states that "[c]lass members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims."[176]

Costs awards to the prevailing party are not always inconsequential, however. In *Kerr v. Danier Leather Inc.,* the court awarded costs in excess of $1 million against the plaintiff.[177] In *McCracken v. Canadian National Railway Co.,* the plaintiff was awarded over $740,000 for costs of the certification motion.[178] Funding agreements are, thus, an integral part of Ontario cases.

8. Funding of Cases

There are three main sources of funding for class action proceedings in Ontario: (i) indemnities given by class counsel; (ii) quasi-public funding; and (iii) funding supplied by professional funders. While Ontario firms do fund some of their cases, they also embrace the use of funders.

Quasi-Public Funding

Several provinces, most notably Ontario, have an approved non-private, quasi-public funding source, which is quite unique by U.S. standards.[179] The Ontario source is administered through the Class Proceedings Committee ("CPC"). The CPC provides financial support for disbursements and indemnity against costs through the Class Proceedings Fund ("CPF" or "Fund").

In 1992, the Law Society Amendment Act established the CPC and the CPF to provide financial support to class action plaintiffs in Ontario class actions.[180] The Fund

[169] *See, e.g.*, (Ontario) CPA, 1992, S.O. 1992, c. 6, s. 31(2); Alberta Rules of Court, Alta Reg. 124/2010, r. 10.32; (Saskatchewan) CAA, S.S. 2001, c C-12.01, s 40; (Nova Scotia) CPA S.N.S. 2007, c 28, s 40.

[170] *See Damages and Costs for Securities Litigation in Canada*, Borden Ladner Gervais LLP (Jan. 9, 2019), https://www.lexology.com/library/detail.aspx?g=ea8be1f0-23d8-457c-acad-12b556c4120a.

[171] *Smith v. Inco Ltd.*, 2013 ONCA 724 (Can. Ont. C.A.) (court considered the precarious financial condition of the funder, The Law Foundation of Ontario, discussed below).

[172] Erik S. Knutsen, *The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada,* 36 Queen's L.J. 113, 122 (2010).

[173] *Id.* at 123.

[174] *Id.* at 124.

[175] *Id.*

[176] 1992, S.O. 1992, c 6, s 31(2).

[177] 2007 SCC 44, [2007] 3 S.C.R. 331 (Can.).

[178] 2010 ONSC 6026, [2010] O.J. No. 4650 (QL) (Can. Ont. Sup. Ct. J.).

[179] Class Proceedings Fund, The Law Foundation of Ontario, http://www.lawfoundation.on.ca/class-proceedings-fund/, (last visited Apr. 3, 2019). Quebec also has a provincial public fund, the Fonds d'aide aux recours collectif. *See* http://www.faac.justice.gouv.qc.ca/, (last visited Apr. 3, 2019).

[180] *See* Class Proceedings Fund, The Law Foundation of Ontario, http://www.lawfoundation.on.ca/class-proceedings-fund/, (last visited Apr. 3, 2019); History, The Law Foundation of Ontario, http://www.lawfoundation.on.ca/who-we-are/history/, (last visited Apr. 3, 2019).

was first established with a $500,000 grant from The Law Foundation of Ontario, which is a grant-making organization that promotes and enhances justice for Ontarians. The CPC's current sources of funding are (i) a levy of 10 percent of any awards or settlements in favor of plaintiffs in funded proceedings; and (ii) a return of any funded disbursements after settlement or award.[181]

Plaintiffs' applications for CPC funding (including oral submissions) are confidential. The CPC may seek the applicants' permission to request written submissions from defendants. Any defense submission is not confidential and plaintiffs may receive a copy of it. If accepted: (i) plaintiffs must fulfill reporting requirements (*i.e.*, they need to provide advance notice of motions and copies of documents filed with the court); (ii) all costs, including "loser pays" costs, are covered; and (iii) 10 percent of any recovery is paid back to the Fund. The CPC determines whether applicants will receive funding based upon a number of considerations including the merits of the plaintiff's case, the extent to which the issue in the proceeding affects the public interest, the plaintiff's efforts to raise funds, the likelihood of certification and the amount of money in the Fund. The CPC summarizes its financials as well as statistics regarding applications, such as total number of hearings held and applications approved, in its annual reports.[182]

Private Funding

Ontario law firms are also increasingly using private funders. In *Metzler Investment GMBH v. Gildan Activewear Inc.,* the Ontario Court determined that third-party agreements are not inherently champertous, but can become so in the presence of an improper purpose (for example over-compensation, improper motive and the potential for "officious intermeddling" in the litigation).[183] Shortly thereafter, in *Dugal v. Manulife Financial Corporation,* Justice Strathy held that a foreign litigation funding company could indemnify the plaintiffs from their exposure to a potential adverse cost award in exchange for a cut of any money recovered from litigation.[184] In the order, the Court noted that litigation funding was a necessity given the loser-pays model in effect in Ontario.[185] However, in approving the agreement, it was important to the Court that the private funder had not "stirred up, incited or provoked this litigation," and that the private funder was charging a "reasonable" (7 percent) commission with a "reasonable" commission cap ($5 million pre-trial and $10 million thereafter).[186] Additionally, the funding agreement left control of the litigation in the hands of the representative plaintiff as long as the funder received appropriate information about the progress of the case.[187]

Third-party financing has been approved in several cases since Manulife including in *Bayens v. Kinross Gold Corporation*[188] and *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*.[189] Courts in other Canadian provinces have approved funding agreements as well.[190]

A key difference between obtaining third-party funding and funding through the CPF is that the third-party funding must be approved by the court.

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[181] Class Proceedings Fund, The Law Foundation of Ontario, https://www.lawfoundation.on.ca/for-lawyers-and-paralegals/class-proceedings-fund/, (last visited Apr. 3, 2019). Details about how to apply can be found here: https://www.lawfoundation.on.ca/apply/, (last visited Apr. 3, 2019).

[182] *See* Resources & Reports, The Law Foundation of Ontario, https://www.lawfoundation.on.ca/for-lawyers-and-paralegals/class-proceedings-fund/reports-resources/, (last visited Apr. 3, 2019).

[183] *See Metzler Investment GMBH v. Gildan Activewear Inc.*, 2009 CanLII 41540 (Can. Ont. Sup. Ct. J.). *See also Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129 (Can. Ont. Sup. Ct. J.).

[184] *See* 2011 ONSC 1785, [2011] 105 O.R. 3d 364 (Can. Ont. Sup. Ct. J.) (provides outline of terms of retention agreements).

[185] *Id.* at para. 28.

[186] *Id.* at para. 33.

[187] *Id.*

[188] 2013 ONSC 4974, [2013] 117 O.R. 3d 150 (Can. Ont. Sup. Ct. J.).

[189] 2012 ONSC 2937 (Can. Ont. Sup. Ct. J.).

[190] *See Hobshawn v. Atco Gas and Pipelines Ltd.* (May 14, 2009), Action 0101-04999 (Can. Alta. Q.B.) (approving a third-party funding agreement in the Alberta Court of Queen's Bench); *MacQueen v. Sydney Steel Corporation* (October 19, 2010), Action 218010 (N.S.S.C.) (approving a third-party funding agreement in the Supreme Court of Nova Scotia).

If an application is made to the CPF, the court does not need to approve the arrangement, as it is made pursuant to the legislation set out above. In *Dugal*, Justice Strathy considered the specific facts of the case and determined that the private funding agreement was neither "champertous" nor illegal under Ontario law. Justice Strathy did require further information on two issues regarding the arrangement: (i) further evidence regarding the capacity of the funder to satisfy any costs award that may be made; and (ii) further information about the reasonable controls on the provision of information to the funder. Once this further evidence was given, Justice Strathy approved the agreement.

One advantage to obtaining third-party funding is that the amount paid as a levy can be negotiated. In contrast, with the CPF, the levy is always 10 percent. In *Dugal*, as noted above, the plaintiffs were able to negotiate an agreement where the funder would receive 7 percent of any money recovered.

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E. Denmark

1. Trends in Securities Litigation in Denmark

Class actions are still relatively new in Denmark, as the changes in the law that allowed them entered into force a little over ten years ago, on January 1, 2008. While class actions in Denmark have remained rare since then, the most notable class actions have been actions brought by groups of private plaintiffs that are based on claims regarding securities. Several of these actions are discussed briefly below, along with a general overview of the rules regarding class actions in Denmark generally and a brief summary of relevant Denmark securities laws.

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2. Types of Class Actions Under the Danish Administration of Justice Act (the "Danish Act")

The legal basis for class actions in Denmark was introduced via new provisions that were added to the Danish Administration of Justice Act (the "Danish Act") in February 2007 and became effective on January 1, 2008.[191] These provisions were enacted after significant debate and a recommendation by the Standing Committee on Procedural Law (Retsplejeradet). They provide for two types of class actions: (i) "opt-in" class actions, or

[191] Administration of Justice Act, pt. 23, Act No. 181. Feb. 28, 2007 (Den.) (in force Jan. 1, 2008).

class actions that require prospective class members to affirmatively join the action by written submission within a certain court-specified window, and (ii) "opt-out" class actions, or class actions in which class members are automatically included in the case unless they take affirmative action to opt out by written submission.[192]

Private plaintiffs may only bring opt-in class actions, while opt-out class actions may only be brought by public bodies, and primarily the Danish Consumer Ombudsman (Forbrugerombudsmanden). This requirement reflects the fact that an opt-out class action was believed, by at least some, to be foreign to Danish legal tradition. Additionally, opt-out actions will only be deemed appropriate where the damages per class member are relatively small. While there is no specific limit, the amount of each member's claim must typically be no more than 2,000 Danish kroner, or 270 euros, because opt-out proceedings are only considered appropriate if the claims are "unmarketable."

Whether proceedings will take place on an opt-in or opt-out basis lies within the judge's discretion. To date, the Danish Consumer Ombudsman has not appeared as a class representative, and so all class actions in Denmark have thus far been opt-in.

The Danish Act originally required a "sunset" review of the class action regime after three years. The first review was therefore planned to take place in 2012 but was postponed until 2014. A key reason for including a review provision in the Danish Act was to address fears, principally voiced by the business community, that Danish class actions would exponentially increase as a result of the Danish Act and create what opponents to the Act termed the "American situation" in Denmark.[193] However, so far, that has not been the case, as Danish class actions have remained relatively rare. Accordingly, when the Ministry of Justice ultimately reviewed the class action rules in 2014, it concluded that they were satisfactory and should not be amended or repealed.

3. Class Action Requirements in Denmark

Generally, class actions may only be brought when the class members have "uniform claims" based on the "same factual circumstances," as well as the same "legal basis," and Denmark must be the proper legal venue for all asserted claims. Case law suggests that the "similar claims" criterion is typically satisfied in securities class actions that involve claims for liability based on errors or omissions in prospectuses, stock market information, annual reports, and other public company filings. Nonetheless, in a number of cases, courts have found that claims relating to investment decisions did not meet the conditions for being pursued as a class, such as where the case required individual assessment of each investor's assumptions in connection with their purchase of the subject security. In this situation, claimants and their attorneys may consider cutting the class to a greater extent in order to fulfill the condition of "uniformity." However, in so doing, plaintiffs may lose the possibility of involving individual considerations and pleas.

The court must also determine that a class action is the best way of examining the claims, which largely depends on whether it is deemed likely that the claims will not be litigated individually because of the size of the claims and/or lack of resources. While there are no minimum number requirements in Denmark to form a class, the number of class members will be taken in to account when determining if class action proceedings are the best option for the case in question.

The court decides the scope and precise limits of what claims can participate in the class action. This will determine who can join the class action, and also the time limit for bringing the claims. In Denmark, most claims are barred by the statute of limitations three years after the point when the claimant knew or should have known of his claim.[194]

[192] Martin Christian Kruhl & Anders Julius Tengvad, DLA Piper, *Getting the Deal Through: Class Actions in Denmark* (Dec. 2018) (hereafter "Kruhl & Tengvad, *Class Actions in Denmark*"), *at* https://gettingthedealthrough.com/area/82/jurisdiction/52/class-actions-2019-denmark/.

[193] Dan Terkildsen & David Frolich, *New Possibilities for and First Experiences With Class Actions in Denmark*, The Int'l Litig. Quarterly, Am. Bar Ass'n (Summer 2010).

[194] Kruhl & Tengvad, *Class Actions in Denmark*, *at* https://gettingthedealthrough.com/area/82/jurisdiction/52/class-actions-2019-denmark/.

4. Class Action Procedure

For opt-in class actions, provided the court determines that all of the class action prerequisites are met, the court will appoint a class representative—who may be a member of the class, an association or a private institution or organization—and set the scope of the class action. Notably, the class representative is not required to have suffered harm in order to be appointed.

The class action is then publicly announced either by the court or the class representative. Prospective class members then have the opportunity to join ("opt in") the class during a specified window, which is usually three months (for opt-out class actions, the process is largely the same, except that prospective class members typically have three months to affirmatively opt out). After receiving the notice, parties that want to opt in must register with the court by written submission.

Prospective members who fail to join the action during the opt-in window (or to opt out during the opt-out window) are barred from doing so unless the court makes a special exemption. Interestingly, the Danish Standing Committee on Procedural Law acknowledged the possibility that a small minority of class members might not become aware of an opt-in or opt-out notice but concluded that this issue did not give rise to due process concerns.

Notably, there is no right to a jury in a civil case in Denmark. Rather, civil cases are typically tried before one judge, while a more complex case may be tried before a panel of three judges.[195]

5. Settlement Agreements and Objections

A settlement agreement entered into by the parties in a class action is only valid if it has been approved by the court. Generally, the court must approve the settlement agreement unless it discriminates against members of the class or is clearly unreasonable. Class members can object to the settlement by filing a motion before the court.

6. Attorneys' Fees, Costs, and Third-Party Funding

Under the Danish Act, the losing party is normally ordered to pay at least a portion of the opposing party's legal fees. This rule applies to opt-in class actions. The court may also require the class representative to provide security for legal costs, as well as to pay outstanding costs not covered by the group. Parties should note that, in class actions, if there is a risk of very high legal costs, security is generally required. The maximum costs to be covered by group members are decided at the beginning of the proceedings.

In opt-out class actions, however, participating members cannot be ordered to provide security for legal costs, and they may only be ordered to pay legal costs that do not exceed the maximum amount the group member may receive as a result of the action.

Contrary to many foreign countries, Denmark bar rules allow lawyers to bring cases on a contingent basis. That is, lawyers may contract with their clients to advance all costs and only seek fees if they obtain a recovery. The one significant limitation is that it is unlawful for lawyers to agree to take a contingent fee that is fixed as a certain portion of the damages awarded. Thus, while the lawyer's fee may still be contingent on the outcome of the case, the amount of the fee must be dictated by some metric other than as a percentage of recovery. For example, a lawyer may agree to take nothing, or 50% of his or her hourly rate, when an action is unsuccessful, but seek to be paid an hourly rate plus a multiplier if the action is successful. This rule is often explained by stating that it is possible to agree on "no cure no pay" basis but not possible to agree on "good cure good pay" basis. In other words, the attorney's fees must be deemed reasonable in comparison with the value of the matter, the result, and the work performed, among other things.

While third-party funding of class actions is permitted, such funding may have tax implications or be questionable if made with an illegal purpose. Until the end of 2018, third-party funding had not been employed in Denmark to fund class actions. Rather, the attorneys would fund the cases themselves. However, a number

[195] *See id.*

of litigation funders have entered the Danish market in connection with the Danske Bank case (cf. below) and have publicly stated that they are preparing actions against Danske Bank. Whether these actions will be admitted under the provisions regarding class actions or will be filed as joined individual actions still remains to be seen.

7. Danish Securities Laws

The OMX Nordic Exchange Copenhagen is the Danish center for trade of listed securities such as stock, bonds, notes, derivatives and money market instruments. Securities listed at the OMX Nordic Exchange Copenhagen are carried out electronically on the NASDAQ and registered with the VP Securities Services (Værdipapircentralen).

The most important securities laws are: (i) the newly introduced Capital Markets Act, which came into force on January 3, 2018, and replaced the Danish Securities Trading Act (Værdipapirhandelsloven), (ii) the EU Market Abuse Regulation ("MAR"); (iii) the Danish Financial Businesses Act (Lov om Finansiel Virksomhed); and (iv) the Rules Governing Securities Listing on the NASDAQ OMX Copenhagen.[196] These laws are supplemented by derivative regulations issued through a number of executive orders setting forth detailed provisions on particular subjects, such as issuers' disclosure duties. In addition, the Danish Financial Supervisory Authority ("the DFSA") has issued a number of guidelines on the interpretation of the executive orders. In practice, many securities class actions begin by the DFSA or the NASDAQ Copenhagen raising questions or conducting inquiries into potential issues, and any resulting administrative orders tend to influence related court proceedings.[197]

Generally, under these laws, an issuer listed on OMX Nordic Exchange Copenhagen is required to disclose "inside information" to the public as soon as possible. Information is considered "inside information" if the information (i) has not been made public and (ii) is likely to have a significant effect on the share price if made public. An issuer may delay the disclosure of inside information only if: (i) immediate disclosure would be likely to prejudice the issuer; (ii) delay of disclosure is not likely to mislead the public; and (iii) the issuer is able to ensure confidentiality of the non-public information. The DFSA must be informed immediately upon disclosure of the delayed inside information, along with a written explanation of how the requirements for delay were met.[198]

The Supreme Court's ruling in the Bank Trelleborg case (discussed below) indicated that there is no requirement to prove specific "reliance" on the relevant information by the investor. In other words, this ruling suggests that where a failure to disclose is deemed to have a material impact, there is a presumption under Danish law that the shares would not have been purchased if the correct information had been available. Bank Trelleborg also placed the burden of proof regarding the causal nexus of prospectus liability on the defendant.

The alleged defects in the prospectus must be attributable to those responsible for the prospectus, and those responsible must have acted intentionally or negligently. The group of people responsible for the prospectus generally includes the issuer and the persons listed on the prospectus, however this is not decisive, as the critical question is whether the defendant actually participated in preparing the prospectus.[199]

As for damages, under Danish law, the loss of the claimant is equivalent to the difference between (1) the claimant's economic situation due to the unlawful acts/omissions of the defendant and (2) the claimant's economic situation if the unlawful acts/omissions of the defendant had not taken place.

8. Notable Securities Class Action Cases

Since the class action provisions of the Danish Act became effective in 2008, there have only been a few class actions brought in Denmark concerning financial misconduct. Notably, Danish case law in this area is

[196] Portions of this section are from http://www.mwblaw.dk/Doing%20Business%20in%20Denmark/Securities%20law.aspx

[197] Karsten Kristoffersen, Bruun & Hijele, The Securities Litigation Review: Denmark (4th ed. July 2018), available at https://thelawreviews.co.uk/edition/the-securities-litigation-review-edition-4/1170658/denmark.

[198] *See id.*

[199] *See id.*

concentrated around the public offerings of shares to the market and the information contained in prospectuses provided by the issuer in connection therewith (*i.e.*, the primary market as opposed to the secondary market).

Bank Trelleborg. The case involving Bank Trelleborg was the first class action of any kind brought under the Danish Act. The case arose out of Bank Trelleborg's financial troubles during the financial crisis of 2008 that resulted in a forced acquisition of the bank by Sydbank. A group representing nearly 5,000 minority shareholders of Bank Trelleborg sued Sydbank, majority shareholders that had requested the compulsory acquisition, and the Danish Financial Supervisory Authority in three separate class actions regarding (i) the minority shareholders' contention that the mandatory share redemption required by the acquisition was at too low a rate, and the majority to call for such redemption was not met; (ii) inaccuracies and omissions in a prospectus made public one year prior to the takeover; and (iii) errors and omissions in that prospectus in a claim brought by investors who bought shares in the secondary market.

The first class action was won by the defendant, Sydbank. While Denmark's Eastern High Court (and subsequently the Supreme Court) eventually ruled that the compulsory acquisition of Bank Trelleborg was unlawful for technical reasons (the majority to call the redemption was not met), they determined that the minority shareholders nonetheless suffered no damages.[200]

The second two class actions were ultimately settled because, simultaneously, three individual shareholders brought a case regarding prospectus liability against Sydbank and, in January 2013, were awarded damages by the Danish Supreme Court. Significantly, in that action, the Danish Supreme Court found that the prospectus was flawed and did not give an accurate depiction of the bank's financial situation at the time. After this verdict, Sydbank settled with the shareholders in the remaining two class actions by agreeing to pay 135 million Danish kroner (about U.S. $20.2 million).[201]

Jyske Bank. Denmark's second notable class action involved a hedge fund administered by Jyske Bank (Jyske Invest Hedge Markedsneutral - Obligationer). The hedge fund was marketed to investors as investing in "market-neutral bonds" that offered "more stable dividends." However, in October 2008, when the financial crisis hit, the fund lost approximately 80% of its value in less than two weeks. An association of approximately 1,100 investors brought a class action under the Danish Act, alleging misrepresentations and omissions in the fund's prospectus materials.

While the class action was still pending, DFSA issued a notice to the hedge fund stating that its marketing materials had been misleading. Following this and a verdict from the Danish Eastern High Court in an individual proceeding where the bank had been found liable to an investor in the hedge fund, the bank and the class representative settled the action, resulting in the 1,100 class members receiving compensation equal to 80% of the loss on their investments in the fund. Ultimately, through settlement, investors recovered approximately 300 million Danish kroner (about U.S. $45 million).[202]

Pandora. In July 2014, a group of 36 mostly institutional investors sued Danish jewelry manufacturer and retailer Pandora A/S ("Pandora") and its CEO for issuing a late profit warning. On August 2, 2011, Pandora slashed its previous profit guidance from 30% down to zero, prompting a 65% one-day drop in its share price. The investor-plaintiffs sought damages ranging from €20 million to €50 million.[203] However, on February 23, 2016,

[200] *See the Eastern High Court finds compulsory acquisition unlawful*, Dec. 8, 2010, at http://www.mwblaw.dk/en/Nyheder/Nyheder%202010/2010-12-07%20Oestre%20Landsret%20finder%20tvangsindloesning%20ulovlig.aspx

[201] Press Release, Sydbank, Settlement of bank Trelleborg claims (Aug. 7, 2013), *at* https://www.globenewswire.com/news-release/2013/08/07/565081/0/en/Settlement-of-bankTrelleborg-claims.html.

[202] *See LETT in brief—highlights from 2015 at LETT Law Firm*, at 7, *at* http://www.lett.eu/media/18417919/aarsrapport-2015_uk_20pages_www.pdf.

[203] *Investors in Denmark's Pandora sue over 2011 profit warning*, Reuters, July 31, 2014, *available at* http://www.reuters.com/article/pandora-lawsuit-idUSL6N0Q643Z20140731.

Pandora was acquitted of all criminal charges that it had violated the Securities Trading Act with regard to this conduct.[204] Specifically, the Court of Eastern Denmark found that Pandora had no duty to disclose the slashed profit guidance before August 2, 2011. Following this determination, the class action was withdrawn.

