Global Securities Litigation Trends

December 2020 Update

Dechert LLP

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Introduction

The landscape of global securities litigation is continuing to evolve rapidly. As explained in "Developments in Global Securities Litigation,"[1] a white paper prepared by Dechert in 2018 and the subsequent July 2019 update,[2] multinational companies must continue to brace for a new era of global securities litigation as they may be forced to defend against securities class actions not only in the United States, but also around the world, as collective action mechanisms continue to evolve.

With its decision in *Morrison v. National Australia Bank Ltd.*,[3] the United States Supreme Court closed the door on plaintiffs bringing "F-cubed" cases in the United States whereby foreign investors sue a foreign issuer based upon a security traded on a foreign exchange. While litigants continue to grapple with the scope of *Morrison*, the landmark opinion has presented enterprising plaintiffs the opportunity to look for relief beyond the U.S. Indeed, if *Morrison* created a vacuum for securities class actions, other countries such as the Netherlands, Australia, and Israel are in a position to fill it.[4]

This article provides the latest update to the White Paper and July 2019 Report. Part I briefly updates the recent jurisprudence in the U.S. following the Supreme Court's landmark ruling in *Morrison*. Part II then reviews the developments of collective shareholder litigation in various jurisdictions around the world, including the European Union and its member states, the United Kingdom, Australia, Canada, Israel, and Japan. Lastly, Part III provides a summary of the key findings and takeaways of which issuers should be aware in order to navigate the ever-changing global landscape of securities litigation.

1 David H. Kistenbroker, Joni S. Jacobsen, Angela M. Liu, *Developments in Global Securities Litigation* (2018) (hereinafter, the "White Paper").

2 David H. Kistenbroker, Joni S. Jacobsen, Angela M. Liu, *Global Securities Litigation Trends: July 2019 Update* (2019) (hereinafter, the "July 2019 Report").

3 561 U.S. 247 (2010).

4 Discussed *infra* Part II.

Post-*Morrison* Jurisprudence

In 2010, the Supreme Court issued its seminal opinion in *Morrison v. National Australia Bank Ltd.*[5] Interpreting the extraterritorial scope of the Securities Exchange Act of 1934 (the "Exchange Act"), the Court extinguished access to U.S. courts for "F-cubed" cases.[6] Since then, the impact of *Morrison* continues to evolve. The year 2019 saw an uptick in the number of securities class actions filed against non-U.S. issuers, with these suits constituting 15% of all shareholder class action lawsuits.[7] These statistics for 2019 show that of the 64 investor actions filed in U.S. federal courts, Chinese companies comprised the highest number, followed by companies in the UK, Canada, and Ireland.[8] While some courts have evaluated securities litigation cases involving American Depositary Receipts ("ADRs") of non-U.S. companies without any analysis relating to *Morrison*, the post-*Morrison* landscape continues to evolve.

Notably, in 2020, the Central District of California in *Mark Stoyas v. Toshiba Corporation et al.*[9] demonstrated that even companies with unsponsored ADRs trading in the U.S. can be subject to U.S. securities class action suits. The defendant in *Stoyas*, Toshiba Corporation, is a "worldwide enterprise that engages in the research development, manufacture, construction, and sale of a wide variety of electronic and energy products and services," and is headquartered in Japan.[10] The plaintiffs allege that Toshiba violated Sections 10(b) and 20(a) of the Exchange Act as well as Japan's Financial Instruments & Exchange Act ("JFIEA").[11] Toshiba's common shares trade on the Tokyo Stock Exchange, but Toshiba has unsponsored Level I ADRs that trade in the U.S. (*i.e.*, the ADRs were set up by a depositary bank without Toshiba's involvement).[12] According to the Toshiba plaintiffs, this case arises from Toshiba's deliberate use of improper accounting over a period of at least six years in an effort to inflate pre-tax profits by more than US$2.6 billion and conceal at least US$1.3 billion in impairment losses.[13] Upon "revelation of the impaired goodwill at Westinghouse, the price of Toshiba securities declined by more than 40%, resulting in a loss of $7.6 billion [] in market capitalization that caused hundreds of millions of dollars in damages to U.S. investors in Toshiba securities."[14] The court originally dismissed the first amended complaint with prejudice in 2016.[15] The plaintiffs then appealed, and on July 17, 2018, the Ninth Circuit reversed and remanded.[16] Though the Ninth Circuit held that the plaintiffs had not sufficiently alleged a domestic transaction nor sufficiently alleged that the fraudulent conduct was in connection with the sale of securities, the court concluded that leave to amend was proper.[17] The Supreme Court denied certiorari.[18] On August 8, 2019, the plaintiffs filed a second amended complaint, and the defendants moved to dismiss.[19]