OW Bunker. On December 19, 2016, three separate groups of investors filed class actions against former owners and members of management in Danish fuel supplier OW Bunker, including: (i) a group of Danish institutional investors; (ii) a group of Danish private investors; and (iii) a group of primarily foreign institutional investors. OW Bunker filed for bankruptcy only eight months after its IPO in March 2014. The claims are based on allegations that the prospectus provided incorrect, incomplete and misleading information regarding the company's speculation about changes in oil prices and trading activity between OW Bunker's Singapore-based subsidiary and its customer. On February 9, 2018, the Eastern High Court acknowledged that the institutional investors' case could continue as a class action. On March 26, 2018, the Eastern High Court determined the same with respect to the group of private Danish investors, but defined the class as only consisting of investors who had suffered losses up to a certain date, excluding a significant number—nearly 1,000—of the approximately 4,000 investors involved. The group has declared its intention to appeal, and the outcome of that appeal may have continuing implications for future class actions.

The OW Bunker cases are all still pending, and the total claims included in the cases have not yet been calculated.[205]

Danske Bank. Investors are currently joining together with the purpose of taking action against Danske Bank. Between 2007 and 2015, Danske Bank, the largest financial institution in Denmark, participated in the largest money-laundering scheme in Europe, as more than 200 billion euros in suspicious payments passed through its Estonian branch. The full picture of the scandal emerged only in September 2018, following various press reports starting in February 2018, and the release of a report prepared by the bank's lawyer issued on September 18, 2018. Despite red flags having been raised internally as early as 2007 to Dankse Bank management regarding the Estonian money laundering issue, and despite a number of investigations performed by local regulatory authorities over the years, Danske Bank only decided to shut down the non-resident portfolio of its Estonian branch in December 2015 without disclosing anything to the public about the matter. Danske Bank employees are now being charged by the public prosecutor for having participated in criminal actions. The stock price has declined by more than 40% since February 2018.

One case has already been filed as a class action, however the court has not yet approved that the case can advance according to the provisions regarding class actions. More cases are under preparation.

[204] Press Release, Pandora Acquitted in Court Case (Feb. 23, 2016), *at* https://investor.pandoragroup.com/news-releases/news-release-details/pandora-acquitted-court-case.

[205] Kristoffersen, The Securities Litigation Review: Denmark, available at *https://thelawreviews.co.uk/edition/the-securities-litigation-review-edition-4/1170658/denmark*.

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F. Germany

Germany has a civil law system. It does not provide for class action lawsuits or comprehensive discovery rules. However, over the past fifteen years Germany has developed a procedure for dealing with mass claims. The catalyst for establishing a mass litigation procedure was the litigation against Deutsche Telekom that began in the early 2000s. In 1999, Deutsche Telekom AG went public and in its prospectus included a valuation of its real property that later turned out to have been overstated. Deutsche Telekom wrote down the value of its real property by €2 billion in 2001 and the share price of its stock dropped 92%. In response, over seventeen thousand individual lawsuits were filed against Deutsche Telekom between 2001 and 2003. The volume of the litigation crippled the court systems and illustrated the need for a more efficient mechanism for dealing with mass securities claims.[206]

In 2005, Germany passed the Kapitalanleger-Musterverfahrengesetz ("Capital Markets Model Case Act" or "KapMuG").[207] The KapMuG allows the court to decide common issues of law and fact by appointing a model plaintiff. It is a quasi-class action in that each investor is still required to file their own complaint and issues that are not common (such as damages and reliance) cannot be decided by the model case. The KapMuG law that was originally implemented contained a sunset provision with an expiration date in 2012. The KapMuG was renewed and extended until November 1, 2020.[208]

[206] Burkhard Schneider, *Securities Litigation*, Clifford Chance Deutschland LLP (Mar. 2019), https://gettingthedealthrough.com/area/73/jurisdiction/11/securities-litigation-germany/.

[207] A translation of the KapMuG law is available here: https://www.gesetze-im-internet.de/englisch_kapmug/index.html.

[208] Peter Bert, *Kapitalanleger Musterverfahrensgesetz: Looks As Though It's Here To Stay*, Dispute Resolution in Germany (Oct. 15, 2011), http://www.disputeresolutiongermany.com/2011/10/kapitalanlegermusterverfahrensgesetz-looks-as-so-it%E2%80%99s-here-to-stay/.

At the time of this writing, it was not clear whether the KapMuG will be extended in its present form or whether it will be modified.

1. Basics of Filing a Claim and Litigation

KapMuG proceedings are based on individual securities litigation claims filed with the District Court (court of first instance). A party wishing to initiate a model case proceeding must file a complaint and apply to the court to initiate a model case proceeding. Applications to initiate model case proceedings can be filed by both the plaintiff and the defendant. The plaintiff, however, can combine such an application with the filing of the claim. The application must set out the legal and factual issues to be determined by way of the model case proceeding as well as the underlying facts and the supporting evidence. Furthermore, it must demonstrate that these issues may have significance for other similar cases beyond the individual dispute concerned.[209] The court shall then decide on the admissibility of any model case application within 6 months and publish any admissible applications in a claims register.[210]

Once a total of ten applications referring to the same complex of disputes have been published in the claims register, the determination of the legal and factual issues included in application is transferred to the Higher Regional Court by way of a court order.[211] Once this court order is published in the claims register, all individual proceedings in this complex of disputes are stayed.[212]

2. The Model Case Proceeding at the Higher Regional Court

Once the Higher Regional Court receives the order of referral from the District Court, the Higher Regional Court can both accept the referral and commence model case proceedings, or it can decline to initiate model case proceedings. For example, the Stuttgart Higher Regional Court declined to initiate separate model case proceedings against Porsche for the Volkswagen diesel emissions scandal.[213]

If the Higher Regional Court accepts the order of referral, the court will designate a model plaintiff upon its own discretion. However, it shall consider the following points in its decision:

- The suitability of the plaintiff to consider the interests of all similarly-situated plaintiffs in the conduct of the model case proceedings;
- Agreements among several plaintiffs on who shall be the model plaintiff (if applicable); and
- The amount in dispute as filed for by the (potential) model plaintiff.[214]

Upon designation of the model plaintiff, the Higher Regional Court shall publicly announce, among other things, the model plaintiff, the model defendant and the file number of the model case proceeding. Within a period of six months after this public announcement, any plaintiff who has not already filed an individual claim can register its claim in writing with the Higher Regional Court.[215] However, the six-month period for claims registration does not toll any applicable limitations periods. In other words, it is possible that the model case proceedings will be publicly announced with less than six months available for would-be claimants to act before the expiration of the statute of limitations that would bar the claimant from pursuing claims. If a claimant "registers" a claim instead of filing a complaint, the registration will toll the statute of limitations, but the claimant must convert the registration to an active case (by filing a complaint) before the KapMuG reaches a conclusion if the claimant wants to be bound by the result.[216]

[209] KapMuG § 2.

[210] KapMuG § 3.

[211] KapMuG § 6.

[212] KapMuG § 8.

[213] *Diesel processes: Porsche escapes with Hengeler's second model procedure*, Juve (Mar. 27, 2019), https://www.juve.de/nachrichten/verfahren/2019/03/dieselprozesse-porsche-entgeht-mit-hengeler-zweitem-musterverfahren.

[214] KapMuG § 9.

[215] KapMuG § 10.

[216] Michael Weigel, *Collective Redress in Germany*, Expert Guides (Jan. 3, 2014), https://www.expertguides.com/articles/collective-redress-in-germany/collec14.

While the model claim proceeding is conducted by the model plaintiff, plaintiffs not selected as the model plaintiff are not excluded from acting in the model case proceeding. Rather, they can participate as a so-called "interested party." As such, they have a position similar to a co-plaintiff and can generally plead their own case in the model case proceeding.[217] For more details, please see below under "Opt-In vs. Opt-Out". There are no particularities with respect to the taking of evidence in the model case proceeding. And, as noted above, there are no provisions for discovery.

The legal and factual issues brought before the Higher Regional Court (the objectives or "Festellungsziele") can be expanded in the course of the model case proceeding.[218]

The Higher Regional Court's final decision by which it determines the relevant legal and factual issues is made by way of a court order which is called the model case ruling.[219] The model case ruling can be challenged by an appeal to the Federal Supreme Court only as to points of law.[220]

3. Opt-In vs. Opt-Out

The KapMuG is neither "opt-in" nor "opt-out." Plaintiffs do not have a choice whether they may join the model case or not. Rather, once an individual plaintiff has filed a lawsuit on which a model case proceeding has already been established, all other plaintiffs are statutorily included as "interested parties" to the model case. Those plaintiffs are automatically bound by the model case ruling regardless of whether they decide to participate in the model case proceedings or not.

However, KapMuG provides limited measures to release plaintiffs from the binding effect of the model case ruling. In order to take these measures, plaintiffs have to participate in the model case proceeding. By doing so, they get a position similar to a co-claimant which enables them to plead their own case. For example, they can:

- File their own briefs;
- Bring forward their own evidence; and
- Attend the oral hearing and plead in front of the court.

This generally includes pleading adversely to the model plaintiff. In the model case proceedings, such adverse pleadings will not be heard, and the positions of the model plaintiff will prevail. However, with respect to the model case ruling, it results in a kind of a partial opt-out. Any issues to which a plaintiff pleaded adversely will be determined in the plaintiff's subsequent individual proceedings regardless of the findings in the model case on those particular issues.

Apart from that, the effects of the model case proceedings can only be avoided if the model claimant and the model defendant have agreed on a settlement.

This demonstrates that despite the lack of a general opt-out provision, the KapMuG allows for the protection of the non-model plaintiffs' individual interests. In order to ensure that non-model plaintiffs make best use of their rights under the KapMuG, it seems advisable for any plaintiff to seek individual representation in KapMuG proceedings. This is particularly the case for plaintiffs with very high losses.

Continuation of the Individual Proceedings

Once the model case ruling is final, the individual proceedings are recommenced as soon as one party has submitted the final model case ruling to the District Court (court of first instance). From that point on, the case is tried by the District Court based on the findings set out in the model case ruling (except, as discussed above, with respect to plaintiffs who pleaded adversely to the model plaintiff).

Collective Settlements

During the course of the model case proceedings, the model plaintiff and defendant can negotiate a settlement that is approved by the court and made available to all non-model plaintiffs. Non-model plaintiffs can opt-out of

[217] KapMuG § 14.

[218] KapMuG § 15.

[219] KapMuG § 16.

[220] KapMuG § 20.

any settlement agreement between the model plaintiff and the model defendant. However, the settlement will only become effective if less than 30 percent of the participants in the model case proceedings opt-out. If the settlement becomes effective, any non-model plaintiffs that opt out can continue their individual proceedings before the District Court.

4. Funding the Litigation

Attorneys are prohibited from charging contingent fees under German law. Attorneys and their clients are otherwise free to negotiate the contract for their fees except that German law sets a minimum fee that attorneys must receive based on the value of the dispute in the case.

Although contingent fees are prohibited, there is no prohibition on third-party litigation funding. German litigation funders usually cover all costs of the proceeding including the liability for adverse costs.

Germany is a loser pays system and the losing party must pay all litigation costs, including court costs and the opposing party's attorney fees. All court costs and adverse costs are flat fees set by statute based on the amount in dispute. The amount in dispute applicable for fee calculations is capped at €30 million. Accordingly, bundling claims can be a cost-efficient way to pursue securities litigation in Germany because the aforementioned cap is generally also applicable if several claims of different plaintiffs are joined together in one complaint. In a model case proceeding, the adverse cost liability is distributed among all the plaintiffs (even those whose cases are stayed) on a pro-rata basis.

If the defendant makes an application to the court, plaintiffs who are not residents of the EU are often required to provide a security for the defendant's possible claim for reimbursement of costs.

5. Pleading Standards

German pleading standards are strict. In Germany, the initial statement of claim occupies a place of central importance. Generally, it is an extensive and detailed paper, as the German system requires specific fact pleading and also requires a party to designate the means of proof for each factual assertion in the pleadings (for example, by identifying documents and witnesses). It is, however, possible to supplement the initial complaint with additional allegations and evidence as the litigation proceeds.

6. Standard of Proof

German law has a subjective standard of proof. In order to prove a factual allegation in a German court, the judge has to be convinced that the allegation is true. In making this determination, the judge has to evaluate all pleadings and all evidence presented in the proceedings and must not ignore the laws of logic, physics, and thought.

7. Causes of Action in Securities Litigation

The scope of the KapMuG is expressly set out in section 1 of the KapMuG. In general terms, the causes of actions that fall under the KapMuG are:

1. Claims for compensation damages due to:

- False, misleading or omitted public capital markets information;
- The use of such information; and
- The failure to clarify such information.

The most common claims comprised by this regulation are: (i) claims under sections 37b and 37c of the German Securities Trading Act ("WpHG") (communication of insider information); (ii) tort claims under section 826 of the German Civil Code in relation to the communication of capital markets information; and (iii) prospectus liability claims under the Securities Prospectus Act and the Capital Investment Act.

2. Claims to fulfillment of a contract, which is based on an offer under the Securities Acquisition and Takeover Act.

In practice, these kinds of claims have not been of any relevance among the KapMuG proceedings initiated so far.

8. Fraud on the Market Theory

Germany does not yet recognize a "fraud on the market" theory. However, under sections 37b and 37c of the WpHG, an investor does not need to prove individual reliance in order to recover damages from issuers of financial instruments who make false or misleading ad-hoc announcements or who fail to disclose inside information by way of a mandatory ad-hoc announcement.

In order to be eligible for damages, an investor must be economically affected by such incorrect or omitted ad-hoc announcements. For example, in case of failure to publish inside information which has an adverse effect on the issuer's share price (WpHG § 37b(1) no. 1), the issuer is liable to an investor if:

- The investor acquired the issuer's shares after the issuer's obligation to make an ad-hoc announcement existed; and
- The investor was still holding the shares when negative insider information later became public.

In such case, the investor has acquired the shares at an inflated price and later suffered a loss from the correction in the share price when the negative insider information became public. Accordingly, the investor is entitled to damages in the amount of the difference between:

- The price actually paid for the shares; and
- The hypothetical correct share price if the ad-hoc announcement had duly been made.

According to the German Federal Supreme Court, such a damage claim does not require reliance. Although individual reliance is not required, it is disputed among German commentators whether the investor must still prove loss causation. However, the German Federal Supreme Court set out that under section 37b(1) no. 1 of the WpHG, an investor can alternatively claim for rescission of the acquisition of the shares.

Finally, under the recently amended regime for the statute of limitation, claims under sections 37b and 37c of the WpHG are time-barred after three years. This limitation period starts at the end of the year in which (i) the claim came into existence; and (ii) the investor obtained knowledge of the circumstances giving rise to the claim and the identity of the obligor or would have obtained such knowledge if he had not been grossly negligent.

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G. ITALY

1. Overview of Investment-Related Litigation

Most Italian securities fraud claims are based upon violations of the conduct rules imposed by the consolidated text on financial services of legislative decree N. 58 of 24 February 1998 ("TUF")[221] and by the implementing regulations issued by the Italian Exchange Control Authority (Commissione per le Società e la Borsa, "CONSOB").[222] The TUF has been recently modified following the implementation of the MiFID, The TUF contains the consolidated text of securities regulations under Italian law and, when Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU ("MiFID", also known as "MiFID 2").[223]

The majority of recent Italian securities litigation cases involve banking institutions. During the last five years, the stability of the Italian banking situation has deteriorated dramatically as eight banks defaulted with a total combined loss of over 30 billion Euros. The prime example was the 500-year-old Banca Monte dei Paschi di Siena, the third most important Italian bank, which lost its entire capital forcing Italy to nationalize it. Indeed, in Italy, the most typical securities fraud litigation involves:

[221] The Italian version of the TUF, as recently modified, is *available at* http://www.consob.it/documents/46180/46181/dlgs58_1998.pdf/e15d5dd6-7914-4e9f-959f-2f3b88400f88.

[222] www.consob.it

[223] The TUF contains the consolidated text of securities regulations under Italian law and, when MiFID was implemented, due to the supremacy of EU law, the TUF was modified to adjust the Italian rules to the new EU directive on financial services. The English version of MiFID is *available* at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=EN.

- Bond default (Argentina, Parmalat, Cirio, etc.);
- Derivatives (IRS swap, currency swaps, Credit Default Swaps, etc.);
- Statutory violations in lending, financial leasing, etc. (usury);
- Compensation of damages for unfaithful bank employees or financial consultants; and

  Other breaches of financial services conduct rules (suitability, fairness, disclosure, conflict of interest).

2. The Relationship Between Civil and Criminal Proceedings

Discovery. Italian procedural rules do not provide for U.S.-style discovery. While a party has the right to obtain contractual documents and statements of accounts from the bank/broker/dealer, it is almost impossible to obtain the financial institutions' internal documents to support a securities fraud claim. Thus, in the most egregious cases, a civil claim is filed simultaneously with the criminal complaint. Civil claimants in a criminal investigation may use the evidence gathered by the prosecutor in the subsequent civil trial. In other words, the discovery is obtained by the prosecutor and civil parties exploit it to support their claims for damages.

Criminal conviction and civil proceeding for damages. Pursuant to article 538 of the Italian Code of Criminal Procedure, when delivering a judgment of conviction, the criminal court shall decide on civil claimants' requests for restitution and damages. However, if the evidence acquired during the criminal trial is not sufficient to decide the exact damages to be awarded, the criminal court requires the accused to pay damages to be determined by the civil court.[224] If requested by the civil parties, the criminal court also requires the accused to pay interim compensation of damages already proven.[225] In practice, criminal courts do not determine precise damages, but tend to issue this "provisional redress" and leave quantification to civil judges. This provisional award is often determined in a fixed amount or percentage of the claimed losses. Civil claimants may accept the provisional award or may pursue the responsible parties by an ordinary civil trial, limited to the exact damage suffered by each claimant.

The statute of limitations on claims for damages caused by a crime. According to case law[226] and article 2953 of the Civil Code, "[t]he rights for which the law prescribes a statute of limitation shorter than ten years are subject to a statute of limitation of 10 years when they have been ascertained with a final judgment of conviction." This principle applies to the claims for damages resulting from a criminal conviction. The Italian Supreme Court recently clarified that if the criminal court does not determine the exact damages, any resulting civil action remains subject to the 10-year statute of limitation starting from the date on which the criminal sentence became irrevocable.[227]

Financial crime is subject to applicable statutes of limitation and, due to the length of Italian criminal trials, the statute of limitation may lapse on an action for civil damages. According to the Court of Appeal, while a conviction might be time-barred even after the judgment of the trial court, which also ruled on civil liability, the trial court is obliged to uphold the decision on civil liability pursuant to article 578 of the Italian Code of Criminal Procedure. In other words, **the judgment of the Court of First Instance is considered final and just** for the purposes of the statute of limitations. The Roman Court of Appeal ruled that "the judgment establishing the extinction of the crime implies a confirmation of the judgment of the Court of First Instance as far as the civil liability is concerned."[228]

[224] Article 539 of the Code of Criminal Procedure.

[225] *Id*.

[226] Cass., civil Section III, 13 Decembre 2002, decision No. 17825, DeG – Dir. e giust. 2003, 4, 103.

[227] Cass., civil Section III, 7 Aprile 2015, decision No. 6901, Guida al diritto 2015, 28, 65.: "If the criminal trial has been concluded with a judgment containing the generic sentence to pay damages in favor of the injured party, **the subsequent action aimed at quantifying the damage is subject to the 10-year statute of limitation** pursuant to art. 2953 of the Italian Civil Code, starting from the date on which the conviction has become irrevocable."

[228] The Roman Criminal Court of Appeal, Section. III, 27 March 2017.

3. Causes of Action in Securities Litigation

The main causes of action concerning institutional investors encompass market manipulation, false accounting and financial statement and false statements in prospectuses. According to article 185 of the TUF, penalties include:

> [i]mprisonment for between one and six years and a fine of between twenty thousand and three million euro shall be imposed on any person who disseminates false information or sets up sham transaction or employs other devises concretely likely to produce a significant alteration in the price of financial instruments.
>
> Courts may increase the fine up to three times or up to the larger amount of ten times the product of the crime or the profit therefrom when, in view of the particular seriousness of the offence, the personal situation of the guilty party or the magnitude of the product of the crime or the profit therefrom, the fine appears inadequate even if the maximum is applied.
>
> Article 173 bis of the TUF provides:
>
> [a]ny person who, with a view to obtaining an undue profit for himself or for others, in prospectuses required for public offerings or for admission to trading on regulated markets, with the intention of deceiving the recipient of the prospectus, includes false information or conceals data or news in a way that is likely to mislead such recipients, shall be punished by imprisonment for between one and five years.

A resulting civil action may be brought in the criminal trial and in a separate civil litigation as explained above.

4. Compulsory Mediation

With Legislative Decree 28 of 4 March 2010 (Decree 28), the Italian Parliament introduced compulsory mediation for certain matters, in particular, for insurance, banking and financial services contracts. A special ADR procedure in financial and security services litigation is provided by the Legislative Decree 179 of 8 October 2007. Based upon that Decree, CONSOB created a chamber of conciliation and arbitration office for disputes in financial matters.

In a securities claim, if the mediation process has not commenced prior to filing the summons, courts declare the claim inadmissible until the mediation process has been completed or the period of time required to exhaust the process (three months) has elapsed. The compulsory mediation process is directed by a professional and independent mediator (from a public or private entity, subject to Ministry of Justice control) who assists the parties through attempting an amicable conciliation or advancing a proposal to settle the dispute out of court.

The duration of the mediation process is limited to three months from the date of filing the mediation request. If there is no settlement, the mediator's proposal may affect the costs of litigation. The winning party, having rejected the mediator's proposal and nevertheless obtained a favorable judgment that mirrors the proposal's terms, is required to pay its own legal costs incurred after the issuance of the proposal and to reimburse the legal costs incurred by the losing party during the same period of time.

5. Pleading Standards

Securities civil litigation is commenced by serving a writ of summons on the defendant. The writ must include, among other things, a subject matter of the claim, a description of the facts, and the legal grounds on which the claim is based.[229] The defendant must be

[229] Stefano Parlatore and Daniele Geronzi, *Litigation and enforcement in Italy: Overview*, Practical Law Country Q&A (2017), *available at* https://uk.practicallaw.thomsonreuters.com/3-502-1581?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1.

given sufficient notice (between 90 and 150 days) before the hearing to prepare the defense. Within 10 days after serving the summons, the plaintiff must file with the court the summons, duly served to the defendant, and the supporting documents, together with a form summarizing the case and containing a nominal stamp duty tax (which varies depending on the value of the litigation).

Under the Code of Civil Procedure (the "Code"), the defendant decides whether to file pleadings with any supporting evidence at least 20 days before the date of the hearing, or to appear directly in court at the first hearing with a lawyer and present a defensive brief with the relevant documentation. Ordinary trials are controlled and governed by courts, which set the dates of the subsequent hearings according to the court's calendar.

As set forth below, civil trials are divided into three stages: stage 1 - the filing of the parties' initial pleadings and of any supplemental defensive briefs; stage 2 - the decisions on the admission and the gathering of evidence; and stage 3 - the issuance of the judgment.

Stage 1 – Filing Initial Pleadings and Supplemental Briefs. After the initial exchange of the pleadings, the parties appear before the judge, who addresses the preliminary issues such as jurisdiction or joining third parties. The judge may postpone the hearing for the parties to attempt to settle the dispute. Additionally, under article 183 of the Code, the parties may request a 30-day deadline to amend their pleadings and responses, and may request extensions to file additional defensive briefs, to refute the other parties' defenses, and to request the admission of evidence. Such briefs must be filed within the deadlines contemplated in the Code (up to a maximum of 80 days from the date of the first hearing). The judge sets the next hearing to hear oral arguments regarding admission of evidence.

If there is no additional evidence to be gathered other than the documentary evidence filed by the parties with their initial pleadings, stage 2 does not take place.

Stage 2 – Admission and Gathering of Evidence. The second hearing discusses admissibility of evidence. At the conclusion of the hearing, the judge issues an interim decision as to the evidence to be gathered, depositions, the appointment of the expert witnesses, the examination of the documentary evidence, and for similar evidentiary formalities. If the evidence admission process contemplates several witnesses and/or expert evidence, the subsequent hearings will be held until all evidence is gathered.

Stage 3 – Issuance of Judgment. Once all the evidence admitted by the judge has been filed or gathered, the judge sets a deadline for the parties' final arguments. The parties may file their final briefs within the deadlines contemplated by the Code (up to a maximum of 80 days from the date of the summation). The judgment is then issued within the following 60 days. The appeal of civil judgments is filed with the Court of Appeal having territorial jurisdiction over the tribunal that issued the judgment.

6. Class Actions

Class actions are not popular in Italy because, in part, stockholders are not considered consumers under the Consumer Code, under which class actions are permitted. The most common class action claims against banking institutions have been actions for damages due to excessive commissions applied to customers' accounts.

That said, the Parliament reformed the Italian class action system in a law passed on April 12, 2019.[230] Article 1 of the law moves the class action regime from the Italian Consumer Code directly into the Italian Code of Cvil Procedure, by introducing therein the new title VIII-bis "Collective proceedings" composed of 15 new articles. Among other things, the law extends the scope of the class action beyond the consumer law to all those injured with regard to the same homogenous individual right and the defendants will include companies. Moreover, the law clarifies that the court having jurisdiction to hear the claim is the specialized court of enterprises and the losing defendant will be obliged to pay to the representative of the class and to the lawyers an additional contingent fee

[230] The Italian version of the draft law A.S. 844, which was not changed in its final vote in the Senate on April 12, 2019, is *available at* http://www.senato.it/service/PDF/PDFServer/BGT/01082832.pdf.

determined as a percentage of the total amount inversely proportional to the number of members of the class, modified by the complexity of the case, the employment of expert witnesses, the quality of the work done, the care with which the activities were carried out, and the number of members.

7. Market Reliance

The Italian Supreme Court recognizes the "fraud on the market" theory in market manipulation and insider trading cases. In a well-known decision, the Supreme Court held that:

> (1) the market value of the share reflects and incorporates the information issued to it from time to time by the issuer and/or by other parties operating on it; (2) hence, where the high share price is <based on false premises> and specifically the disclosure of the truth has caused a sudden collapse in the share price, it must immediately be considered as entirely likely (logically consistent, not seriously refutable) that there was an original, undue overvaluation of the shares [...] and consequent excess in the price paid by the [investor]; (3) the investor who acquired at a [...] overvalued price immediately suffered a pecuniary loss (at least corresponding to the impact of the unwittingly assumed <risk> of a subsequent decline in the share price for reasons other than those relating to the ordinary evolution of the market) for which it may thus immediately request compensation; consequently (4) the amount of the loss subject to compensation may be identified as the difference between the price paid ab origine by the investor and the <hypothetical> price that the same share would presumably have reached on the market if stripped of the influence of information that was untrue and/or reticent and/or simply omitted; (5) there is a strict [...] consequentiality [...] between the disclosure of the truth and the collapse of the share price [...] it immediately appears legitimate to use as a reference the price that relates to the financial instruments immediately after the distortion was [definitively] made public.[231]

According to this interpretation, there is a presumption of a causal link between the misleading statement in the prospectus or financial statement and the investment decision that caused the loss. Thus, investors that acquired the shares on the market based upon false information paid a higher price than they would have otherwise paid. For these transactions, the resulting loss is equal to the excess amount paid at the time of acquisition. This excess amount shall form the object of compensation, increased by revaluation and interest.

8. Funding - Contingent Fee Arrangements

The Italian Parliament enacted new bar rules with Law n. 247 of 31 December 2012 ("Law 247"). The bar rules mandated the Government to issue the new professional tariffs, which were approved with Decree 10 March 2014 n. 55. Under Law 247, contingent fee arrangements are prohibited if they provide that the lawyer's fee consists of a portion of the claim or the thing that is the subject matter of the litigation. In addition, under article 1261 of the Italian Civil Code, lawyers are prohibited from receiving the assignment of the claim brought to court. Thus, 'no win no fee' arrangements are illegal. However, lawyers may agree with clients and charge a success fee for their activities.

Except for the limitations provided under article 1261 of the Italian Civil Code, the law does not prohibit a third party from funding a claim. A claimant would also be permitted to seek funding for a claim and to assign to such lender the claim or a percentage of the amount recovered, provided that article 1261 of the Civil Code is complied with. Moreover, the rules of professional conduct applicable to practicing lawyers expressly contemplate third party financing.

[231] Cass., 11 June 2010, No. 14056, confirmed by Cass., 26 May 2016, No. 10934.

9. Adverse Party Cost Risk

In criminal trials there is no loser-pays adverse cost risk. Thus, civil claimants in a criminal trial cannot be ordered to pay the defendant's or the civilly responsible party's legal fees in case of acquittal or rejection of the civil claims.

In civil litigation, the legal costs incurred are awarded to the winning party unless the trial addressed new issues of law or the court has departed from the existing precedents or unless the claims have not been entirely upheld. In this scenario the decision must explain the reasons for such decision. In order to determine the amount of the legal fees to be awarded, the judge normally uses professional tariffs. If the action brought by the claimant is frivolous, the court would in its discretion fix the fair amount of the compensation of damages due to the defendant.

There has been an increase in the number of securities actions filed in Japan over the last several years. Much of this litigation is a direct result of the passage of the Japanese Financial Instruments and Exchange Act (the "FIEA") in 2004 and the news of a number of high-profile corporate governance scandals over the past ten years including the accounting frauds at the Japanese corporations Olympus and Toshiba. Numerous lawsuits have been filed by investors alleging material misrepresentations, and many of them have been resolved in the investors' favor.

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H. Japan

1. Basics of Filing a Claim and Litigation

Litigation begins when a party files a complaint with the court. After the complaint is filed, the court reviews the complaint for compliance with formalities and then serves it on the defendant by mail. The defendant must answer the complaint within the time set by the court in the notice of summons that accompanies the complaint. The complaint also specifies the date of the first hearing.

The Japanese Code of Civil Procedure ("CCP") is the primary law governing court procedures and it outlines a system for efficiently resolving litigation. Courts have discretion to manage the proceedings as they see fit, but will often first engage in preliminary proceedings in order to distill the legal and factual issues in dispute. The preliminary proceedings often require the parties to exchange a number of written briefs and file supplemental evidence. The court also holds periodic hearings to discuss the open issues with the parties, which are not typically open to the public.

After the court is satisfied with the preliminary proceedings, the court may attempt to mediate a settlement between the parties or will set a date for a hearing/trial where the parties can examine witnesses. In the case brought by more than 100 institutional investors against Olympus in 2011 and resolved for ¥11 billion, the court encouraged the parties to mediate the dispute after the conclusion of the preliminary proceedings.[232] Mediation

[232] Jonathan Stempel, "Olympus to pay $92 million to resolve lawsuits over accounting," Reuters (March 27, 2015), https://www.reuters.com/article/us-olympus-settlements/olympus-to-pay-92-million-to-resolve-lawsuits-over-accounting-idUSKBN0MN23A20150327; *see also* "Olympus Corporation: Japanese accounting case settles for 11 billion yen," Kessler Topaz Meltzer & Check, LLP (accessed May 31, 2019), https://www.ktmc.com/settled-cases/olympus-corporation-japanese-accounting-case-settles-for-11-billion-yen.

ultimately resulted in the settlement and no hearing/trial was required.[233]

In cases where a hearing/trial is necessary, that hearing/trial is generally open to the public. The court rarely asks questions of the witnesses presented but instead relies on the parties to make arguments and submit evidence for its consideration.

Under the CCP, there is no set time limit when a proceeding must be filed. Rather, rights and obligations lapse after certain intervals set forth in specific provisions of Japan's substantive law. Therefore, the "statutes of limitations" vary depending on the type of claim brought. The Japanese Civil Code ("JCC") provides general limitations periods; for example, the limitations period for tort claims is three years or 20 years, depending on the circumstances, and the limitations period for contract claims is generally ten years.

2. Different Mechanisms for Group Proceedings in Japan

There is no class action system in Japan that is similar to the class action system in the United States. There are, however, a number of different legal mechanisms available to those seeking collective redress in Japan: joint proceedings, appointed party proceedings, consumer organization proceedings, the consumer class action system, and individual suits. Individual suits and joint proceedings are the most relevant to institutional investors seeking a remedy for investment losses due to a material misstatement or omission. Appointed party proceedings could also be potentially relevant for investors pursuing securities litigation depending on the circumstances. Consumer organization proceedings and the consumer class action system are limited primarily to consumer claims. Furthermore, only injunctive relief is available in consumer organization proceedings.

Article 38 of the CCP allows joinder of parties or claims, known as a "Joint Suit Proceedings." or "Joint Proceeding." Such proceedings are permissible if claims: (i) are common to the parties; (ii) arise from the same facts or law; or (iii) are of the same kind and arise from the same kind of cause. In Japan, most group disputes are resolved by utilizing this established system of joinder, which involves the appointment of the same attorneys as plaintiffs' counsel. There are various remedies available through Joint Proceedings, such as monetary, injunctive, specific performance and declaratory relief. Joint proceedings have become quasi-class actions in recent securities litigation in Japan in cases such as those against Seibu Railway[234], Livedoor[235], and Olympus.[236] These actions were filed on behalf of hundreds (and in the Livedoor case more than 3,000) investors represented by either a single law firm or a small group of law firms.

Another potential method for pursuing collective securities litigation is to utilize the "appointed party proceedings." Article 30 of the CCP allows "[a] number of persons who share common interests…[to] appoint, from among them, one or more persons as parties to stand as plaintiffs or defendants on behalf of all." The appointed party proceedings effectively work like an opt-in class action in that all interested persons need to file litigation. However, if they authorize one or more of the plaintiffs to proceed on their behalf, they can remain more passive and avoid substantially participating in the litigation.

[233] *Id.*

[234] "Seibu Railway investors sue for 350 million yen," The Japan Times, February 2, 2002, *available at* https://www.japantimes.co.jp/news/2005/02/02/business/seibu-railway-investors-sue-for-350-million-yen/#.XOWsL8hKgdU.

[235] "Shareholders win suit for Livedoor damages," The Japan Times, May 22, 2009, *available at* https://www.japantimes.co.jp/news/2009/05/22/national/shareholders-win-suit-for-livedoor-damages/#.XOWrDchKgdU.

[236] There were a few separate group actions filed by investors against Olympus. All of the cases settled and none went to judgment (as in the *Seibu Railway* and *Livedoor* cases). *See* Jonathan Stempel, "Olympus to pay $92 million to resolve lawsuits over accounting," Reuters (March 27, 2015), https://www.reuters.com/article/us-olympus-settlements/olympus-to-pay-92-million-to-resolve-lawsuits-over-accounting-idUSKBN0MN23A20150327; *see also* "Olympus Corporation: Japanese accounting case settles for 11 billion yen," Kessler Topaz Meltzer & Check, LLP (accessed May 31, 2019), https://www.ktmc.com/settled-cases/olympus-corporation-japanese-accounting-case-settles-for-11-billion-yen.

3. Causes of Action in Securities Litigation

Shareholder litigation in Japan most frequently alleges violations of the Financial Instruments & Exchange Act ("FIEA") or tort liability under the Japanese Civil Code ("JCC").

The FIEA contains provisions that cover accounting fraud, prospectus liability and other material misrepresentations, omissions, or false statements made by a company. For example, Article 21 of the FIEA provides that when a registration statement "contains any false statement on important matters or lacks a statement on important matters that should be stated or on a material fact that is necessary for avoiding misunderstanding [the company] shall be held liable to compensate damage sustained by persons who have acquired the securities issued by [the company]…" Article 21-2 provides similar liability for false statements or omissions made in other documents, such as annual and quarterly reports.

To prevail on a claim for damages under Article 21-2, plaintiffs must prove: (i) there was a material misrepresentation in an issuer's public disclosure documents enumerated under Article 25 of FIEA; (ii) that the acquired securities were issued by the person or entity who submitted the disclosure documents; and (iii) the securities were acquired from such person or entity (rather than in a public offering) after the document was disclosed to the public. Material misrepresentations include both affirmatively false statements and omitted statements regarding "important matters." The applicable disclosure documents listed in Article 25 include, but are not limited to: annual reports, semi-annual reports, quarterly reports, and internal control reports. Interestingly, Article 21-2 is not applicable to misrepresentations made in disclosures required by stock exchanges or in voluntary disclosures by an issuer.

A fraud on the market theory like that utilized in the U.S. is generally applicable to claims under Article 21-2. Accordingly, plaintiffs need not prove actual reliance on the challenged disclosure. Under a 2014 amendment to the FIEA, the standard of liability imposed upon defendants was changed from strict liability to negligence. Plaintiffs can allege a claim under Article 21 by demonstrating (1) a false (or omitted) statement, (2) materiality of the false statement, and (3) loss causation. However, defendants still have the ability to rebut a showing of negligence in connection with their alleged misrepresentations and omissions. If a defendant can demonstrate they were not negligent, they will not be held liable for the false or omitted statement. Additionally, unlike for claims under Section 10(b) of the U.S. Exchange Act, investors in Japan need not demonstrate a defendant's scienter.

There is also the equivalent of a "statute of limitations" to assert claims under Article 21-2. Claims are extinguished if not exercised: (i) within two years from the time the claimant becomes aware of the misrepresentation (or should be aware through the exercise of reasonable care); or (ii) within five years from the date the challenged disclosure document is filed.

Under FIEA, there is a statutory rebuttable presumption of damages caused by a defendant's material misrepresentations. Specifically, damages are presumed to be the difference between the average market price in one-month period before and after a corrective disclosure. This presumption only applies to investors who acquired the issuer's shares within one year prior to the corrective disclosure date, and who continued to hold the shares on the day of the disclosure. Investors are also able to pursue damages calculated based on a different methodology. The presumption essentially serves as a minimum damage amount for those who purchased within one year prior to the disclosure. Moreover, recoverable damages under Article 21-2 are limited to the difference between the amount paid by plaintiff to acquire the security, and the market value of that security when plaintiff claimed damages. Issuer defendants are also not liable for damages stemming from a decline in stock price not caused by a defendant's alleged misrepresentation.

In the alternative, investors can pursue a remedy for investment losses based on allegations of general tort liability. Article 709 of the JCC is a general tort provision that provides that "[a] person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence." In order to bring a tort claim, a plaintiff must allege an intentional or

negligent wrongdoing that caused the plaintiff damages. The Japanese Supreme Court has held that tort liability can be used by investors to cover losses due to false statements or misrepresentations. A plaintiff or plaintiffs that bring suit alleging Article 709 as the cause of action must demonstrate (1) the defendant's intentional or negligent wrongdoing, and (2) that the wrongdoing caused damage to the plaintiff.

4. Costs and Attorneys' Fees

Pursuant to Article 61 of the CCP, court fees and other litigation costs are paid by the losing party unless otherwise allocated by the court. Attorneys' fees are not considered costs under the CCP and so each party is responsible for paying for their legal representation regardless of the outcome. There is no CCP provision that specifically requires a court to impose a cap on court fees, so the court can use its discretion to allocate such fees. In joint proceedings, the joint parties generally pay court fees in equal amounts, but the court can order a different allocation. If a party withdraws a lawsuit or otherwise abandons a claim, that party will pay the court fees relating to that claim.

It is permissible for Japanese attorneys to represent clients on a contingency fee basis and there is no per se limit on the amount of such fees. However, in practice most Japanese attorneys do not work on a purely contingency fee basis.

Third party litigation funding is permissible in Japan and has successfully been used in a number of large securities cases brought by groups of institutional investors.

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I. NETHERLANDS

In the wake of the Supreme Court's decision in *Morrison*[237] limiting the reach of the U.S. securities laws, Dutch collective actions and collective settlement vehicles have gained increasing attention from investors in non-U.S. securities seeking redress for securities fraud. The Netherlands is the only national legal system in the European Union ("EU") that authorizes opt-out collective settlements. Indeed, the Amsterdam Court of Appeal has recognized that, after *Morrison*, the international legal system needs a forum outside the United States with jurisdiction to render a settlement binding on persons who cannot be included in U.S. class action settlements.[238]

Enter the *stichting* (foundation) and the *vereniging* (association), the preferred mechanisms in the Netherlands for collective redress under either a representative collective action pursuant to Article 3:305a of the Dutch Civil Code ("DCC") or a collective settlement pursuant to the Act on the Collective Settlement of Mass Damage (*Wet Collectieve Afwikkeling van Massaschades,* or "WCAM") under Sections 7:908-7:910 of the DCC and Sections 1013-1018 of the Dutch Code of Civil Procedure

The Netherlands is the only national legal system in the European Union ("EU") that authorizes opt-out collective settlements.

[237] 561 U.S. 247 (2010).

[238] Amsterdam Court of Appeal, 17 January 2012, JOR 2012, 51 (*Converium*) rendering final its interim decision of 2 November 2010, JOR 2011, 46 (*Converium*).

("DCCP"). DCC Article 3:305a and the WCAM statutes are complementary: the former can be used to seek a declaratory judgment with respect to liability, but may not yet seek money damages, while the latter may be used for the settlement, but not the prosecution, of class-wide claims on an opt-out basis similar to American class actions. Despite some eye-catching settlements by these foundations and associations, Dutch collective actions have failed to completely fill the void left by *Morrison* for a number of reasons, including due to (1) jurisdictional limitations highlighted by the Amsterdam Court of Appeal in the recent *BP* case, (2) concerns about so-called "free-riding" absent class members created by WCAM settlements, as seen in the €1.3 billion *Fortis/ Ageas* settlement, and (3) the requirement under new DCC Article 3:305a that a sufficiently close connection exist between the collective action and the Dutch jurisdiction.

Changes to DCC Article 3:305a recently approved by the Dutch House of Representatives and passed by the Dutch Senate in March 2019 codify jurisdictional limitations, but also allow a *stichting* to bring a collective claim for damages similar to American opt-out class actions.[239] The new legislation also sets stricter requirements for the representative of the class, an opt-out mechanism for Dutch residents, and punitive measures for frivolous claims.

Despite blockbuster settlements in the past 15 years, for example, in *Converium* and *Royal Dutch Shell*, there are case-specific factors that may diminish the availability of global peace going forward.

1. Jurisdictional Limits of Collective Actions in the Netherlands: BP and Petrobras

In 2016, the Court of Justice of the European Union (the "ECJ") ruled in the *Universal Music* case[240] that EU Member States' courts cannot exercise jurisdiction over a defendant based on the mere circumstance that damage consists exclusively of financial damage to a plaintiff's bank account, absent any other connecting factors, and is the direct result of an unlawful act committed in another jurisdiction. On September 12, 2018, the ECJ confirmed that the *Universal Music* criteria also apply to prospectus liability.[241] The ECJ further clarified the types of circumstances that can constitute other connecting factors, such as: (1) the place of residence of the plaintiff; (2) the place where the payments relating to the acquisition of the bonds were made; (3) on which market the securities were acquired; (4) with which competent authority the prospectus was filed; and (5) where the investment contract was signed.

In 2017, the Amsterdam Court of Appeal applied the ECJ's *Universal Music* decision to a case against BP concerning BP's misrepresentations about the Deepwater Horizon drilling rig explosion.[242] There, a *vereniging* (*Vereniging Effecten Bezitters* or "VEB") brought a collective action under DCC Article 3:305a on behalf of individuals who invested in BP through a Dutch intermediary or account. The appellate court agreed with the defendant that the lower court did not have jurisdiction.

The appellate court's analysis noted that BP was domiciled in the United Kingdom, so the Dutch court could only have had jurisdiction over the case if the event giving rise to damages was in the Netherlands or if damage occurred there.[243] First, the court ruled that the event giving rise to plaintiffs' claimed damages did not take place in the Netherlands. The appellate court further assessed whether the damages themselves occurred in the Netherlands. The court determined that investors alleged that they suffered financial damages in Dutch bank accounts, but that fact in itself did not establish jurisdiction. Referring to the *Universal Music* case, the appellate court ruled that it could only take on

[239] The provision applies to events giving rise to the damages that took place on or after November 15, 2016, the day the first draft of the legislative proposal was sent to the Dutch House of Representatives.

[240] ECJ 16 June 2016, C-12/15, ECLI:EU:C:2016:449 (*Universal Music International Holding BV/Schilling*).

[241] ECJ 12 Sept. 2018, C-304/17, ECLI: EU:C:2018:701 (*Löber/ Barclays Bank plc*).

[242] Amsterdam Court of Appeal, 7 November 2017, ECLI:NL:GHAMS:2017:4588 (*VEB/BP plc*); Court of Amsterdam, 28 September 2016, C/13/589073 & HAZA 15-573, ECLI:NL:RBAMS:2016:6593 (*VEB/BP plc*).

[243] Based on Article 7 paragraph 2 of the recast EU Brussels I Regulation (1215/2012) and *inter alia* ECJ 30 November 1976, C-21/76, ECLI:EU:C:1976:166 (*Kalimijnen*).

jurisdiction if there were special circumstances justifying bringing the dispute before the Dutch court. The court then held that the facts that (1) a significant group of investors represented in the case had been domiciled in the Netherlands, (2) BP had reached a settlement with a number of non-Dutch investors in the United States, and (3) no other litigation proceedings against BP were pending in Europe were not special circumstances that demanded the conclusion that a close connection existed between the dispute and the Netherlands. The court also noted that BP securities listings throughout the world, including in the Netherlands, did not provide a basis for jurisdiction because BP investors could reside anywhere, making it impossible for BP to predict in which jurisdictions it might be sued. The Vereniging Effecten Bezitters filed an appeal with the Dutch Supreme Court, whose ruling is expected later in 2019.

Different facts in *Petrobras*[244] led to a different outcome. In *Petrobras*, a *stichting* initiated civil proceedings in the Netherlands against Petrobras, certain Dutch (financial) corporations within the Petrobras group that were alleged to have participated in the fraud, and certain other defendants seeking to obtain compensation for the losses suffered by investors as a result of a massive bribery scheme and related accounting manipulations. Defendants sought to dismiss the case on the basis that the Dutch court had no jurisdiction to hear the foundation's claims. The Rotterdam Court denied the motion and took jurisdiction with regard to the majority of the claims, based on DCCP Article 7.[245] Article 7 provides that if a Dutch court has jurisdiction with respect to one of the defendants (here, Dutch defendants), it has jurisdiction over all defendants named in the same proceedings, provided that the rights of action against the different defendants are connected with each other (*i.e.*, concern the same events) in order to avoid inconsistent judgments in separate proceedings. The *Petrobras* decision illustrates that, under certain circumstances, a (collective) claim can be brought against a foreign, non-Dutch holding company in the Netherlands regarding events that happened outside the Dutch jurisdiction, by naming Dutch defendants (such as a Dutch subsidiary with alleged involvement in the wrongdoing). The Rotterdam court's decision in the *Petrobras* case is expected to be appealed and two levels of appellate review are available.

2. WCAM Settlement Free-Riders Encourage Opt-Out or Direct Damages Actions: Fortis

An initially proposed settlement agreement by settlement foundations to resolve allegations against Ageas SA/NV (f/k/a Fortis SA/NV) accorded different treatment to "active" and "non-active" claimants. "Active" claimants were given preferential treatment because they participated in a legal proceeding before the settlement or registered with one of the foundations involved in the agreement—the rationale being that the participants' involvement had propelled the actions against Fortis. The terms of the proposed settlement provided those investors with compensation that was approximately 50 percent higher than that for "non-active" claimants, i.e., passive class members, even though "non-active" claimants held about three times more shares than "active" claimants. The plaintiffs argued that this arrangement was equitable in order to avoid leaving shareholders with no incentive to actively participate in litigation because they would get no additional benefit as compared to "non-active" claimants, which seemed like "free riders."

However, the court rejected this argument, as the collective action mechanism—which is meant to prevent numerous separate actions—anticipates "free-rider" class members who will wait for the results of a settlement. Ultimately, in approving an amended settlement proposal, the court did not object to differential treatment among class members based on any substantive differences in their claims and agreed to provide active claimants with compensation that was 25 percent higher than that of non-active claimants to reimburse their reasonable and demonstrably incurred costs and take into account the fees they had agreed to pay counsel. Active claimants were also paid a substantial portion (first distribution) of

[244] District Court of Rotterdam, 19 September 2018, ECLI:NL:RBROT:2018:7852 (*Stichting Petrobras Compensation Foundation/Petroleo Brasileiro SA*).

[245] Because Petrobras was not domiciled in the EU, the Rotterdam Court assessed its jurisdiction on the basis of the DCCP, instead of the recast EU Brussels I Regulation (1215/2012).

their compensation almost a full year before the claims filing process even opened for non-active claims.

Thus, investors who assume an active role in litigation can be compensated for their costs but should be cautioned by the court's assessment of the *Fortis* settlement. Costs must be objectively justified and investors should be mindful of the court's scrutiny. Accordingly, direct actions continue to be an important tool for investors seeking a recovery.

3. Amendments to Dutch Civil Code Article 3:305a

For several years, there have been legislative attempts to expand the power of representative collective actions to permit them to also seek damages. Most recently, on March 19, 2019, the Dutch Senate approved a legislative proposal that clears the way for collective actions for damages under DCC Article 3:305a, bridging the gap between that procedure and the WCAM procedure.[246] Under the new legislation, a collective action could seek damages only if the action has a sufficiently close connection to the Dutch jurisdiction. The legislative text explains that such a connection is deemed to exist if any one of the following three conditions can be met:

1. The representative entity is able to show that the majority of the individuals on behalf of whom the collective claim is brought reside in the Netherlands;
2. The defendant resides in the Netherlands and additional circumstances demonstrate that the action is sufficiently connected to the Netherlands (effectively mirroring the jurisdictional requirement discussed by the court in BP); or
3. The event or events that form the basis of the collective action took place in the Netherlands.

The new legislation also limits the "opt-out" format of the Article 3:305a action to class members who are domiciled in the Netherlands. Class members domiciled elsewhere are able to join the action by opting in. However, the new legislation also allows courts to determine, at the request of foreign defendants, that the opt-out structure applies to a clearly defined group of foreign aggrieved parties. The applicability of this exception, at least in a securities fraud action in which the class is easily ascertainable, may come to swallow the rule.

Finally, in a bid to curb potential abuses of the class action mechanism, the Dutch legislature introduced the possibility of the court ordering a claimant to pay up to five times current liquidated damages to the prevailing party in the case of a frivolous claim.

[246] As of this writing, the new legislation will come into effect on a date to be determined.

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J. Spain

1. Overview

In Spain, collective redress for investors is available primarily through consumer protection law,[247] which since 2000 has permitted actions on behalf of groups of consumers who suffer harm due to the same event.[248] Collective actions remain relatively rare in Spain, though their frequency has increased since the start of the global financial crisis.[249]

[247] In addition to consumer law, collective redress is available in Spain for environmental law, competition law, labor law, and trademarks. Francisco de Elizalde, *Collective redress in the Member States of the European Union*, European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, at 237 (Oct. 2018), *available at* http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608829/IPOL_STU(2018)608829_EN.pdf.

[248] In 2000, the *Ley de Enjuiciamiento Civil* (Civil Procedure Act) introduced specific litigation procedures granting standing for the protection of rights and interests of consumers and users in Article 11. Prior to 2000, collective actions were mainly named by Art. 7.3 of the Ley Orgánica 6/1985, de Julio 6, del Poder Judicial (Organic Law 6/1985, of July 6th, of Judicial Powers). María Paz García Rubio & Marta Otero Crespo, *Report II on collective redress, Collective redress in Spain in light of the EC Recommendation,* British Institute of Int'l & Comparative Law (Nov. 2014), *available at* https://www.collectiveredress.org/collective-redress/reports/spain/overview.

[249] *See* International Comparative Legal Guide, *Class & Group Actions 2016*, Global Legal Group (Oct. 28, 2015), *available at* http://zunzunegui.net/wp-content/uploads/2016/09/CA16_Chapter-22-Spain.pdf ("[C]ollective claims procedures . . . are seldom used."); *see also* Andoni De la Llosa Galarza and Albert Poch Tort, *The Class Actions Law Review – Edition 2: Spain, The Law Reviews* (May 2018), *available at* https://thelawreviews.co.uk/edition/the-class-actions-law-review-edition-2/1169592/

The Civil Procedure Act of 2000 (la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil) introduced rules for two types of proceedings: one for actions where the affected groups of consumers or users are easily identifiable; and another for actions where the damaged parties have "diffuse" interests.[250] The Civil Procedure Act did not create a special proceeding or court, but rather overlay rules for collective redress onto existing procedures.[251] Remedies available in actions for collective redress include damages and, in certain cases, injunctive relief. Punitive damages are not available.[252]

Under Sections 11 and 15 of the Civil Procedure Act, standing depends on which of the two types of actions is initiated. In the first type, where the damaged consumers are identified or are easily identifiable, collective actions may be brought by consumer associations, certain authorized consumer protection entities, and groups representing the majority of the affected parties. In the second, where it is difficult or impossible to determine the number of affected consumers, only legally recognized representative consumer associations (such as members of the Spanish Council of Consumers and Users) have standing to bring an action. In both instances, public prosecutors are also authorized to take action to defend consumers' interests.[253]

The Civil Procedure Act provides procedures for the protection of consumer collective interests based on groupings of specialties, such as telecommunications services, financial services, and product liability. The Act has been criticized because of an absence of systemic and consistent parameters.[254] There is a lack of a harmonized and methodical approach to collective redress mechanisms in Spain due to the contradictions and inconsistencies among the rules of the Civil Procedure Act.[255]

2. Opt-In vs. Opt-Out

Spain's system for collective redress shares characteristics with both opt-in and opt-out regimes but cannot be clearly defined as either.[256] There is no need for individuals to agree to participate in collective actions brought by groups, associations or legal entities. If individuals opt in, they will be able to claim their damages within a certain time, depending on the type of collective action. If they remain out of the proceedings, they will still be bound by the decision and able to benefit from it by filing a claim for damages with the court enforcing the judgment.[257] While consumers who do not opt in can benefit from favorable judgments applying to individual plaintiffs, the Spanish courts have not allowed businesses to apply non-favorable rulings in collective proceedings to other actions by affected claimants.[258]

The Civil Procedure Act requires the court to give notice to the local, regional or national news media once an action for collective redress has been initiated. In cases

spain (stating that such cases are "becoming popular in order to challenge financial and banking services contracts").

250 Francisco Malaga, *Collective Redress across the globe – Spain*, Linklaters (Feb. 1, 2019), *available at* https://www.linklaters.com/en-us/insights/publications/collective-redress-2018/collective-redress-across-the-globe-2018/spain.

251 Albert Poch Tort and Andoni De la Llosa Galarza, *The Class Actions Law Review – Edition 2: Spain,* The Law Reviews (May 2018), *available at* https://thelawreviews.co.uk/edition/the-class-actions-law-review-edition-2/1169592/spain.

252 Quantification of damages is mandatory. Prof. C. Van Heerden, *Redress for Consumers in terms of the Consumer Protection Act 68 of 2008: A Comparative Discussion, JICLT*, at 131-44. (2011).

253 Gobierno de España, Ministerio de Justicia, Traducciones del Derecho Español, *Law 1/2000, of 7 January, on Civil Procedure*, E-Book, PDF, non-official Spanish Justice Ministry translation including changes introduced by Law 42/2015 of 5 October (2015), available for purchase at *https://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol*.

254 Poch and De la Llosa, *supra* note 251; María Paz García Rubio & Marta Otero Crespo, *Report II on collective redress, Collective redress in Spain in light of the EC Recommendation*, British Institute of International & Comparative Law (Nov. 2014), available at https://www.collectiveredress.org/collective-redress/reports/spain/overview.

255 Poch and De la Llosa, *supra* note 251 (Rather than create a "special proceeding," the Civil Procedure Act sprinkles procedural rules for collective redress on existing ordinary or oral proceedings in various of its Articles. "This lack of regulation on the Civil Procedure Act has generated a vast number of problems when the number of collective actions filed before the courts has increased …").

256 de Elizalde, *supra* note 247, at 239.

257 Poch and De la Llosa, *supra* note 251.

258 de Elizalde, *supra* note 247.

where the members of the group are identifiable, the group or organization protecting consumers' "diffuse" interests must notify the affected consumers of its intention to file a claim before doing so. Once proceedings have begun, individual claimants may join the case at any time. In cases where the members of the group are not easily determinable, the court must stay the proceeding for no longer than two months while the claim is publicized. In such cases, potential claimants can only come forward and join the claim while the stay is in place.[259] While the cost of notice must initially be borne by the party responsible for publicizing the case, the court may make publicity costs part of the recoverable costs under the loser pays principle if the claim succeeds.[260]

If the court upholds the claim, it must determine which individuals are entitled to benefit from the award regardless of whether they joined the proceedings or remained out of the proceedings.[261] The court will rule on the individual claims filed by affected consumers who joined the proceedings, and also hold whether other members of the group of affected consumers can benefit from the relief obtained by the claimant. If it is not possible to identify the beneficiaries of the award with sufficient certainty, the court will need to establish requirements that individuals must fulfill in order to be entitled to participate.

3. Possible Strategies to Bring Collective Actions in Spain

One strategy to bring a collective action in Spain is to obtain a court ruling on a few individuals that are representative of the class. This ruling will bind the class, and future claims can be brought under the original ruling.[262] Another strategy is to file a criminal complaint on behalf of the victims and join a civil action for damages to it. In Spain, the judicial system allows a criminal proceeding to be initiated ex officio (by the Public Prosecutor's Office, State Counsel, police or courts themselves) and by private persons.[263] The court then decides, based on the relevant facts, whether the acts in question constitute an offense.[264]

The *Bankia* case offers a good example of both strategies. Bankia was formed in 2010 by consolidating seven unlisted regional savings banks, or *cajas de ahorros.* During the consolidation, troubled loans were allegedly transferred to a separate government-controlled holding company. Ignoring warnings from the *Banco de España* (Spain's central bank), Bankia went public in July 2011, raising more than €3 billion, including €1.85 billion from retail investors, hundreds of thousands of them Bankia customers and employees who bought convertible debt marketed as "preferred shares" at bank branches.[265] In early 2012, Bankia's stock plummeted after the company announced that its 2011 profit of €300 million was actually a €3 billion loss, the largest corporate loss in Spain's history. The scandal triggered a government bailout and restructuring that eventually cost the public €22 billion.[266]

Two small investors filed suit against the directors and officers for failing to disclose the loan problems. The cases went up to the Tribunal *Supremo de España* (Supreme Court), which ordered Bankia in January 2016 to reimburse the investors for misleading them about the IPO. Under the ruling, the bank was ordered to pay one investor nearly €10,000 and the other nearly €21,000.[267]

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[259] Latham & Watkins LLP, *The Class Actions Global Guide, Spain*, p. 352 (October 2015), *available at* https://www.jdsupra.com/legalnews/the-class-actions-global-guide-spain-88969/.

[260] de Elizalde, *supra* note 247, at 241.

[261] Malaga, *supra* note 250.

[262] Civil Procedure Act, art. 11, 221, 222.3, 519 (B.O.E. 2000); *see also* Malaga, *supra* note 250.

[263] *Spain: Business Crime 2019*, International Comparative Legal Guides, *available at* https://iclg.com/practice-areas/business-crime-laws-and-regulations/spain.

[264] *Id.*

[265] International Financial Litigation Network, *White Smoke for Bankia's Shareholders* (Apr. 1, 2019), *available at* http://www.ifl-network.com/white-smoke-for-bankia-s-shareholders.html.

[266] Charlie Devereux, *Ex-Officials Stand Trial on Bankia IPO That Sparked Spain Crisis*, Bloomberg (Nov. 26, 2018), *available at* https://www.bloomberg.com/news/articles/2018-11-26/ex-officials-stand-trial-on-bankia-ipo-that-sparked-spain-crisis; *see also*, Raphael Minder, *Spanish Court Orders Criminal Inquiry Into Oversight of Bankia I.P.O.*, N.Y. Times, Feb. 13, 2017, *available at* https://www.nytimes.com/2017/02/13/business/spain-bankia-ipo.html.

[267] Raphael Minder, *Spanish Supreme Court Orders Bankia to Repay 2*

The Supreme Court held that Bankia's prospectus for its public stock offering in 2011 had contained "serious inaccuracies."[268] The ruling entitled minority shareholders who participated in Bankia's IPO to recover all of their investment plus interest and the costs of the proceedings.[269] Indeed, in early February 2016, a collective action was filed on behalf of 660 Spanish investors seeking €6.3 million, plus interest.[270] Later that month, however, Bankia announced that it would repay investors who bought shares in the offering all of their investment, plus 1% a year in interest. The bank said it had decided to make the IPO investors whole to save €400 million of the €500 million in legal costs Bankia estimated it would have spent to fight all the lawsuits filed on investors' behalf.[271] Through the program, Bankia said it had repaid 225,106 retail investors a total of €1.847 billion as of year-end 2017 in exchange for investors withdrawing any pending legal or out-of-court claims.[272]

In addition, a criminal trial that began in November 2018 offered investors who bought Bankia shares on the secondary market, after the 2011 offering but before the bank's nationalization in May 2012, an opportunity to seek collective damages. Thirty-one individual defendants and three entities—Bankia, parent company BFA, and former consultant Deloitte SL—were accused of fraud-related charges after a nine-month investigation by the Audiencia Nacional, Spain's highest criminal court.[273]

Four former high-ranking Bankia officers faced charges by public prosecutors, including one-time International Monetary Fund chief Rodrigo Rato, who was Bankia's chairman at the time of the merger and IPO. (As the trial began, Rato was already serving a prison term for embezzlement over his misuse of Bankia credit cards.)[274] All of the defendants, however, were also facing "private accusations" by organizations representing groups of claimants. Private complainants admitted by the court included an employees' union (Confederación General de Trabajo), a bank consumers' organization (Asociación de Usuarios de Bancos, Cajas y Seguros), a group representing hundreds of retail investors (Asociación Española de Accionistas Minoritarios de Empresas Cotizadas),[275] and a range of other private claimant groups.[276] The trial was expected to last seven months.

One final note concerning the *Bankia* case: in its January 2016 ruling, the Supreme Court distinguished between individual and institutional investors, suggesting that institutional investors would be held to a higher standard given their access to greater resources.[277] In May

Investors in Its I.P.O., N.Y. Times, Jan. 27, 2016, *available at* https://www.nytimes.com/2016/01/28/business/spanish-supreme-court-orders-bankia-to-repay-2-investors-in-its-ipo.html.

[268] *Id.*

[269] International Financial Litigation Network, *supra* note 265.

[270] Kevin LaCroix, *Spanish Class Action is the Latest Collective Investor Action Filed Outside U.S.*, Int'l D&O (Feb. 7, 2016), *available at* https://www.dandodiary.com/2016/02/articles/international-d-o/spanish-class-action-is-the-latest-collective-investor-action-filed-outside-u-s/.

[271] Ian Mount, *Bankia to pay retail investors for €2bn IPO loss*, Fin. Times, Feb. 17, 2016, *available at* https://www.ft.com/content/a9a66274-d567-11e5-829b-8564e7528e54.

[272] Bankia, *Refund of Investments during IPO*, https://www.bankia.com/en/shareholders-and-investors/shareholder-corner/refund-of-investments-during-ipo/ (last visited Mar. 31, 2019).

[273] Radio y Televisión Española (RTVE), *Juicio Bankia: Quien y por que se sienta en el banquillo de los acusados en el juicio por la salida a bolsa de Bankia* (Bankia Trial: Who Is Sitting in The Defendants' Dock in The trial for Bankia's Stock Offering, and Why) (Nov. 26, 2019), available at http://www.rtve.es/noticias/20181126/quien-se-sienta-banquillo-acusados-juicio-salida-bolsa-bankia/1843600.shtml.

[274] Agence France-Presse, *Ex-IMF chief Rato in dock again in major Bankia trial* (Nov. 25, 2018), available at https://www.france24.com/en/20181125-ex-imf-chief-rato-dock-again-major-bankia-trial; *see also*, Reuters, *Ex-IMF head Rodrigo Rato starts jail term in 'black cards' case* (Oct. 25, 2018), available at https://uk.reuters.com/article/uk-spain-corruption/ex-imf-head-rodrigo-rato-starts-jail-term-in-black-cards-case-idUKKCN1MZ21A.

[275] Europa Press, *La Audiencia Nacional admite la personación de AEMEC en el procedimiento de Bankia,* Dec. 1, 2017, *available at* https://www.lainformacion.com/economia-negocios-y-finanzas/la-audiencia-nacional-admite-la-personacion-de-aemec-en-el-procedimiento-de-bankia_c14aQUmNYE1aRqSEfRiD95/.

[276] RTVE posted a copy of the opening trial document, which lists all charges, defendants and plaintiffs, at http://www.rtve.es/contenidos/documentos/Auto%20apertura%20juicio%20oral%20Bankia.pdf.

[277] David H. Kistenbroker, Joni S. Jacobsen, and Angela M. Liu, *Developments in Global Securities Litigation*, Dechert LLP (2017), *available at* https://www.dechert.com/knowledge/onpoint/2017/11/developments-in-global-securities-litigation.html.

2016, the Spanish utility Iberdrola tested this distinction by filing a lawsuit seeking €12.4 million in compensation for losses on a €70 million investment.[278] A Madrid court dismissed the case, stating that Iberdrola should have had a better understanding of Bankia's IPO than individual investors: "As opposed to retail investors, Iberdrola knew, for example, that demand was weak among foreign institutional investors who were worried about country risk in Spain at that point."[279] Iberdrola appealed the ruling, and the Audiencia Provincial de Madrid affirmed the lower court's ruling in full.[280]

4. Regulatory Environment for Securities Litigation

The Comisión Nacional del Mercado de Valores (CNMV) regulates the securities market in Spain. The Securities Market Act creates liability "for any damages that may be caused to the owners of the securities acquired as a result of false information or omissions of relevant data from the prospectus or any other document that the guarantor must draw up."[281] The Securities Market Act was most recently updated in December 2017 to comply with a series of European Union securities regulations.[282]

The Securities Market Act provides that certain acts or omissions constitute very serious violations, including:

- Launching public offerings for sale or subscription or listing without complying with the basic conditions set forth in the prospectus, where a prospectus is required, or omitting material data or including in the prospectus inaccuracies or false or misleading information where the amount of the offering or listing or the number of investors affected is material.[283]

- Breach of the disclosure duties with intent to conceal or gross negligence, where the missing disclosure and the delay which occurred was material.[284]

The statute of limitations is five years for serious or very serious violations and two years for minor violations.[285]

Spanish financial institutions are regulated by the Banco de España (Spain's Central Bank) under Act Number 26/1988 of 29 July, on Discipline and Intervention of Credit Institutions.

Criminal prosecution of misconduct resulting in counterfeiting the balance sheet or the books which caused damages to the company, to stakeholders or to third parties is available under Article 290 of the Spanish Criminal Code.

In Spain, civil liability may be claimed in criminal proceedings by the Public Prosecutor or by the victims, who must act under the same representation, according to Article 103 of the Criminal Procedural Law.[286]

[278] Ian Mount, *Iberdrola Files Lawsuit Against Bankia Over IPO*, Fin. Times, May 31, 2016, *available at* https://www.ft.com/content/89a87a0a-2744-11e6-8b18-91555f2f4fde.

[279] Sarah White, *Spanish Court Throws Out Iberdrola Claim Against Bankia over IPO*, Reuters, March 25, 2017, *available at* https://www.reuters.com/article/spain-bankia-iberdrola-idUSL5N1H2097.

[280] *La Audiencia de Madrid También da la razón a Bankia frente a la demanda de Iberdrola por la salida a Bolsa*, El Pais (July 5, 2018), *available at* https://elpais.com/economia/2018/07/05/actualidad/1530786172_312006.html.

[281] Act 24/1988, of 28 July, on the Securities Market, Article 28(3) (Spain). Consolidated unofficial English translation text provided by the CNMV (Last update July 2012), *available at*: https://www.cnmv.es/docportal/legislacion/leymercado/LMV_May2012_EN.pdf.

[282] While an updated English translation of the Act itself is not available, the changes are contained in Royal Decree-Law 21/2017, of 29 December, on urgent measures for the adaptation of Spanish law in accordance with European Union regulations in relation to the securities markets, available at https://www.cnmv.es/Portal/legislacion/legislacion/tematico.aspx?id=1.

[283] Act 24/1988, of 28 July, on the Securities Market, Article 99(n) (Spain).

[284] Act 24/1988, of 28 July, on the Securities Market, Article 99(p) (Spain).

[285] Act 24/1988, of 28 July, on the Securities Market, Article 101. bis (Spain).

[286] Marta Requejo, *Securities Class Actions and Extra-Territoriality: a View from Spain*, Conflict of Laws, July 2, 2010, *available at* http://conflictoflaws.net/2010/securities-class-actions-and-extra-territoriality-a-view-from-spain/.

5. Loser Pays Model

In Spain, the losing party will pay the costs ("loser pays" or the English rule).[287] Legal costs in Spain are the resulting expenses from the proceedings and include lawyers' fees; publication of announcements that must be published during the proceedings; court fees; copies of documents; and experts' fees.[288] The amount in legal fees that the losing party has to pay cannot exceed one-third of the amount claimed in the proceeding.[289] The losing party may allege that the fees are excessive or improper, and the court will decide the exact amount that has to be paid.[290]

6. Funding the Litigation-Contingent Fee Arrangements

Lawyers and their clients can freely agree on the amount of legal fees, subject to ethical and unfair competition rules.[291] Contingency fees agreements are available.[292]

[287] Poch and De la Llosa, *supra* note 251 (Successful party can "recover court fees or other incidental expenses and their own legal costs" under loser pays, unless: "a. the case raises serious doubts regarding the facts or the application of the relevant law; and b. the arguments of the losing party are not totally dismissed …," in which place each party bears its own costs.).

[288] de Elizalde, *supra* note 247, at 240-241.

[289] Civil Procedure Act, art. 394 (B.O.E. 2000, 3).

[290] Civil Procedure Act, art. 35 (B.O.E. 2000, 2).

[291] *Id.*, Limits of legal fees are established by Section 394.3 LEC. STC 719/2008, 4 de noviembre; *see also* the STC 357/2004, de 13 mayo (RJ 2004, 2739) and STC 446/2008, 29 de mayo (RJ 2008, 4164); María Paz García Rubio & Marta Otero Crespo, Report II on collective redress, *Collective redress in Spain in light of the EC Recommendation*, British Institute of International & Comparative Law (Nov. 2014), *available at* https://www.collectiveredress.org/collective-redress/reports/spain/overvieww.

[292] STC 219/2008. 4 de noviembre; *see also* STC 357/2004, 13 de mayo (RJ 2004, 2739) and STC 446/2008, 29 de mayo (RJ 2008, 4164); María Paz García Rubio & Marta Otero Crespo, Report II on collective redress, *Collective redress in Spain in light of the EC Recommendation*, British Institute of International & Comparative Law (Nov. 2014), *available at* https://www.collectiveredress.org/collective-redress/reports/spain/overview.

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K. United Kingdom

1. Overview

The United Kingdom does not presently have an American style "opt-out" class action system. There are, however, other methods of multi-party actions available. In the combined jurisdiction of England and Wales there are presently three types of collective redress actions available: (1) representative actions; (2) the Group Litigation Order ("GLO"); and (3) a new collective action is presently available to consumers only for claims arising from a breach of competition law and is known as a collective proceedings order; this type of collective action may be expanded to encompass other causes of action in the future. However, it is an important development as it is the first collective proceeding in English procedure that can be brought on an "opt-out" basis. Scotland, also a U.K. jurisdiction, has a different legal system and has not introduced a group action procedure. It will not be addressed in this article.

Representative actions are the most similar to the American class action. In a representative action, one plaintiff can represent other parties with the same interest.[293] Representative actions, however, are rarely used because they are not available where members of the class have different remedies or defenses.[294] Any

[293] *See* CPR, Part 19, Title II, https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part19.

[294] Alison Brown & Ian Dodds-Smith, et. al., International Comparative Legal Guide to: Class and Group Actions 2016, *Chapter: England & Wales,* 8th Ed. (2016)*; see also* Lloyd v Google LLC [2018] EWHC 2599 (QB), in which the Court summarized the difficulties in using the representative action framework.

action where damages must be proved cannot be brought as a representative action. The strict limitations on representative actions led to the development of the GLO mechanism.[295]

The GLO, introduced in 1999, is a mechanism created by the courts for managing multiple claims "which give rise to common or related issues of fact or law (the "GLO issues")."[296] Before the court grants a GLO, it must determine that it will be the most appropriate means of resolving the claims and must establish:

- A group register on which details of the claims to be managed under the GLO must be entered;
- The GLO issues, which will identify the claims to be managed under the GLO; and
- The "management court" responsible for managing the claims.[297]

A GLO is not considered a representative action because it is a means of managing individual claims. It is possible, however, that a lead or test case may be selected for decision on a certain issue before other GLO participants.[298] So-called "lead actions" allow for a determination of issues of law or fact that can then be applied in other GLO cases to allow the other actions to focus on any remaining individual issues. The rules of estoppel require that any judgment on one GLO issue be binding on all other claims on the group register, unless otherwise ordered by the court.[299]

There are several steps that must be taken to initiate a GLO. First, either a plaintiff or defendant in a claim may apply to the court for a GLO. The application should summarize the litigation, including the nature and number of claims, parties, and the common issues to the litigation. The applicant should also specify whether there are issues that distinguish any sub-groups. There is no predominance requirement in the GLO criteria, which allows the mechanism to operate as a more flexible case management tool. Once the application is approved, the group litigation is assigned to a judge. After the GLO has been granted, the judge can order that a group of specific lawyers represent parties in the group so as to ensure more effective coordination. In some of the more complex cases, a "steering group" of lawyers may be appointed.[300] There is no oversight by the courts regarding the fairness and reasonableness of settlements.[301]

An alternative to a GLO is for multiple cases to be run concurrently as a multi-plaintiff action and heard together. The court will then exercise its general case management powers to ensure efficiency and fairness as between the different plaintiffs and as against the defendant(s).

The *RBS Rights Issue Litigation*[302] proceeded by way of a GLO. However, in the *Tesco Litigation*[303] the plaintiffs' application for a GLO was refused primarily on the ground that there was not a sufficiently large body of plaintiffs that had already issued proceedings or, in the court's opinion, were likely to issue claims to make case management by any other method within the court's discretion so difficult as to make a GLO necessary. It is unclear whether or not this precedent will be followed in future cases. Difficulties have also been faced where GLOs have been applied for at too early a stage and

[295] Dr. Christopher Hodges, *Global Class Actions Project Country Report: England and Wales*, 3 (2010), http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf.

[296] CPR, Rule 19.10, https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part19.

[297] Brown & Dodds-Smith, *supra* note 294.

[298] Dr. Christopher Hodges, *Global Class Actions Project Country Report: England and Wales*, 1 (2010), http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf.

[299] Brown & Dodds-Smith, *supra* note 294.

[300] Dr. Christopher Hodges, *Global Class Actions Project Country Report: England and Wales*, 14, 17 (2010), http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf.

[301] Dr. Christopher Hodges, *Global Class Actions Project Country Report: England and Wales*, 15, 25 (2010), http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf.

[302] *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

[303] *Omers Administration Corporation & Ors v Tesco Plc.* [2019] EWHC 109 (Ch).

whilst various issues are still to be determined as between different groups or legal representatives.[304]

GLO proceedings are becoming more common in England and Wales. From 2000 to 2016, the Courts have managed 92 GLOs of those, 14 had been commenced since 2012.[305]

2. Loser Pay Model

Similar to the "loser pay" model, England and Wales follow a "cost shifting" rule that requires the losing party to pay the prevailing party's court fees and legal costs. Such fees also include costs for expert witnesses and other incidental expenses. It is up to the court to make a determination on the appropriate fees to be paid. In determining the appropriateness of the fees, the court may consider a party's success on a particular issue and/or the parties' conduct in the litigation. Costs are often significantly discounted upon assessment by the court. Thus, England does not operate under a full "loser pay" model.[306]

If one party offers a settlement that meets certain requirements, called a "Part 36 offer," and the opposing party does not accept, the opposing party may be liable for all costs incurred after refusal of the offer unless they achieve a better result at trial.

3. "Opt-in" vs. "Opt-out"

Plaintiffs to an opt-in collective action will only join collective proceedings when they actively assert membership to a class action. Whereas plaintiffs to an opt-out collective action will automatically fall within a 'class' for the purposes of the proceedings unless they take steps to opt out. The GLO system requires plaintiffs to opt in and for individual claims to be managed together. In order to be coordinated under the GLO, a plaintiff must have issued its proceedings in the management court (or had them transferred there) and be named on the group register.[307]

The U.K. Government has considered introducing a generic right to a collective action on a sector-specific basis. The only sector-specific rule for litigation currently available is for cases regarding competition laws. [308] The Consumer Rights Act 2015, which came into force on 1 October 2015, makes it easier for plaintiffs who have suffered harm as a result of an infringement of competition law both to bring a damages claim and obtain compensation. This introduced a jurisdiction for the UK's Competition Appeal Tribunal ("CAT") to certify that qualifying claims can continue on behalf of, for example, victims of a cartel, on an opt-out or opt-in basis, and to approve collective settlement, where appropriate. These are known as collective proceedings orders ("CPOs"). The CAT is the forum for such claims.

However, initial applications for certification of classes in this context (see *Gibson v Pride Mobility Scooters*[309] and *Merricks v Mastercard*[310]) have been unsuccessful (although *Merricks* is currently subject to appeal). The first instance judgment in *Merricks* provided useful guidance as to what is required to achieve a successful CPO. Various CPO applications such as *Road Haulage Association v Man SE and Others*[311] have been filed and the outcome is likely to provide better insight into the use of CPOs. As this jurisdiction matures, it is possible that it may be extended to other collective redress claims such as securities actions, especially if there is an anticompetitive aspect to the alleged wrongdoing.

One notable difference from individual proceedings is that exemplary damages are not available in collective

[304] *See, e.g., Viner & Ors v. VW Group* [2018] EWHC 2006 (QB).

[305] Brown & Dodds-Smith, *supra* note 294.

[306] David H. Kistenbroker, Alyx S. Pattison, Patrick M. Smith, *Recent Developments in Global Securities Litigation*, 1904 PLI Corp. 607, 13 (2011); http://www.kattenlaw.com/files/upload/Recent_Developments_in_Global_Securities_Litigation_2011.pdf.

[307] Brown & Dodds-Smith, *supra* note 294.

[308] *Id.*

[309] *Gibson v. Pride Mobility Scooters* [2017] CAT 9.

[310] *Merricks v. Mastercard* [2017] CAT 16.

[311] https://www.catribunal.org.uk/cases/12897718-road-haulage-association-limited.

proceedings.[312] Also, contingency fee type arrangements are not permitted in these opt-out proceedings.[313]

4. GLO Costs

Costs incurred under a GLO are usually divided into individual costs and common costs. Individual costs are costs associated with the defense or pursuit of individual claims and common costs are those costs incurred in defending or pursuing the GLO issues. Additional common costs are incurred by a firm acting for the plaintiffs who are appointed as the Lead Solicitor by the court to administer the group litigation, performing tasks such as keeping the group register and preparing court bundles and transcripts.

Unlike normal multi-plaintiff or multi-defendant actions where liability for costs is joint and several, GLOs have a specific costs regime. The default rule under GLOs is that each plaintiff will be liable for its individual costs and severally liable for an equal share of common costs of pursuing the group action (and a several and equal share of any adverse costs awarded where the action does not succeed). This means an individual plaintiff's contribution to own costs and adverse costs risk is limited and often small where there are many plaintiffs.

In securities actions, the court has recognized that the economic interest of each plaintiff may be very different and so may vary the default GLO position to provide that each plaintiff's contribution to common costs and adverse costs risk, while still several, is pro-rata to the size of its economic interest (such as the size of its shareholding or claim).[314] Such orders are perceived to be fairer as between institutions and individual shareholders in securities actions.

5. Jurisdiction

Foreign plaintiffs may bring proceedings in England against English corporations or persons domiciled in England as of right under the Brussels Regulation 1215/2012 save in certain circumstances such as an exclusive jurisdiction clause in a prospectus in favor of another jurisdiction.[315] Proceedings also may be brought in England based on conduct in England and the conduct of English subsidiaries outside of the U.K. For example, South African citizens successfully brought an action against an affiliate of an English company for exposure to asbestos in South Africa.[316] Where the European regime does not apply, there are common law rules governing jurisdiction. In the U.K., these rules are founded on the ability of the English court to permit service of process on a defendant who is not in the jurisdiction.

6. Funding the Litigation - Own Costs and Adverse Costs Risk

There are a number of options for funding litigation in England. While plaintiffs may pay for the litigation themselves, usually at an hourly rate, the relatively high cost of group actions means that this may not be the preferred option in group litigation.[317]

There is a highly developed and well-resourced market for third-party funding in England. Third-party funders will typically fund some or all of the costs of litigation on a non-recourse basis in return, on a successful action, a multiple of the funding provided or a percentage of the damages awarded. While the English courts used to have rules against champerty, these no longer apply, and third-party funding is recognized as contributing to access to justice.

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[312] Stuart Carson, Consumer Rights Act 2015: *Collective action and its discontents* https://www.stewartslaw.com/news/collective-action-discontents-stuart-carson-article-published-ft-adviser/.

[313] Competition Act 1998, s 47(C)(8) (as amended by the Consumer Rights Act 2015) http://www.legislation.gov.uk/ukpga/2015/15/schedule/8/enacted.

[314] *Trustees of Mineworkers Pension Scheme Limited and Ors v. Royal Bank of Scotland Group plc* [2014] EWHC 227 (Ch) http://www.bailii.org/ew/cases/EWHC/Ch/2014/227.html.

[315] Office Journal of the European Union: Regulation (EU) No 1215/2012 of The European Parliament And of The Council http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF.

[316] *Lubbe v. Cape Plc* [2000] 1 WLR 1545; Brown & Dodds-Smith, *supra* note 294.

[317] Dr. Christopher Hodges, *Global Class Actions Project Country Report: England and Wales*, 26 (2010), http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf.

Another method of funding a case in England is through a conditional fee agreement ("CFA") with the law firm acting on behalf of the plaintiffs. CFAs are commonly referred to as "no win no fee" agreements; however, they typically take two forms: (1) the law firm taking no fee unless the action succeeds, in which case the firm receives its full fees on the basis of hours worked at its full rate along with a success fee, or (2) as is more typical in commercial actions, the law firm charging at a discounted hourly rate and receiving an uplift to its full hourly rate along with a success fee on a successful action.[318] Success fees are calculated as a percentage of the law firm's full fees and that percentage cannot exceed 100%. Success fees cannot be recovered against the defendant on a successful action and must be paid by the plaintiffs or out of damages (although the law firm's fees on the basis of its full hourly rate can still be recovered).

Since 1 April 2013, it has been possible for English law firms to act on a contingent basis (known as a damages-based agreement or "DBA") where the law firm can agree to take a percentage of damages in lieu of its fee. In commercial cases the percentage of damages that the law firm can take is limited to 50% of damages recovered (as opposed to awarded). The initial uptake of DBAs was low due to the poorly thought out regulatory regime governing them but they have become more common.

In terms of covering adverse cost risk, there is a mature and sophisticated market in England for ATE legal expenses insurance which, in return for a premium, will cover costs payable to the defendant in the event that the claim is unsuccessful. Premiums can be payable upfront, deferred and contingent (meaning that they are only payable in the event that the litigation is successful) or a mixture of the two with part of the premium payable upfront and part deferred and contingent. ATE premiums are not recoverable on a successful action from the defendant and must be paid out of damages.

Before-The-Event ("BTE") legal expense insurance has recently become more popular in England. If this method of funding is used, the insurer will usually select the lawyer and there will be a financial limit. Such insurance, however, is typically focused on consumer and employment cases and is unlikely to cover group cases.[319]

Large commercial actions such as securities actions may often be funded by a combination of the above with, for example, a third-party funder funding the discounted fees of a law firm working on a CFA and the upfront part of a partly deferred ATE premium in return for a multiple of the funding it has put in on the action being successful. In this way, the commercial effect for the plaintiff is similar to a U.S.-style contingent action where the plaintiff pays no money up front and has no adverse costs risk but will pay over a proportion of damages on a successful action.

7. Fraud on the Market Theory

Where securities claims rely on a fraud cause of action (see below), English law does not currently recognize the doctrine of fraud on the market. As such, claims for deceit and misrepresentation, in connection with non-prospectus related claims, in theory require proof of actual reliance. Thus, in bringing a claim for deceit:

> The claimant must in fact rely on the statement, as part of which requirement the claimant would have to be aware of the statement. This requirement is taken to rule out the theory of "fraud on the market," whereby a misstatement which has an effect on the market price can be said to cause an investor loss, even though that particular investor was not aware of the misstatement.[320]

That said, there are as of yet no decided cases on how the courts will require multiple plaintiffs to prove reliance in securities fraud cases. However, the balance of legal opinion is that the English courts are unlikely to adopt a

[318] Brown & Dodds-Smith, *supra* note 294.

[319] Dr. Christopher Hodges, *Global Class Actions Project Country Report: England and Wales*, 26 (2010), http://globalclassactions.stanford.edu/sites/default/files/documents/England_Country%20Report.pdf.

[320] Paul Davies, *Davies Review of Issuer Liability: Liability for Misstatements to the Market*, 16 (2007), www.treasurers.org/system/files/daviesdiscussion260307.pdf.

fraud on the market theory in the same way as the U.S. courts have. The *Tesco Litigation*[321] has reached the stage where reliance evidence has been filed but, to date, there have been no detailed rulings from the court as to what reliance evidence is required or considered sufficient for the purposes of establishing reliance under section 90A FSMA 2000 (considered in more detail below).

8. Pleading Standards

The English common law system has pleading standards that are relatively similar to the American requirements. Pleading standards are regulated in England using the Civil Procedure Rules ("CPR") and their associated practice directions. Under the CPR, proceedings are commenced when the Claim Form, which contains basic information about the plaintiff and defendant along with a brief summary of the claim, is issued in court. The Claim Form is usually accompanied or followed shortly by Particulars of Claim setting out a concise statement of the facts on which the plaintiff relies. Particulars of Claim may also refer to points of law and witnesses intended to be called.

Once the Claim Form and the Particulars of Claim have been served on the defendant, the defendant must then serve a Defense stating which of the allegations in the Particulars of Claim it denies, admits or if it intends to put forward a different version of events from that given by the plaintiff. It must state its own version of events in the contents of the Defense and bare denials are not permitted. A plaintiff is then given the opportunity to reply to the Defense.

The Particulars of Claim and Defense may be amended, and such amendment is common in large cases particularly in securities cases to take account of discovered documents which will generally all come from the Defendant.

CPR 22 also requires documents to be verified by a statement of truth. The statement of truth is a statement, to be included in any statement of case, witness statement, expert's report and certain other documents, which confirms that the facts stated in the document are true. The statement of truth must be signed by the litigant (or his legal representative on instructions) or the witness or expert as the case may be. Knowingly signing a false statement of truth can be punished by sanctions for contempt of court.

9. Discovery

Discovery is known as disclosure in English proceedings. While not as wide ranging as U.S.-style discovery, each party is entitled to disclosure of all documents that are relevant to the case, *i.e.*, that might support or harm the cases of either party. Litigants are also obliged to apply document holds from the earliest time litigation is contemplated.

The current procedural rules governing disclosure attempt to reign in the costs of the disclosure process by applying the relevance test set out above (no "train of enquiry" disclosure has been permitted in recent years) and a proportionality test. However, disclosure exercises will still generally result in most if not all documents essential to the case being produced. In 2019, a disclosure pilot scheme was introduced in the Business and Property Courts[322] (where security cases will be held), which is designed to limit the disclosure burden on parties to what is appropriate for each party in relation to each aspect of the case. This is likely to lead to a lower disclosure burden for securities plaintiffs. It still allows for full disclosure against defendants (including "train of enquiry" disclosure in appropriate cases). Given its recent introduction, it is not clear yet whether this scheme will be a success in controlling the costs and scope of relevant disclosure or if its provisions will be adopted more widely.

While all parties are generally obliged to give disclosure, in non-fraud prospectus litigation it is usual that other than transaction documentation relating to the purchase of securities, plaintiffs have few disclosable documents and all the key documents will come from

[321] *Omers Administration Corporation & Ors v Tesco Plc.* [2019] EWHC 109 (Ch).

[322] https://www.stewartslaw.com/news/disclosure-pilot-business-property-courts-key-provisions/.

the defendant. In a recent non-fraud case, it was ordered that the plaintiffs did not have to give any disclosure.[323] In open market fraud cases, experience in the *Tesco Litigation*[324] indicates that plaintiffs are likely to have to give disclosure in support of their reliance case.

Depositions do not usually form part of English procedure. Witness evidence is given by exchange of written statements of evidence in chief on which witnesses may be cross examined at trial.

10. Causes of Action in Securities Litigation

In England, the primary causes of action for securities claims are statutory as set out below. While English law recognizes common law theories including fraud, deceit, and negligent misrepresentation, they require the relevant representation to be directed to the plaintiff with the intention that it relies on that representation. Documents such as prospectuses and periodic accounts are considered to have been published to the public and as such do not meet the common law tests. That said, where a specific representation is made to a plaintiff to induce it to purchase securities, such as at a road show to investors, actions in deceit and negligent misrepresentation may be available (although the plaintiff must prove that it relied on the misrepresentation).

The two key statutory provisions under which securities claims may be brought are section 90 of the Financial Services Markets Act of 2000[325] relating to prospectus liability and section 90A of the Financial Services Markets Act of 2000 relating to open market liability for fraudulent statements in certain publications by listed companies.

Section 90 FSMA

Section 90 introduced a statutory liability regime for untrue or misleading statements contained in or omissions from a prospectus or listing particulars. This updated the existing legislation applicable to listing particulars to meet the requirements of the European Prospectus Directive.[326] It provides that any person responsible for a prospectus is liable to pay compensation to a person who has acquired securities offered by the prospectus and suffered loss as a result of any untrue or misleading statement or omission from the prospectus of matters that should be included under section 87A. Section 87A requires that a prospectus must include the information necessary to enable investors to make an informed assessment of the issuer and the rights attaching to the securities.[327]

Similar to claims brought under Sections 11 and 12 of the Securities Act of 1933, 15 U.S.C. §§77k and l, claims brought under section 90 do not require proof of reliance on the alleged misstatement. This is considered to be a non-reliance cause of action. Plaintiffs need not prove that they relied upon the prospectus or that they even read it, but must merely prove that the prospectus was misleading or omitted necessary information and they suffered loss as a result.

Persons responsible for the prospectus will always include the issuer and the directors of the issuer, but also may include others such as the investment banks sponsoring the prospectus.

There have been two recent claims brought against an issuer under section 90 under a GLO: (i) the *RBS Rights Issue Litigation,*[328] which settled prior to trial for a reported £800m; and (ii) the *Lloyds Litigation,*[329] for which the trial was heard between 2017 and 2018, with judgment expected to be given in 2019. It is anticipated that the *Lloyds Litigation* judgment will provide some further clarity on a number of issues including the role of advisors to issuers, the materiality test and issues relating to the principles of quantum of loss and the methodologies for calculating that loss in a non-statutory securities litigation context. It will also address a number of issues relating

[323] *Trustees of Mineworkers Pension Scheme Limited and Ors v. Royal Bank of Scotland Group plc* [2015] EWHC C740 (Ch).

[324] *Omers Administration Corporation & Ors v Tesco Plc.* [2019] EWHC 109 (Ch).

[325] Financial Services and Markets Act, 2000, c. 8 § 82-384 (U.K.).

[326] Directive 2003/71/EC http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003L0071.

[327] Savitt, W. *The Securities Litigation Review,* Law Business Research Ltd (2015) First Edition.

[328] *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

[329] *Sharp & Ors v. Blank & Ors* [2015] EWHC 2681 (Ch).

to directors' duties as relevant to non-statutory claims, particularly in relation to the issuing of a shareholders' circular.

Section 90 avoids the problems with common law actions on prospectuses arising from the case of *Derry v. Peek*,[330] which held that directors of a company were not liable in an action for deceit for untrue statements made in a prospectus unless it could be demonstrated that those directors had acted fraudulently.[331]

Section 90A FSMA

Section 90A was introduced to comply with the European Transparency Directive[332] and was substantially updated in 2010. It provides that an issuer of securities is liable to pay compensation to persons who have suffered loss as a result of an untrue or misleading statement in or omission from certain publications made by the issuer or dishonest delay in publishing such information. Such publications include not only periodic financial reports, but any information published by a recognized information service or information whose availability (*e.g.,* on a website) is announced by means of a recognized information service. Persons entitled to compensation include those who bought, continued to hold, or sold the securities in reasonable reliance on the publication and so include those in the open market.

However, this is a fraud cause of action and as such plaintiffs must prove that persons discharging managerial responsibility within the issuer (generally the directors) knew that the statement was untrue or misleading (or were reckless as to whether it was) or that an omission was a dishonest concealment of a material fact and that the plaintiff relied on the relevant information. The fact that the plaintiff must also prove that it relied on the information at a time and in circumstances when it was reasonable for it to do so means that the reliance threshold is more exacting than the test for reliance in a common law deceit claim where reasonableness is not relevant. The *Tesco Litigation* may provide helpful judicial guidance regarding where the reliance threshold lies for claims of this type.

Under the U.K. Companies Act of 2006, shareholders may also bring derivative suits for breach of duty, breach of trust, and director negligence.[333]

11. Regulatory Body for Securities

Since the financial crisis, the U.K. has undergone significant reform of its regulatory bodies. New reforms were published in February 2011 to be overseen by the Financial Policy Committee,[334] the Prudential Regulation Committee,[335] and the Financial Conduct Authority. [336] The Financial Policy Committee is assigned to oversee and regulate the entire U.K. financial system. The Prudential Regulation Committee regulates the financial institutions that carried the greatest balance sheet risk. The Financial Conduct Authority is the successor to the U.K. Financial Services Authority ("FSA"), which was the U.K.'s version of the Securities and Exchange Commission.[337]

Regulators and professional bodies have no role as of right in collective proceedings. As with other proceedings, a third party with an interest in the outcome of proceedings may intervene in proceedings where it is appropriate for it to do so.

[330] (1889) 14 App. Cas. 337.

[331] Hudson, A. *Securities Law*, Sweet & Maxwell (2013) Second Edition.

[332] 2004/109/EC http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004L0109.

[333] Companies Act, 2006, c. 46 (U.K.); Robert F. Carangelo, Paul A. Ferrillo and Catherine Y. Nowak, *Designing a New Playbook for the New Paradigm: Global Securities Litigation and Regulation*, 3 (2011), http://www.dandodiary.com/2011/12/articles/securities-litigation/designing-a-new-playbook-for-the-new-paradigm-global-securities-litigation-and-regulation/.

[334] https://www.bankofengland.co.uk/about/people/financial-policy-committee.

[335] https://www.bankofengland.co.uk/about/people/prudential-regulation-committee.

[336] https://www.fca.org.uk/about.

[337] Robert F. Carangelo, Paul A. Ferrillo and Catherine Y. Nowak, *Designing a New Playbook for the New Paradigm: Global Securities Litigation and Regulation*, 4 (2011), http://www.dandodiary.com/2011/12/articles/securities-litigation/designing-a-new-playbook-for-the-new-paradigm-global-securities-litigation-and-regulation/.

Where there are broad issues of consumer protection a regulator such as the FCA or what was previously the Office of Fair Trading can pursue a claim as a representative action or as a matter of principle to determine an issue. These are collective claims in so far as they have an indirect impact on the operation of a particular consumer market. They are, however, brought in the name of the regulator and do not give rise to compensation payments.

In March 2017, the FCA announced a compensation scheme, administered by KPMG, for shareholders who purchased Tesco shares and bonds on or after 29 August 2014 as a result of the FCA's finding, which Tesco accepted, that Tesco PLC issued a false and misleading trading update constituting market abuse. This is the first time the FCA has used its powers under section 384 of FSMA to require a listed company to pay compensation for market abuse. However, the scheme itself has limitations. For example, it only applies to net acquirers of shares in a very limited three-week period and does not therefore prevent litigation under section 90A from being pursued. The extent to which the FCA might instigate further and other compensation schemes pursuant to section 384 FSMA is unclear.

III. INSTITUTIONAL INVESTORS' GUIDE TO RECENT DEVELOPMENTS IN FOREIGN LITIGATION

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A. The Rise of Multi-Jurisdictional Cases – How Investors Can Determine the Best Option For Recovery/Protecting Interests In A Multi-Jurisdictional Case (*E.G.*, Steinhoff)

As discussed in greater detail above,[338] foreign legal regimes can be fraught with risks unfamiliar to U.S. institutional investors, like "loser pays" adverse-party cost awards. Before diving in headfirst and joining a foreign litigation, institutional investors would do well to understand such risks by asking questions like:

- Is this a loser-pays jurisdiction or are other costs potentially assessable, and if so assessed, how would they be applied as against the group (*e.g.*, jointly and severally)?[339]
- What indemnities or insurance are in place to mitigate cost risk?
- How is the funder capitalized and, thinking ahead to a worst-case scenario, what is its jurisdiction of organization, in the unlikely event claimants are compelled to sue the funder?
- Does the foreign jurisdiction present the risk of compelled witness attendance, document production, or other discovery burdens?
- By participating in the litigation, will the investor be acceding to the foreign jurisdiction generally in respect of unrelated matters? What is the composition of the funders' group, both in terms of number of claimants and aggregate claims asserted?
- How many local claimants, resident in the foreign forum, does the group include?[340]
- Does the group comprise pension funds or other large institutional investors or smaller individual claimants?
- Will the proceedings be structured as a class or group action or a "mass action" with each claimant filing its own case?
- If the former, is there a lead or representative claimant, and if so, how will that claimant be chosen?
- How much experience does the litigation funder & the law firm(s) involved have with shareholder litigation like the action proposed?[341]

Suffice to say, the peculiarities of a foreign jurisdiction can make pursuing claims there a complicated (and potentially risky) proposition. This complexity has been multiplied in a handful of recent cases presenting multiple jurisdictions as possible forums for the litigation. Take *Steinhoff,* for example. The company is structured as a Dutch holding company with a primary listing of equity securities on the Frankfurt Stock Exchange and a secondary listing on the Johannesburg Stock Exchange. Thus, the Netherlands, Germany, and South Africa each represented a potentially viable forum when allegations of accounting fraud emerged.

[338] *See* Sec. II – Survey of Foreign Law.

[339] *See* Sec. III.B. for discussion of loser pay provisions and jurisdictions.

[340] This is not always relevant as there are some jurisdictions without a large presence of institutional investors or where most of a company's shares are held by foreign investors. Nevertheless, where there are a large number of local institutional investors, it can be instructive if the local institutional investor community is opting to pursue recovery actions outside their home jurisdiction. For example, in the *Steinhoff* action discussed in this section, the majority of South African institutional investors who suffered large losses opted to pursue recoveries in The Netherlands.

[341] A written litigation policy can be helpful in identifying and considering such risks. NAPPA's Model Securities Litigation Policy is available on NAPPA's member website under "Resources - Resource Documents."

In a multi-jurisdiction situation like this, the relative risk and favorability of each jurisdiction must be considered, implicating additional procedural and strategic questions:

- How strong is each proposed jurisdiction's claim to jurisdiction? Are there rules in the country or countries that may impact whether a case may be filed or allowed to continue in one jurisdiction (such as EU Brussels I Regulation which deals with competing EU jurisdictional claims)?
- Are some claims or damages theories viable (or easier to prove) in only certain jurisdictions?
- Does one jurisdiction have a shorter limitations period?
- If an unfavorable (or favorable) resolution is reached in one jurisdiction, will that have a preclusive effect in other jurisdictions?
- How far advanced procedurally are competing actions relative to one another?
- Does one jurisdiction present a strategicadvantage, like the ability to take discovery or the ability to render a judgment in one or more defendants' home country?

As of the writing of this article, ISS RecoverMax lists eight separate groups with proceedings against Steinhoff: six groups with proceedings proposed or filed only in the Netherlands, one group with proceedings proposed in the Netherlands and Germany, and one group with proceedings in South Africa, Germany and the Netherlands. In the *Steinhoff* situation, certain funders and claimants have indicated they gained some comfort proceeding in the Netherlands given that (1) Dutch law in this area is further developed than South African law, and (2) certain delays and uncertainty were unfolding in the German *Volkswagen* cases around the time *Steinhoff* filing decisions were being made.[342] But with at least one active case proceeding against Steinhoff in all three jurisdictions, there was no single correct answer.

Unfortunately, this will likely also be true in future multi-jurisdiction situations, given the complexity presented. Each jurisdiction will have a particular mix of potential risks and benefits. Accordingly, foreign cases—and especially multi-jurisdiction foreign cases—should be approached as an exercise in identifying (and mitigating) risks and maximizing possible strategic benefits.

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[342] The latter concern exemplifies how filing decisions must sometimes be made based on transitory, imperfect information. The concerns of investors at that point in the *Volkswagen* case could ultimately prove to be unfounded. If *Volkswagen* claimants end up achieving a favorable outcome, *Steinhoff* claimants with the benefit of hindsight may well wish they had filed in Germany.

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B. Loser Pay Provisions

"Loser Pay" statutes are common in foreign jurisdictions and one item that institutional investors should carefully examine when considering foreign litigation. For example, under the English Rule, the losing party is required to pay the reasonable litigation costs incurred by the winning party.[343] In contrast, under the American Rule, each party typically bears its own litigation costs.[344] Depending on the jurisdiction, a loser pay statute may require an institutional investor to pay a variety of costs, should the case be unsuccessful. The costs can include the other side's attorneys' fees, court and expert costs, or a statutory amount. Below is an illustrative chart of several jurisdictions and the current status of loser pay provisions within the jurisdiction.

"Loser Pay" statutes are common in foreign jurisdictions and one item that institutional investors should carefully examine when considering foreign litigation.

1. Countries' Law on Loser Pay Provisions

Australia	Yes, the representative party bringing the class action is responsible for any costs awarded in favor of the defendant. Federal Court of Australia Act 1976, Sec. 43. However, successful respondents can only obtain cost orders against the applicants (i.e., the class representatives). The Court is not permitted to make an adverse costs order against the remaining class members. Federal Court of Australia Act 1976 Sec. 43(1A).
Brazil	Yes, courts in Brazil may, by statute, award ten to twenty percent of the amount in controversy. Castro & Domingues, note 240. Arbitrators (overseeing disputes through the B3 Market Arbitration Chamber) are less likely to apply the Brazilian Code of Civil Procedure and award adverse costs as a percentage of damages claimed.
Canada	Yes, in certain Canadian provinces (Alberta, Ontario, New Brunswick, Nova Scotia and Saskatchewan). The costs are dependent on the stage of the litigation, whether a litigation is novel, and the conduct of the parties.
Denmark	Yes, the losing party is typically ordered to pay a portion of the costs of the opposing party. Based on experience, the rule of thumb is that this amounts to 3% or 4% of the amount of damages sought in court for a claim of around USD 55 – 110 million.
England	Yes, a "cost shifting" rule applies, which is the general rule that requires the losing party to pay the prevailing party's court fees and legal costs. The Court makes the determination as to the fees to be paid to the prevailing party. Civil Procedure Rules 44.2.
France	Yes, but to a (very) limited extent. The costs of litigation, or "dépens" in French, (court fees, translations costs, expert fees, etc.) are paid by the losing party by order of the Court. The Court can also order the losing party to pay the other parties' other costs, such as lawyers' fees, and make the determination as to those costs, but this amount usually represents only a (very) small part of the winning party's actual costs. Typically the loser pay rule is applied to corporate defendants.
Germany	Yes, the losing party will pay all litigation costs, including court costs and the opposing party's attorney fees. The fees are somewhat limited in that there is a statutory limit on reimbursement of attorney fees which greatly depends on the total claim amount.
Japan	Courts in Japan have discretion to award a party costs under a "loser pays" principle. Japanese Code of Civil Procedure (1996) Articles 61 and 62.
Mexico	No loser pay system. In Mexico the general rule is that each party is responsible for paying the fees of its attorneys or class representatives, if applicable and any other litigation related expense. In collective actions, plaintiff's attorneys' fees are capped by law.

[343] Werner Pfennigstorf, The European Experience With Attorney Fee Shifting, 47 Law & Contemp.. Probs., Winter, 1984 at 37, 44-47.

[344] *See* 1 Mary F. Derfner & Arthur D. Wolf, Court Awarded Attorney Fees, ¶ 1.02 [1], at 109 (1992).

2. Negotiating Contract Documents When Faced With a Loser Pay Jurisdiction

If a jurisdiction has a loser pay rule, institutional investors may consider negotiating provisions in the contract documents to mitigate the impact of any adverse costs before executing documents to participate in foreign litigation. There are several ways that an investor can mitigate the impact of possible adverse costs when entering a foreign litigation.

First, an institutional investor should review the law of the particular jurisdiction. Ask outside counsel up front before executing contract documents:

- What litigation costs will the institutional investor be responsible for in this jurisdiction?
- Does this jurisdiction have a loser pay statute? If it does, how do courts in this jurisdiction interpret the statute? What has happened to the prevailing and losing parties in other similar cases in this jurisdiction?

Second, if a jurisdiction has a loser pay statute, an institutional investor may want to work with outside counsel to mitigate the impact of the loser pay statute. This can be done through the contract documents with counsel or litigation funders prior to entering the litigation. Some possible avenues are as follows:

1. Negotiating with the law firm representing the institution for the law firm to assume any adverse costs.
2. If there are separate funding documents, examine the obligations to the funder in the funding documents. Sometimes the funder will indemnify the fund from the risks of adverse costs. The funder may pay any adverse costs made against plaintiffs in return for a percentage or commission on any settlement or judgment.
3. Consider whether the entity offering to cover the risks of adverse costs is solvent/liquid enough to fulfill its future obligations, if necessary.
4. Negotiate with the institutional investor's counsel a cap on costs that an institution will have to pay to the prevailing party in the event the action is unsuccessful. Or, examine whether the costs are capped by statute?
5. Consider participating in a group with other investors and discussing options. Use the leverage of a group to seek indemnity provisions with respect to having the law firm or funder indemnify the investors.
6. Counsel could provide indemnities, but it may be too burdensome on counsel.
7. Obtain liability insurance to cover any adverse amounts.

Finally, if an institutional investor is considering a jurisdiction with a loser pay statute, what are the merits of the case? Are the merits of the case strong enough to warrant the risk? What is the track record of the law firms or funders offering participation in the action? If the entity offering the action is not experienced in a certain jurisdiction, and does not follow the correct litigation strategy, it may lead to a higher chance of being ordered to pay adverse party costs. Although loser pay provisions may present some challenges to foreign litigation, these challenges may be mitigated by carefully analyzing the jurisdiction and contract documents.

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C. The Choice Between Litigation Vehicles

As the number of securities fraud actions filed outside of the United States have multiplied since the U.S. Supreme Court's decision in *Morrison,* 561 U.S. 247 (2010), several popular formats for pursuing these claims have emerged. Three common approaches used in recent years to recover damages on behalf of shareholders abroad are: (1) the group action model; (2) the assignment model; and (3) the stichting (Dutch foundation) model (which has two variations). All of these models offer investors the negotiation benefit of strength in numbers but afford participants different opportunities for controlling the course of litigation.

1. The Group Action Model

Perhaps the most prolific format for securities litigation outside the United States is the group investor action. With this model, injured investors opt in to participate in a securities fraud action filed against a foreign issuer on behalf of a group of investors. The group can include both institutional investors or individuals, or only one type of investor or the other, depending on the preferences of the counsel and/or funder organizing the action. While group members team up, allowing counsel to advocate on their behalf as one like-minded unit, group members still generally maintain their individual rights to vote with regard to settlement proposals and other dispositive aspects of litigation. Group members should be prepared to produce documentation to substantiate their respective claims and be aware that, depending upon the procedure in each particular country, it is unlikely a litigant participating in a group action will remain anonymous throughout the duration of the case.

Procedures for organizing group investor actions exist in many countries that house prominent securities exchanges, including the United Kingdom ("UK") and Japan. The group action model is a popular approach being proposed to investors in actions against Steinhoff International Holdings N.V. in the Netherlands and Danske Bank A/S in Denmark, among others, because it has served as a successful vehicle for recovery in several recent securities cases.

In Japan, for example, two separate groups of institutional investors settled securities fraud claims against electronics company Olympus Corporation. The cases were initiated after three former Olympus executives pleaded guilty to accounting fraud in Japan following revelations that over the course of twenty years the Company hid more than $1 billion in losses through fraudulent transactions.

The two group cases were filed against Olympus in 2012. The first case was brought by the international law firm and litigation funder DRRT on behalf of nearly 100 investors.[345] An early mediation in the matter resulted in a settlement of ¥11 billion ($92 million) in October 2013. A second case was brought by another group of 60 institutional investors and was funded by Deminor Recovery Services. The Deminor group case was litigated for four years before the Tokyo District Court and settled on December 26, 2016, for approximately 45 percent of the group members' claimed total losses.[346]

Litigation brought in the UK against the Royal Bank of Scotland Group plc ("RBS") provides another example of the effectiveness of group actions as a means to recover losses stemming from securities fraud. The RBS cases were the first large-scale investor group actions ever brought in an English court, and three core institutional investor groups initially filed claims in the UK against RBS in 2013. Their aim was to recover losses suffered from RBS' misrepresentations regarding its exposure to subprime-related assets leading up to a £12 billion Rights Issue in April 2008.

Because the UK does not have a class action system, the three actions against RBS were brought as parallel,

[345] Kevin LaCroix, *Securities Litigation Developments Outside the U.S.: Interview with Shareholder Attorney Alexander Reus*, The D&O Diary, April 16, 2015, https://www.dandodiary.com/2015/04/articles/international-d-o/securities-litigation-developments-outside-the-u-s-interview-with-shareholder-attorney-alexander-reus/.

[346] *Olympus (Japan): Deminor's Clients Achieve the Highest Recovery*, Deminor Recovery Services, https://drs.deminor.com/en/olympus-japan-deminors-clients-achieve-the-highest-recovery/.

competing group actions that pleaded largely the same claims and were coordinated, but not consolidated. Institutional investors had to choose between these three actions, which were structured as independent opt-in proceedings. One of the groups eventually splintered into separate sub-groups with different counsel that included a group of retail investors as well. Toward the end of 2016, RBS agreed to pay a total of £800 million to settle with three groups of institutional investors.[347] The remaining groups settled their claims soon thereafter.[348]

Although investor group actions have been a reliable format for securing recoveries abroad, some investors and funders may not prefer them. Unable to initially assume a passive role as in a U.S. class action and observe the course of litigation, investors must opt in early in the procedural process to be eligible to recover any losses using this mechanism. In addition, funders may find group actions organizationally unwieldy because they need to defer to the views of a group's many investor participants throughout the course of a litigation.

2. The Assignment Model

The assignment model is an alternative format for investor recoveries that has grown in popularity after *Morrison*. Promoted as a way for investors to remain anonymous, the assignment model requires each claimant to contractually assign its claims to a special purpose vehicle ("SPV"), usually controlled by the litigation funder. In turn, the SPV becomes the sole claimant and named plaintiff in the securities case.

In countries that permit them, the SPV can take various legal forms, such as a corporation or a foundation or association. Once the SPV has been created and investors' claims have been assigned, the SPV has legal authority to pursue and litigate the claims on behalf of all individual investors that have executed assignment agreements. The SPV acts as a single plaintiff, and the individual investors are neither plaintiffs nor parties to the proceedings, as the SPV acts on their behalf.

By design, the assignment model gives the SPV, and not individual investors, control over litigation strategy. Generally, once the assignment agreement is executed with the SPV, the underlying investors no longer have ownership or control over their claims, though participants are kept abreast of the proceedings, and funders and counsel may solicit participants' views. Ultimately, however, it is the SPV that makes key decisions (including with respect to settlement). In addition, while control over the litigation is ceded to the SPV, investors must still devote some time to the litigation to assist the SPV in substantiating, among other things, the amount of losses suffered.

A chief factor in favor of the assignment model is that the investor's identity is initially completely masked by and through the SPV. In proving its claims, however, the SPV may be required at some point in the proceedings to identify those investors who assigned their rights and claims to the SPV. For example, defendants in the litigation may file a request with the court asking that the SPV present names and addresses of underlying investors, as well as the agreements governing claims assignments. Courts may be inclined to grant such requests because defendants must be able to ascertain the validity of the underlying investors' claims.

From the perspective of litigation funders, an SPV can be appealing because it makes it easier to organize and administer claims.

Recently, some funders and counsel have teamed up to offer the assignment model as a litigation vehicle in pursuing claims against Steinhoff concerning Steinhoff's use of off-balance sheet companies to artificially inflate earnings. These assignment model-based actions are still pending, and as the proceedings advance, these actions will serve to illustrate the strengths and weaknesses of this litigation structure.

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[347] Chad Bray, *R.B.S. Reaches Agreement to Settle Rights Issue Litigation*, N.Y. Times, Dec. 5, 2016, https://www.nytimes.com/2016/12/05/business/dealbook/rbs-britain-bank-settlement.html/.

[348] Max Colchester, *RBS Investors Accept £200 Million Settlement from Bank*, Wall St. J., May 29, 2017, https://www.wsj.com/articles/rbs-investors-accept-200-million-settlement-from-bank-1496082032/.

3. The Stichting (Dutch Foundation) Model and WCAM Settlements

Unique to the Netherlands are two types of recovery vehicles available to investors through the *stichting* (or foundation) model. While they existed prior to the *Morrison* decision, they have grown in prevalence in the post-*Morrison* era.

The first type, a *stichting* or foundation pursuant to Article 3:305a of the Dutch Civil Code, is a legal entity created under Dutch law for a specific purpose (here, litigation) and with a board of directors at its head. While the assignment model is promoted as a way for investors to maintain anonymity, the stichting model is promoted as a way for investors to remain passive throughout the course of the proceedings.

This model allows for a representative collective action by which a representative entity, the *stichting*, can initiate proceedings to advance claims on behalf of an unnamed group of investors. The stichting is legally distinct from the underlying investor-claimants, and similar to the assignment model, the underlying investors are neither plaintiffs nor parties to the proceedings. A *stichting* can prosecute and settle claims in its own name and at its own cost. One prominent current example is the Stichting Petrobras Compensation Foundation, a Netherlands-based claim foundation established to protect the interests of investors who purchased outside of the United States shares of Petrobras and/or bonds issued by Petrobras and/or its subsidiaries, and who suffered losses stemming from a fifteen-year bribery and kickback scheme—the largest corporate scandal in Brazilian history.

Historically, a *stichting* could only secure declaratory relief and did not have the capacity to sue for damages, requiring investor participants who obtained a declaratory judgment to separately pursue damages in their own names or as a group. However, a recent legislative change will now permit such foundations also to pursue claims for damages.

While Dutch law does not provide for a U.S.-style class action mechanism, it does afford a legal mechanism for collective settlements, which is a second type of recovery vehicle. The Dutch Act on Collective Settlement of Mass Damages (*Wet Collectieve Afwikkeling Massaschade*), commonly referred to as the "WCAM," is a statute that provides global peace for defendants through a "class action-like" opt-out settlement regime, which has certain similarities to the U.S. model under Rule 23 of the Federal Rules of Civil Procedure. For example, if both sides to a litigation elect to use the WCAM, their settlement is brought before a specific Dutch court (the Amsterdam Court of Appeal) for approval and to determine whether the settlement is fair and reasonable. As in the United States, notice of the settlement is disseminated to relevant investors who are then given the opportunity to opt out. The WCAM operates in many respects like a U.S. class action settlement, including permitting large groups of investors to claim a recovery even though they never joined any prior litigation (whether through a *stichting* or otherwise).

Since the WCAM statute entered into force in July 2005, nine securities settlements have been declared binding, a few of which warrant consideration.

Most recently, on July 13, 2018, a collective settlement in the amount of €1.3 billion against *Fortis* S.A./N.V. was declared binding by the Amsterdam Court of Appeal—€100 million more than the settlement amount reached in March 2016, and the largest settlement of a non-U.S. investor action in history. In the *Fortis* case, civil actions were launched first in Belgium and then later in the Netherlands, alleging that Fortis materially understated the adverse effects (including its exposure to subprime-related mortgage-backed securities) of its acquisition of the assets of Dutch bank ABN-AMRO Holding N.V., then the largest-ever acquisition of a bank.

Ultimately, the defendant insisted on global peace through the WCAM, which meant that the many institutions that joined the Belgian and Dutch actions were not the exclusive beneficiaries of the settlement—thousands of passive investors who had taken no action became eligible to make a claim on the settlement fund, which brought down the distribution ratio significantly.

The Amsterdam Court of Appeal initially rejected the proposed settlement in part due to a proposed premium

per share requested for active investors (who had opted in to litigation that prompted the settlement). The Court of Appeal did not object in principle to the idea of a premium for active investors but stated that differences in compensation could not depend solely on whether a claimant was active or not. The Court granted the parties leave to file further submissions on the subject.[349]

Under an amended settlement proposal, which was declared binding on July 13, 2018, all eligible Fortis investors were permitted to share the same settlement fund and were entitled to the same basic compensation payment per share. In recognition of their costs and efforts pursuing the claims, however, active claimants received additional compensation, amounting to a 25 percent premium. This premium served to ameliorate some of the dilutive effect of the WCAM.[350]

Two other cases that pre-date the *Fortis* action also show that the WCAM settlement process has been an effective tool for investor-claimants outside of the Netherlands, though this may be changing (see Section II.H., *supra*). One of these cases involved Royal Dutch Shell plc (an Anglo/Dutch company) ("Shell") in 2009, and the other involved Converium Holding AG ("Converium") and its parent Zürich Financial Services (two Swiss companies) in 2012.

The *Shell* case, which arose from misrepresentations Shell made about its oil and gas reserves, culminated in a settlement declared binding by the Amsterdam Court of Appeal on May 29, 2009. The *Shell* settlement benefitted all investors (other than U.S. shareholders) who purchased Shell shares on any stock exchange (other than the New York Stock Exchange). Thus, the settlement was declared binding on a majority of investor-claimants that were based outside the Netherlands, while only one of the defending Shell entities was domiciled in the Netherlands.

The *Converium* case drew even more attention to the potential cross-border reach of WCAM settlements. The case involved the Swiss reinsurer Converium, which had listed ordinary shares on the Swiss Stock Exchange and American Depositary Receipts ("ADRs") on the New York Stock Exchange. After Converium announced substantial increases in its loss reserves, Converium's share prices dropped dramatically, leading to a class action in the United States. As with the *Shell* matter, the *Converium* WCAM settlement excluded U.S. shareholders, who were already covered by the parallel U.S. action.

The *Converium* case concluded in a settlement declared binding by the Amsterdam Court of Appeal on January 17, 2012. In the cross-border context, this settlement is especially significant because none of the claims were brought under Dutch law, all of the alleged wrongdoing took place outside the Netherlands, none of the defendants were Netherlands-based, and only about 3 percent of investor-claimants were Dutch. Nevertheless, the Amsterdam Court of Appeal approved the settlement and upheld jurisdiction.

When available, the Dutch *stichting* and WCAM settlement procedures offer options for recovery that investors accustomed to U.S. class action procedures may find appealing.

[349] Tom Vos, *€1,2 Billion Settlement in Fortis Case Rejected by Dutch Court*, Corporate Finance Lab, June 19, 2017, https://corporatefinancelab.org/2017/06/19/e12-billion-settlement-in-fortis-case-rejected-by-dutch-court/.

[350] Tom Vos, *Revised €1,3 Billion Settlement in the Fortis Case Approved by Dutch Court*, Corporate Finance Lab, July 16, 2018, https://corporatefinancelab.org/2018/07/16/revised-e13-billion-settlement-in-the-fortis-case-approved-by-dutch-court/.

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D. Litigation Funding

There are significant challenges posed by the funding mechanisms used in foreign jurisdictions. Many jurisdictions do not allow the typical contingency fee arrangements that are commonly used in the U.S. for securities fraud class action litigation. Rather, third parties referred to as litigation funders (typically corporate entities with sophisticated legal capacity or aligned with law firms) offer contingency-style terms to provide funding for legal costs and expenses and seek to "register" investors with securities fraud losses. For jurisdictions in which fees and costs are awarded to the prevailing party, these litigation funders usually offer some form of risk mitigation, such as indemnities or ATE insurance coverage. Without such litigation funding, investors seeking to recover against securities fraud losses on investments made overseas would have to pay foreign counsel directly for fees and costs and run the risk that, if the investors lose the case, they will owe compensation to the defendant.

The litigation funding industry has grown substantially in the last decade. Litigation funders range from publicly traded entities to hedge funds to high net worth individuals seeking returns on investment that can exceed 300 percent. By way of example, in 2009 New York and London-based Burford Capital raised £80 million by public offering, but in December 2018, Burford raised $1.6 billion in funding for litigation commitments, with almost half of funds provided by an unidentified sovereign wealth fund. Other litigation funders, like London-based Therium Group Holdings Ltd. and Australian-based IMF Bentham, have also raised substantial amounts and, like Deminor Recovery Services SARL, offer funding for cases in numerous jurisdictions around the world. U.S. hedge funds like Elliott Management Corporation and Fortress Investment Group LLC seek funding opportunities either by investing directly in cases or by investing in litigation funders. Some law firms, including U.S. firms Grant & Eisenhofer P.A., Kessler Topaz Meltzer & Check LLP, Alexander Reus, P.A. (DRRT), Australian firm Maurice Blackburn Lawyers, Canadian firm Siskinds LLP, and U.K. firm Harcus Parker[351] are also active as litigation funders or are closely aligned with litigation funding entities.

1. The Litigation Funding Factor in Evaluating Foreign Actions

Identification and assessment of litigation funding options for foreign losses is important for investors that seek to recover overseas losses and mitigate financial risks. Unfortunately, in most of the foreign jurisdictions there is no system analogous to the Private Securities Litigation Reform Act,[352] in which a court appoints counsel and oversees the case for the protection of investors. Instead, investors must identify and track foreign actions, evaluate the differences in overseas legal procedures and substantive laws, and negotiate litigation funding and risk mitigation terms, all while keeping in mind that in many cases they must "opt in" to a proposed case in a foreign jurisdiction rather than be included automatically by law. If a fund wants to ensure that it considers participating in all available securities fraud recoveries for foreign portfolio losses, it should establish a method to ensure that it is informed about such losses and any potential recovery options to allow it sufficient information to make prudent decisions on a timely basis.

First, institutional investors should establish a system to identify possibly actionable losses in its foreign portfolio, perhaps tied to a loss threshold based on the risks and resource requirements of the potential case. Unfortunately, jurisdictions outside the United States vary widely with respect to risks and resource requirements for recovery actions. Generally, a fund might consider weighing its loss against factors like merits of the case, proposed costs of litigation funding structure, potential adverse party cost award risk, discovery burdens and headline risk, the anticipated duration of the litigation, and the likelihood and amount of recovery. Another important factor to some funds is the "corporate governance" of the funded group: how will strategic decisions be made and is there a way for that fund's voice to be heard? For example,

[351] Harcus Parker is backed by the U.K. litigation funder Therium.

[352] 15 U.S.C. § 78u–4 (2012).

although Australia generally requires an investor to "opt in" to an action upon the order of a court, thereafter the investor's role is similar to being a passive class member in the United States. On the other hand, in the U.K, there is no effective class action procedure. There is no effective mechanism for selecting counsel or for having third party funders evaluate "loser pay" risks. Each investor must join a lawsuit as a plaintiff, and due to the risk of adverse party cost awards for the non-prevailing party, the associated insurance costs are very high. The limited amount of work involved in Australian actions may lead a public pension plan to establish a lower loss threshold for evaluating Australian actions than for U.K. actions.

When determining whether a loss meets an established threshold, it is important to consider how recoverable losses are calculated in the particular jurisdiction, many of which have little precedent for securities fraud damages. The well-known FIFO/LIFO and U.S. style *Dura Pharmaceutical*[353] damages measures are unlikely to translate to recoverable damages in foreign jurisdictions. In most proposed cases, the litigation funders or their local counsel are prepared to evaluate fund transaction data to estimate recoverable loss. Frequently, where little precedent or guiding framework exists for securities fraud damages measures, competing funded groups come up with different recoverable loss estimates. Investors should pay attention to each funder's proposed "class period" and the underlying legal theories based upon which damages will likely be awarded in the subject jurisdiction.

It is also important to note that some litigation funding offerings may contain false deadlines asserted by the litigation funders in order to press investors into committing to their particular litigation funder group. Investors can pierce through the proposed deadlines by demanding procedural justification (e.g., an impending expiration of a statute of limitations) to evaluate the necessity for the deadline. Once, however, a litigation funder files the case it may be too late to join the action.

[353] *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).

2. Analysis of Participation and Funding Agreements from Competing Groups

Over the past several years, there has been an overall increase in the number of foreign actions presented to investors and an increase in the number of competing offerings to fund these cases proposed by funders on the same or substantially similar facts and legal claims. It is important for funds to analyze all available offerings to determine whether to participate or, conversely, to explain why the fund decided it was not prudent to participate. For example, following the recent Steinhoff securities fraud disclosures, at least six competing groups sought to attract investors for cases in Germany as a KapMuG action, in the Netherlands as a group action or through a special purpose vehicle ("SPV"), and in the Republic of South Africa as a class action, or some combination of those jurisdictions. Likewise, for claims against Danske Bank, at least six competing groups sought to bring claims in Denmark, some as group actions, some as class actions and some through a SPV. In Australia, the *AMP, BHP,* and *Commonwealth Bank* cases saw competing funded groups that brought separate actions. While many of the offerings fall away before a case is filed, presumably due to lack of investor interest (in *Tesco* in the U.K. there were five offerings, but only one proceeded), the accumulation of capital in the litigation funding market will likely result in a continuation of multiple funded group options for significant losses in large market cap securities.

Not all competing offerings are equal, especially in the fine print of the litigation funding documents, and it is important for a prudent investor to understand how to decide among competing options to recover in a foreign securities fraud action. It is also important for the investor to know that many of the important terms in the litigation funding agreements are negotiable, especially if the fund's losses are significant and there is competition among the funders. Set forth below are some of the key terms to issue-spot when evaluating joinder in a funded case:

Funding Agreement Terms: Fees and Cost Structures. Pricing is a central issue for negotiation as it reflects cost to the fund of using litigation funding and

should be balanced against the degree of risk the litigation funder assumes, the expected time to settlement, and the assessment of potential recovery. In the past, litigation funders would dictate one price, usually in the form of a 30+ percentage contingency fee plus recovery of costs, which was offered on a take-it-or-leave-it basis. Those times are gone, at least for the large cases. Now, litigation funders frequently offer a pricing matrix from 10 to 40 percent by which the contingency percentage fee is adjusted based on the size of the investor's claim and the length of time to recovery. Alternatively, some funders offer pricing as a return of capital plus 200 to 400 percent of committed or deployed capital (which may be negotiable as well). Some funders will accept a cap on their contingency pricing based on return of capital plus a percentage of committed capital. Practically, pricing terms are negotiable based on (a) strength of the particular claim (stronger claims allow more downward pricing flexibility); (b) duration of the proceedings (shorter times to trial allow more downward pricing flexibility); (c) the size of the funder's investment (less expensive jurisdictions should allow more downward pricing flexibility); and (d) the size of the investor's potential damages (larger amounts allow more downward pricing flexibility). Funds should also pay attention to how appeals will be paid for and the associated implication to the funding cost structure.

Another variable is how the proposed funding arrangement treats costs. Some will pay back the litigation funder costs and then calculate the funding fee on the gross recovery, but others will calculate the fee on the recovery net of costs. Are there attorneys' fees uplifts for a successful outcome and, if so, will they be paid out of the gross recovery or as a cost and how will the funder's commission accommodate that amount? Some funding offerings will set a cap on costs, indexed to the total size of the accumulated investors' claims or to the amount of the recovery. The cost issue is particularly important in jurisdictions like the U.K. because costs can substantially increase effective contingency pricing and a fund should estimate the size of the group's losses and the size of the expected recovery to factor in its pro rata share of costs to the quoted funder pricing.

Recently, some litigation funders have agreed to substantial "commercial" discounts off quoted pricing for investors that are early adopters and allow their joinder in the group to be disclosed or that bring sufficient losses to help the litigation funder reach the minimum loss levels for its book building. In other cases, litigation funders have offered discounts to public pension funds that join the case together to aggregate their claim size.

In order to best protect the interests of their members and fulfill their fiduciary duties, funds should consider not only the least expensive funding option based on quoted contingency rates, but also evaluate the other cost inputs to the pricing. Investors should also consider other factors, such as the funder's track record in being fair and reasonable with investors, the strengths of the proposed local counsel, and the proposed legal strategies of each funded group. A lower cost option that results in a lower (or no) recovery is not in the best interest of the investor as a litigant.

Funding Agreement Terms: Transparency (including status updates and translated pleadings). The funding agreement should also cover the relationship between investor and funder, and the information provided to the investor about the progress of the case. Some litigation funders reliably provide monthly updates on the progress of their cases and others will report very little until there are major developments. The terms of such communications are negotiable and should address the investor's internal reporting needs, such as quarterly reports to the board. Some funds insist on receiving copies of all significant pleadings translated to English, while others are content to rely on the funded group to run the case with little oversight from internal fund counsel.

An additional transparency issue is full disclosure of costs and funding charges upon settlement, so the investor may undertake its own reconciliation to ensure it has received all the funds it is due.

Funding Agreement Terms: Corporate Governance. Another important issue is how decisions will be made by the funded group. In some litigation funding agreements, the lawyers and litigation funders make all decisions other than accepting or rejecting settlement terms. Frequently, group members can vote on accepting proposed settlements on a pro rata weighted basis. Other

offerings include the creation of a steering committee to make strategic decisions with counsel's advice. Other offerings propose the use of a SPV run by the funder to which the investor assigns its claims in return for a contractual payment right. The SPV prosecutes the claim run by the funder, but the local ethical rules may impose a fiduciary duty running from counsel to the assignor-investor. The issue in most of these funding structures is how much control the litigation funder will have over the prosecution of the case. Corporate governance includes terms governing the litigation funders' right to withdraw funding if it disagrees with the funded group's decision or if it loses faith in the case. Likewise, investors should consider how the funding agreement addresses decision-making on appeal rights, with some funding agreements requiring an investor to appeal at the discretion of the litigation funder.

Finally, an investor's corporate governance analysis should include how dispute resolution with the litigation funder is addressed. This includes terms, which are sometimes negotiable, around whether the funder proposes arbitration, venue and jurisdiction questions, and whether there be fee shifting based on the outcome of the dispute.

Funding Agreement Terms: Termination Rights and Access to Work Product. Litigation funding agreements include provisions relating to termination rights. Among other issues are (i) the litigation funder's or investor's right to terminate the agreement, including notice provisions; (ii) exposure to fees and costs and adverse party cost risk incurred prior to termination; (iii) investor rights to attorney work product after termination; (iv) the costs to the investor if it withdraws from the funded action; and (v) dispute resolution. While terminations are rare, investors should be careful that the proposed terms around this issue do not effectively proscribe the investor's discretion to act prudently in the best interest of its fund if the funder is pushing for an unreasonably low settlement or the fund loses confidence in the case or counsel.

Funding Agreement Terms: Disclosure of other Group Members and Sources of Funding. One of the most vexing issues with litigation funding agreements is the purported confidentiality of the group members. Most funding agreements contain non-disclosure terms purportedly to protect the investors' identity and transaction information. Litigation funders frequently use these terms to refuse to disclose group members to each other. This leads to seemingly unequitable situation that the defendant will know all the members of a funded group, but the group members will not know each other as co-plaintiffs. Some public pension funds have sought terms by which at least other public pension funds will be disclosed to each other. Another potentially negotiable point is the requirement of an un-redacted complaint, if such a document is public in the jurisdiction in which it is filed, by which the investor can see the other members of its group.

A separate issue is disclosure of the sources of capital for the funded action. Some investors have legitimate concerns that the capital deployed for their benefit creates no headline risk given the broad spectrum of sources of capital for funded actions. In many cases, litigation funders are drawing from capital raised in public markets and should be transparent about that source of funds. If a funder is unwilling to disclose the sources of capital from which it is drawing to pay for the litigation, investors might take that as a red flag.

3. Risk Mitigation

It is now common that litigation funders provide non-recourse funding such that funders lose their investment absent recovery in the underlying lawsuit and they no longer seek indemnification from the investors. Nevertheless, litigation in foreign jurisdictions frequently entails risk of adverse party cost orders, i.e., a possibility that fund might be responsible for paying the defendants' costs and fees in the event that the action is not successful. The scope of this adverse party cost risk is frequently determined by statute or local practice. A critical term in litigation funding proposals for cases in jurisdictions with adverse party cost risk is whether the funders are offering indemnification or litigation insurance. A related issue is whether the funder is adequately capitalized to honor its offered indemnification and the amount and rating of the carriers. Some funds have negotiated terms requiring adequate risk mitigation and a right to leave a funded group if, in the fund's discretion, such risk mitigation

is insufficient. Other funds have obtained their own insurance for certain foreign actions to provide an extra layer of risk mitigation.

4. Regulation of Litigation Funding

Many litigation funders ascribe to principles of self-governance published through the Association of Litigation Funders of England & Wales and its 2018 Code of Conduct.[354] The code sets out standards of practice and behavior to be observed by funders, such as informing investors whether the funder is acting for and/or on behalf of an affiliate, preserving confidentiality, ensuring that the investor receives independent advice on the funding agreement terms, and not seeking to influence investors' lawyers to cede control of the dispute to the funder. In addition, the code counsels funders to not seek payment in excess of dispute proceeds, maintain access to adequate financial resources, and pay all debts when they become due and payable. Finally, the code covers aggregate funding liabilities, requiring continuous disclosure for capital adequacy, providing transparency on whether a funder is liable for adverse costs from a settlement accepted by the investor or from an order of the court, paying any premium to obtain adverse costs insurance, and providing security for costs.

In the United States, the U.S. District Court for the Northern District of California requires automatic disclosure of third-party funding agreements in proposed class-action lawsuits. However, this requirement is only applicable to class action proceedings. *MLC Intellectual Property LLC v. Micron Technology, Inc.* (absent specific showing of relevance, litigation funding arrangements not disclosed).[355] Following this example, in 2018 Wisconsin passed an act requiring disclosure of all funding agreements in civil litigation, which mandates that "a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise."[356]

In early 2019, the Australian Law Reform Commission ("ALRC") made 24 recommendations to "promote fairness and efficiency in class action proceedings; protect litigants from disproportionate costs; and assure the integrity of the civil justice system."[357] After considering a licensing regime for litigation funders, especially in the case of foreign-based or private company funders, instead the ALRC noted that there is already ongoing professionalization of litigation funders occurring in the market. Accordingly, ALRC recommended increased court supervision, which might include: court approval of litigation funding agreements and an express statutory power to reject, vary or set their terms, including funding fees.

[354] http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf.

[355] *MLC Intellectual Property LLC v. Micron Technology, Inc*., No. 14-cv-03657, 2019 WL 118595 (N.D.Cal. Jan. 7, 2019).

[356] https://docs.legis.wisconsin.gov/2017/related/acts/235.

[357] https://www.alrc.gov.au/news-media/inquiry-class-action-proceedings-final-report.

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E. Litigation Options: Retention of Counsel Including Domestic Law Firms/Monitoring Companies In Foreign Litigation

Use of a domestic law firm or monitoring company to assess and monitor foreign litigation can be an efficient way to exercise a pension fund's fiduciary obligations to maximize recoveries in the event of securities law violations. In some instances, a pension fund may not have the time, resources, or background and expertise to undertake this process. The challenges facing pension funds when trying to navigate their non-U.S. litigation options have continued to increase since the *Morrison* decision. This is due to the number of significant issues with non-U.S. listed corporations such as Petrobras, Danske, and Steinhoff, as well as the growing availability and utilization of private judicial remedies—including group or collective actions—outside of the U.S. A domestic law firm or monitoring company can provide a variety of services that a pension fund would otherwise have to perform itself. However, as discussed below, the evolving landscape in this area requires a pension fund to closely consider how and the extent to which it utilizes U.S. counsel to ensure that the advice and services it receives are fully consistent with the pension fund's fiduciary obligations to receive unconflicted advice and to get the best possible recovery at the lowest possible cost.

1. The Role of Domestic Law Firms

A domestic law firm can provide services to an institutional investor that include analyzing the case and the relevant law to determine whether participation is feasible for a particular investor, acting as a liaison with foreign litigation attorneys, advising the fund as to other investors who may make suitable co-plaintiffs, and monitoring the case on an ongoing basis, including providing guidance regarding strategy and settlement. In addition, some domestic law firms have also offered litigation funding as an additional service. Of course, a U.S. law firm typically is not able to provide legal advice on questions of non-U.S. law, nor can it provide litigation services in connection with a non-U.S. proceeding unless it has lawyers who are licensed to practice in the non-U.S. jurisdiction.

The domestic law firm can analyze particular cases and jurisdictions, including competing actions. Institutional investors have different loss thresholds and goals when getting involved in foreign litigation, and a domestic law firm can provide an in-depth analysis for the individual funds. For example, cases like *Volkswagen* are brought in multiple jurisdictions—in that case, the jurisdictions include actions in The Netherlands under a Dutch settlement foundation and as active litigation in Germany. Although it may make sense for one investor to join the Dutch settlement foundation for myriad reasons, another may seek to join the active litigation in Germany for other reasons. A domestic law firm can provide guidance as to which action (if any) is most appropriate.

Use of a domestic law firm or monitoring company to assess and monitor foreign litigation can be an efficient way to exercise a pension fund's fiduciary obligations to maximize recoveries in the event of securities law violations

Once the fund determines to join a particular case, the domestic law firm can act as a liaison to foreign litigation attorneys. Given the growing field of foreign securities litigation, qualified domestic law firms will have or will seek to obtain connections to foreign attorneys who will ultimately be responsible for litigating the case. These

relationships allow the domestic firms to have confidence in selecting competent foreign counsel for a particular litigation. Without the use of a domestic law firm as a liaison, an institutional investor would otherwise need to evaluate the capabilities of foreign attorneys in circumstances where the fund might not have sufficient information to make that evaluation.

In addition, by retaining a domestic law firm to oversee foreign litigation, the institutional investor can rely on the litigation being attended to by knowledgeable attorneys who will manage the obligations in the foreign action. A qualified and experienced domestic law firm will have extensive experience in the resolution of complex securities actions. The domestic law firm can leverage this experience in engaging with foreign firms and defendants in the resolution of claims. While U.S.-style class actions have begun to spread around the globe, there are still relatively few non-U.S. firms with substantial experience in handling complex securities class actions. Accordingly, a well-qualified domestic law firm can provide substantial guidance both to clients and foreign attorneys regarding litigation strategies, valuation of claims, and settlement negotiations. Using a retained domestic law firm can also ensure that any foreign recovery is actually obtained, and that a fund's claim in a foreign action is properly submitted. Because most foreign actions require some level of active participation or are "opt-in" proceedings, having a domestic law firm guide and manage this unfamiliar process may be a prudent undertaking.

In selecting a domestic law firm to analyze and coordinate foreign litigation, care should be taken in assessing the firm's experience in handling foreign litigation, as well as the firm's relationships with foreign lawyers in the relevant jurisdictions. Additionally, institutional investors should review the method by which the firm will be paid for its services. Many domestic law firms will assess and monitor foreign litigation on a contingency basis. In those cases, there will typically be little or no out-of-pocket up-front expense to participating in a foreign litigation or claim process. Generally, the domestic firm will be paid a referral fee out of any recovery obtained by the foreign litigators. Depending on the level of activity and oversight provided by the firm, these fees can vary. As a general matter, the fees will be higher in actions where the firm plays an active role in litigating the action. A fund should request disclosure of the referral fee and an understanding from the domestic law firm as to the role of the domestic firm in litigating the case.

Alternatively, some domestic law firms will agree to assess and monitor foreign litigation on an hourly or fixed fee basis, with fees paid directly by the fund as work is completed. Using this approach may cost the fund more in the short term, but it provides a separation between the firm and the foreign litigation funder by which the fund may command better terms in the fee agreement negotiations and an additional layer of independence in evaluating competing options for recovery.

Some domestic law firms have begun to offer litigation funding for non-U.S. cases. This development has been the subject of some discussion as it presents both opportunities and some cause for caution. On the one hand, litigation funding is an essential component for certain of a fund's non-U.S. securities litigation. This is so because some non-U.S. jurisdictions, such as the U.K. and France, do not permit contingent fee arrangements. Accordingly, without litigation funding, the fund would be required to pay non-U.S. counsel and to fund the litigation expenses of a large and complex securities action, typically on a monthly basis. In addition, certain jurisdictions – such as the U.K. – retain a "loser pays" or fee and expense shifting provision. In some instances, adverse rulings, in whole or in part, could shift substantial costs directly to the fund. Litigation funding, therefore, is a sensible mechanism to eliminate or mitigate these risks.

Moreover, the litigation funding arena previously was dominated by a limited number of participants, raising concerns about whether funds were able to obtain funding in exchange for fair and sensible terms from funders. Accordingly, having an increased number of entrants in the funding market would presumably mean more choice and competition for the fund's business and, by extension, downward pressure on the cost of litigation funding. On the other hand, concerns have been raised as to whether conflicts may arise where a domestic law firm wears both the hat of counsel identifying and recommending non-

U.S. cases in which it has a financial interest with non-U.S. counsel and, at the same time, is proposing terms to fund the same litigation (from which it will also benefit financially.) [358] In considering funding from a domestic law firm, a fund should consider alternative, independent sources of advice for case recommendation as well as obtain representations from the funding entity as to the full extent of its economic interests in the litigation. In this way, a fund will be better able to ensure it is making decisions with full information and can obtain the best possible terms both for representation and litigation funding.

2. The Role of Domestic Monitoring Companies

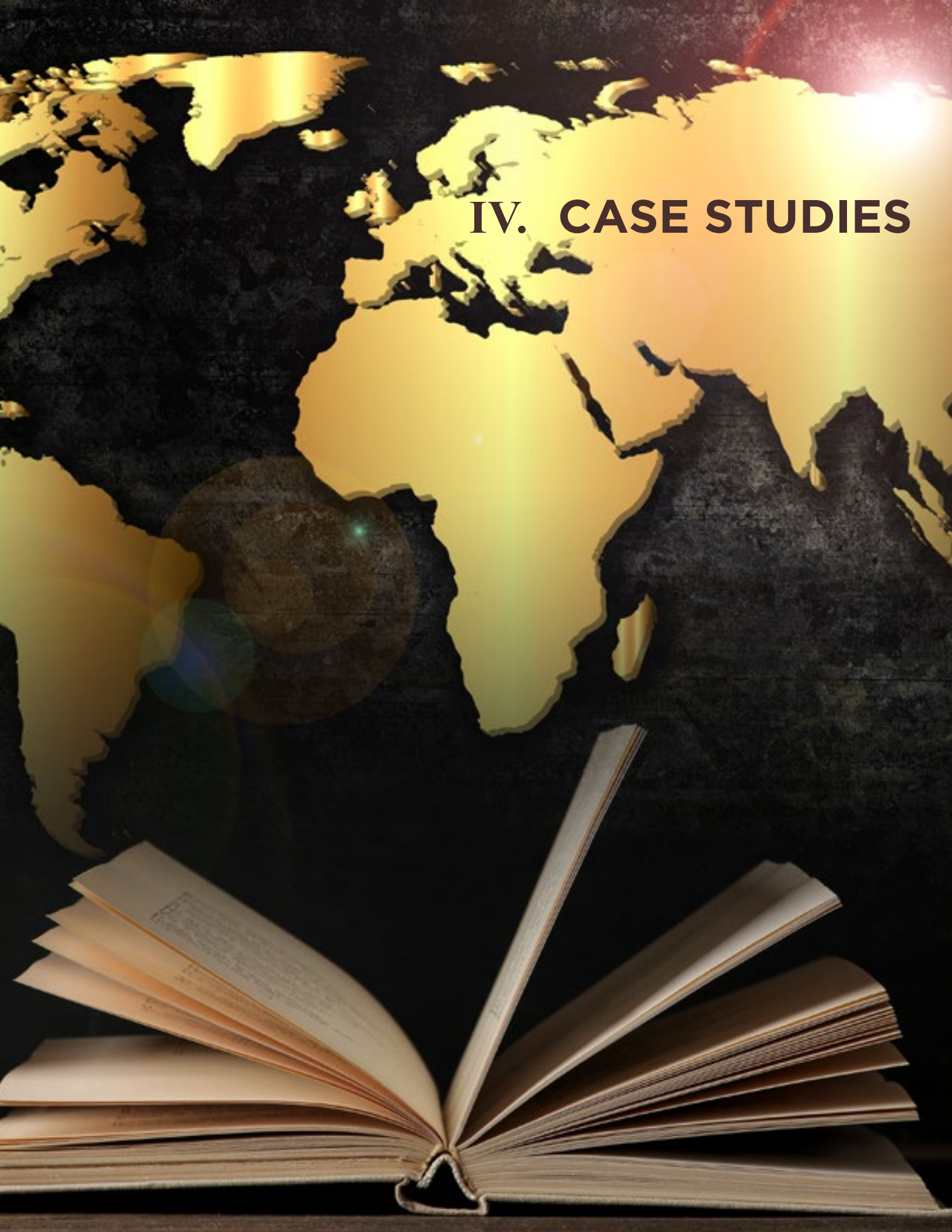
A number of private companies in the U.S. offer monitoring and claims filing services for both domestic and foreign actions. These companies maintain databases of pending, current, and past securities class actions or group action lawsuits and settlements, monitor all class action activity, and match actions with institutional investors' historical transaction data.

The companies that offer foreign monitoring services have generally developed relationships with attorneys in various countries and are able to identify and evaluate a client's exposure in cases that are being investigated (pre-filing) as well as pending cases. These companies do all or some of the following: (i) monitor securities actions being considered and brought in non-U.S. jurisdictions ("Foreign Actions"); (ii) perform electronic portfolio screening and loss calculations for Foreign Actions; (iii) identify and notify clients of Foreign Actions in which the client has an interest ("Relevant Foreign Actions"); (iv) register the client for Relevant Foreign Actions; (v) provide ongoing monitoring of Relevant Foreign Actions where appropriate; (vi) provide full claims recovery services in Relevant Foreign Actions that settle or otherwise result in a recovery; and (vii) provide quarterly reports of monitoring and claims-recovery activities for Foreign Actions. These companies are often able to provide these services on an a la carte basis or provide the full array of services, depending on the goals of the fund.

If a fund decides to utilize a monitoring company to monitor its global portfolio, it is important to perform due diligence to ensure that the provider has the ability to protect the portfolio internationally. Some questions for funds to ask include:

1. Which countries do you provide services for, and what types of services are offered for each?
2. What is your process for identifying potential and/or existing foreign (whether class, or more likely, individual) securities actions? How do you receive the information about foreign cases and, typically, when are you notified of the cases?
3. What advice and information are you able to provide to your clients regarding participation in foreign cases, including the legal process in each jurisdiction?
4. How do you handle "opt-in" cases? What services do you provide for such cases?
5. Do you work with third parties to provide any of your foreign litigation services? If so, which types?
6. What are your fees? Some foreign monitoring services charge on a contingency, net of what the litigation funder charges. Other companies charge a flat fee for some of these services and funds should consider whether these fees are prudent given the potential size of recoveries and the services provided.

[358] Julie Segal, *The Asset Class No One Knows They Own,* Institutional Investor, November 6, 2018, available at https://www.institutionalinvestor.com/article/b1bq4dlkt57shz/The-Asset-Class-No-One-Knows-They-Own.



IV. CASE STUDIES

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A. RBS

Between 2001 and 2007, The Royal Bank of Scotland plc ("RBS"), a banking and insurance holding company based in Edinburgh, Scotland, began a series of acquisitions that transitioned RBS from a small national bank to one of the largest financial conglomerates in the world.

In 2007, as concerns about subprime exposure became manifest throughout the financial markets, RBS assured investors that its subprime exposure was limited. But RBS had accumulated billions of dollars in subprime exposure. One of RBS's investment banks had been selling mortgage debt as asset-backed securities ("ABS") and packaging them together into collateralized debt obligations ("CDO"). The underlying assets in the ABS and CDO transactions were mortgage-backed securities ("MBS"), including securities backed by subprime and other high-risk residential mortgages.

When liquidity in the subprime market weakened, RBS was forced to retain interest in several CDOs and assume the risks associated with them. As a result, RBS's subprime exposure reached at least £34 billion ($68 billion) by 2007.

In April 2007, RBS announced that it was submitting a proposal for the acquisition of ABN AMRO Bank N.V. ("ABN AMRO"), one of the largest financial institutions in the Netherlands. A three-member consortium that included RBS purchased ABN AMRO in October 2007 for approximately $38 billion. Shortly thereafter, in December 2007, it was announced that RBS and ABN AMRO would be taking write-downs of £950 million and £300 million, respectively, attributable to their exposure to U.S. subprime mortgage markets. Nevertheless, RBS continued to claim that the risks were minimal. In April 2008, RBS announced an additional asset write-down of £5.9 billion (nearly $12 billion) attributable mainly to RBS's exposure to subprime assets. On that same date, RBS also announced a £12 billion (nearly $24 billion) rights issue to increase RBS's capital base. Despite these announcements, RBS continued to assert that its business would be healthy going forward. However, six months later, RBS disclosed that it would receive a bailout from the British government. In January 2009, RBS admitted that its subprime exposure had resulted in a loss of £28 billion ($41.3 billion) for 2008.

In 2009, investors filed a securities class action in the United States against The Royal Bank of Scotland Group plc, its executives and board members, and numerous underwriters alleging that investors had been defrauded as a result of defendants' failure to disclose RBS's substantial holdings in subprime and other mortgage-related assets.[359] Notably, the court-appointed lead plaintiffs had purchased common shares of RBS, which traded on the London Stock Exchange and Euronext Amsterdam stock exchange, not the ADRs trading on the NYSE.

Citing *Morrison*, the court concluded that this group of investors could not invoke U.S. securities laws to seek recovery because their purchases were not "domestic" securities transactions.[360] The court emphasized that a foreign company is not automatically subject to U.S. securities laws simply because it lists some of its securities in U.S.-based stock exchanges. As the plaintiffs had purchased common shares of RBS trading in European stock exchanges, the court determined that U.S. securities laws were inapplicable.

Investors precluded from recovery in the U.S. were left with the option of joining one of several actions against RBS that were brought before the High Court of Justice (Chancery Division) in London. The claims pursued in the High Court of Justice were brought only on behalf of investors who purchased shares in conjunction with an

[359] Specifically, plaintiffs alleged claims for violations of 10 Section (b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78t(a), Rule 10b-5 promulgated thereunder; and Sections 11, 12(a)(2), and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 771(a)(2) and 77o, concerning RBS's statements that it held strong capital reserves, a balanced risk portfolio and extensive internal controls relating to its exposure to credit risk.

[360] *In re Royal Bank of Scotland Group PLC Securities Litigation*, 765 F. Supp. 2d 327, 336-37 (S.D.N.Y. Jan. 11, 2011). The court sustained claims on behalf of investors who bought some of an estimated $5 billion of preferred securities that RBS sold in the United States. *Id.*

April 2008 Rights Offering, and were based upon Section 90 of The Financial Services and Markets Act 2000. Section 90 creates a private right of action for monetary claims by shareholders who incurred losses in a rights offering, pursuant to a prospectus. As Section 90 does not extend to open market purchases and the analogous provision of U.K. law dealing with open market purchases has many complexities that have never been addressed by the U.K. courts, none of the groups pursuing claims against RBS sought to include open market purchases of RBS securities. Thus, investors in RBS who did not purchase in the April 2008 Rights Offering had no effective redress for the losses they suffered.

The RBS litigation was pursued by three main groups (two represented only institutional investors while the third represented some institutions and tens of thousands of individuals), and all three groups asserted that their investor members were misled into signing up to the £12 billion rights issue months before RBS failed in October 2008. The three groups collectively sought approximately £4 billion in damages. The court issued a Group Litigation Order ("GLO") for managing the claims of all the investors represented by the three groups.

The central claim of the investor groups was that RBS's 2008 rights issue prospectus contained untrue or misleading statements about certain issues, including RBS's capital and the true purpose of the offering. RBS claimed that it was diligent and truthful in its preparation of the offering and pointed to market volatility as the real culprit behind RBS's near-collapse.

The RBS lawsuits were the largest, and potentially the most expensive, in the history of the U.K, with RBS's legal fees once estimated to exceed £90 million before the end of a merits trial (which, as mentioned below, never occurred because all cases settled before that stage).

Two of the groups of institutional investors, who collectively represented about 87 percent of the claims against RBS, settled for approximately £900 million in late 2016. The remaining group (that included some institutions and tens of thousands of individuals) settled for approximately £200 million in the second quarter of 2017. At least a year after the conclusion of the final group's settlement, thousands of shareholders who participated in that group had not yet received their pro rata share of settlement proceeds due to issues with documentation and disputes between the law firms and funders over the fees due to them. At the time this article was written, it appears that some of those shareholders have now been paid but others are still awaiting compensation.[361]

[361] Jane Croft, *RBS shareholders still waiting for £200m compensation*, The Financial Times, Mar. 18, 2018, https://www.ft.com/content/58fa040c-284e-11e8-b27e-cc62a39d57a0; RBS Rights Issue Litigation Message for SG Group Claimants, March 2019, https://www.signaturelitigation.com/rbs-rights-issue-litigation/.

B. Olympus

Olympus Corporation is a manufacturer of optics and reprography products that is headquartered in Japan. In 2011, the former CEO Michael Woodford blew the whistle on one of the largest accounting frauds in Japan. From the late 1990s to 2011, Olympus had covered up losses by writing off acquisitions and paying exorbitant advisory fees.[362]

Three former Olympus executives pled guilty to accounting fraud in a Japanese court in 2012 after Olympus admitted to concealing more than $1.7 billion in losses and fees through a series of sham transactions, including $687 million payment it made for financial advice on its $2 billion takeover of Gyrus Group PLC in 2008. The executives received suspended sentences and Olympus paid a fine of $7 million (700 million yen). The company did not appeal the fine. Olympus was also required to restate five years of financial statements in order to remain listed on the Tokyo Stock Exchange. In addition, the whistleblower (Michael Woodford) filed and settled claims (reportedly for £10 million) that Olympus had fired him in retaliation for questioning its accounting.

Section 10(b) and 20(a) claims were asserted in the United States in the Eastern District of Pennsylvania as to Olympus ADRs only. That action settled for $2.6 million in May 2014.

For claims based upon purchases of Olympus' common stock, several actions were brought in Japan by groups that included both Japanese and foreign (U.S., European and Asian) investors, including some of the world's largest pension and sovereign wealth funds and mutual fund complexes. Misstatements were alleged pursuant to Japan's Financial Instruments and Exchange Act (the "FIEA").

In March 2015, the action brought by one of the groups of investors (sponsored by three U.S.-based law firms and including more than 100 institutional investors) settled for ¥11 billion (11 billion yen) (approximately $92 million at the time of the settlement) as the result of a mediation proceeding conducted by Australian and Japanese mediators.

An action by a second group of approximately 60 investors (sponsored by a European-based law firm) settled for an undisclosed total amount, but the group reported that investors in the group recovered approximately 45% of their losses claimed in the lawsuit.

[362] Floyd Norris, *Deep Roots of Fraud at Olympus*, The N.Y. Times, Dec. 8, 2011, http://www.nytimes.com/2011/12/09/business/deep-roots-of-fraud-at-olympus.html?r=0 (quoting *Investigation Report - Summary*, The Third Part Committee, Olympus Corp. (Dec. 6, 2011), http://www.olympus-global.com/en/info/2011b/if111206corpe.pdf).

C. Vivendi

Vivendi S.A. is a mass media company headquartered in Paris, France. In December 2013, an action was commenced in France against Vivendi on behalf of investors who purchased Vivendi securities between October 12, 2000 and August 14, 2002 on the Paris Bourse (the "French Action").[363] The plaintiffs in the French Action allege that Vivendi engaged in improper accounting practices and misled the market regarding Vivendi's financial health. It is alleged that, from 2000 to 2001, Vivendi spent approximately €600 billion on several acquisitions to expand its size. Vivendi issued press releases in early 2002 that portrayed its cash flows as "excellent" and reported operating earnings as better than projections. However, in July 2002, Vivendi acknowledged a loss of €13.6 billion for calendar year 2001 and accumulated debts of €37 billion. For fiscal year 2001-2002, Vivendi reported losses of €23.3 billion, the largest reported loss in French corporate history.

At the time this paper was published, the French Action had just moved into the merits phase of the proceedings. The parties were exchanging briefs on the merits and a hearing on the merits is scheduled to begin in September of 2019.[364]

[363] Claims against Vivendi were initially filed in 2002 when a securities class action was commenced in the U.S. District Court for the Southern District of New York alleging violations of U.S. securities laws, *In re Vivendi Universal, S.A. Securities Litigation*, No. 02-cv-5571 (S.D.N.Y.). After a three-month trial that concluded in 2010, a jury found that Vivendi had violated U.S. securities laws by recklessly disseminating materially misleading information. However, soon after the jury verdict, the U.S. Supreme Court limited the scope of the U.S. securities laws to claims by investors who purchased shares on U.S. exchanges in *Morrison v. National Australia Bank Ltd*., 561 U.S. 247 (2010). Thereafter, Vivendi filed a motion to dismiss all claims related to Vivendi securities traded on a foreign exchange, which was granted.

[364] A hearing was originally scheduled for June 2019 but there were extensions granted by the court for submission of written briefs and it is likely that the court will also delay the hearing date.

D. Petrobras

Petróleo Brasileiro S.A. ("Petrobras") is a semi-public oil and gas company headquartered in Rio de Janeiro, Brazil. Petrobras is alleged to have engaged in an enormous money laundering and bribery scheme dating back for many years. It is alleged that Petrobras inflated the value of construction contracts by incorporating bribes into the value of the contracts on its financial statements. Beginning in September 2014, the prices of Petrobras' New York Stock Exchange-traded American Depositary Shares ("ADSs") and debt securities significantly declined following the arrests of members of senior management and Petrobras' admission that it may have to restate its historical financial statements to account for the overpricing of construction contracts. The investigation involves former Petrobras executives, some of Brazil's largest construction companies and a group of money launderers that allegedly colluded to inflate the cost of Petrobras contracts, and then pocketed the difference.

Claims were brought in the United States under the federal securities laws on behalf of common and preferred ADS purchasers. U.S. Plaintiffs also asserted claims under Brazilian law. The District Court sustained the federal securities claims arising out of purchases on U.S. markets, but dismissed the claims arising out of purchases made on the BM&F BOVESPA (now known as the B3), the Brazilian Exchange, holding that "as a matter of Brazilian law, purchasing Petrobras shares on the [BM&F] BOVESPA indicates the purchaser's consent to be bound by the arbitration clause in the company's bylaws."[365] The District Court subsequently granted certification of two classes of U.S. purchasers: (1) open market purchases of ADSs; and (2) purchases or acquisitions of debt securities on various U.S. public offerings. The U.S. class actions settled for $2.95 million in January of 2018.

In addition to the U.S. class action and criminal proceedings in Brazil, efforts are underway to recover for losses arising out of purchases made on the BM&F BOVESPA. Based on the arbitration clause in Petrobras' bylaws, damages resulting from investments in Petrobras Brazilian securities are being sought via a number of arbitrations in front of the Market Arbitration Chamber ("MAC") of the BM&F BOVESPA. Details of the arbitrations are not publicly available and no resolution of any action has yet been announced.

A foundation was also established in the Netherlands and in 2017 the foundation filed an action before the Rotterdam District Court in the Netherlands against Petrobras, Petrobras Global Finance B.V., Petrobras Oil & Gas B.V., Petrobras International Braspetro B.V. and various related individuals.[366] The Foundation's case seeks a declaratory judgment[367] that the defendants unlawfully acted against investors by concealing fraud and publishing incorrect, incomplete or misleading financial information during the fraud period. In response to the Foundation's complaint, the defendants disputed the Dutch Court's jurisdiction to hear claims filed against them on the grounds that: (1) the court lacks jurisdiction over Petrobras and the individual defendants; and (2) that Article 58 of Petrobras's bylaws require all disputes between Petrobras and its shareholders to be arbitrated in front of the MAC.

In a somewhat surprising development, on September 19, 2018, the Rotterdam District Court issued a decision holding that the Netherlands has jurisdiction to hear the Dutch Action. The court's decision on jurisdiction over Petrobras is narrow and based on a provision of Dutch law that[368] allows a court to assert jurisdiction over multiple defendants when it has jurisdiction over one defendant and the claims are closely related. Contrary to the findings of both Brazilian and U.S. courts, the Rotterdam District Court also held the arbitration provision in Petrobras'

[365] *In re Petrobras Sec. Litig.*, 116 F. Supp. 3d 368, 389 (S.D.N.Y. 2015).

[366] RBROT Rotterdam 19 september 2018, (Stichting Petrobras Compensation Foundation/Petroleo Brasileiro S.A., et al. (Neth.).

[367] Under Dutch law, Foundations are not permitted to file claims for damages. Foundations can only pursue a declaratory judgment. Any claims for damages need to be filed by each individual investor either via a joint complaint (joinder) or through an individual complaint.

[368] Article 7(1) of the Dutch Civil Code of Procedure (provides that if a Dutch court has jurisdiction over one defendant, then it can assert jurisdiction over all other defendants who are called to the same proceedings if the claims are so closely connected that joint consideration is justified for reasons of efficiency and avoiding disparate judgments).

bylaws to be unenforceable. There are two levels of appellate review available on this decision and it is uncertain whether the Rotterdam District Court's decision will be upheld. Furthermore, the Dutch foundation can only pursue a declaratory judgment and it is unclear whether the Dutch courts will also assert jurisdiction over damages actions brought by investors.

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