On January 28, 2020, Judge Dean Pregerson denied the motion to dismiss. The court found that the plaintiffs plausibly alleged that the parties incurred irrevocable liability within the U.S., reasoning that allegations regarding the location of the broker, the tasks carried out by the broker, the placement of the purchase order, the passing of title, and the payment made were relevant to the domestic transaction inquiry. The court explained, "[if] discovery ultimately reveals that the ADR transaction involved an initial purchase of common stock in a foreign transaction . . . [that] can be a matter properly raised at the summary judgment stage."[20]

5 561 U.S. 247 (2010).

6 *Id.* at 266–67.

7 David H. Kistenbroker, Joni S. Jacobsen, Angela M. Liu, *Non-U.S. Issuers Targeted in Securities Class Actions Filed in the United States* 6 (Mar. 3, 2020).

8 *Id.*

9 424 F. Supp. 3d 821 (C.D. Cal. 2020).

10 *Id.* at 823.

11 *Id.* at 823-24.

12 *Id.* at 824.

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 952 (9th Cir. 2018).

18 *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund,* 139 S. Ct. 2766 (2019).

19 *Stoyas*, 424 F. Supp. 3d at 825.

20 *Id.* at 827.

The court also found that the plaintiffs sufficiently alleged Toshiba's "plausible participation in the establishment of the ADR program,"[21] and stated that the plaintiffs sufficiently alleged the "in connection with" element of the claim. In other words, the plaintiffs alleged "the nature of the . . . ADRs, the OTC Market, the Toshiba ADR program, including the depositary institutions that offer Toshiba ADRs, the Form F-6s, the trading volume, the contractual terms, and Toshiba's plausible consent to the sale of its stock in the United States as ADRs."[22] The court also found that the plaintiffs sufficiently alleged that the purported fraudulent conduct concealed the true condition of the company and risks associated with its stock. The allegations plausibly demonstrated "some causal connection" between the defendants' conduct and the purchase or sale of the ADRs at issue.[23] Lastly, the court concluded that the plaintiffs had sufficiently alleged Exchange Act claims, and concluded that comity and *forum non conveniens* did not compel dismissal.[24]

The ruling shows that even companies with unsponsored ADRs trading in the U.S. can be subject to U.S. securities class action suits, and it is not enough to simply defend the matter by arguing that the company did not sponsor the ADRs. As the *Stoyas* proceeding continues,[25] it will likely shed additional light on Morrison's import for multinational companies and the expression of U.S. jurisdiction.

21 *Id.* at 828.

22 *Id.*

23 *Id.*

24 *Id.* at 829-30. Interestingly, at least one court, however, has dismissed a case concerning a company with unsponsored Level I ADRs on *forum non conveniens* grounds. In *Church v. Glencore PLC*, Civ. No. 18-11477, 2020 WL 4382280 (D.N.J. July 31, 2020), the court granted dismissal where the global defendant company was incorporated in the United Kingdom, its officers were citizens of various foreign nations with their primary residence in Switzerland, and an alleged bribery scheme occurred outside of the U.S. *Id.* at *1; see also Kevin LaCroix, *Unsponsored ADR Investors' Securities Suit Dismissed on Forum Non Conveniens Grounds*, The D&O Diary (Oct. 21, 2020). Whether non-U.S. companies with unsponsored Level I ADRs are able to avoid litigation in the U.S. because the courts may more readily dismiss such cases on forum non conveniens is unclear, but reveals an available path for dismissal for such companies.

25 Toshiba Corp. filed its answer on February 11, 2020 (Dkt. 89). Discovery is ongoing, though the court denied Toshiba's motion for phased discovery, finding that it "would cause further delay and prejudice Plaintiffs." (Dkt. 104). Per the most recent scheduling order (Dkt. 97), fact discovery ends on September 23, 2021, dispositive motions are due on February 17, 2022, and the trial is scheduled for September 27, 2022. The court referred the litigation to private mediation on March 13, 2020 (Dkt. 98). It is important to note that all future dates set forth throughout this report may change due to the COVID-19 pandemic and related court closures throughout the world.

Global Developments

European Union

With collective actions on the rise within the European Union, member states are increasingly focusing on available mechanisms and potential consequences.[26] As part of this effort, the EU's governing bodies have taken steps to investigate and implement preferred methods of collective litigation.

In 2013, the EU's European Commission (the "Commission") published its Collective Redress Recommendation (the "EU Recommendation").[27] The EU Recommendation provided member states with two recommendations for collective redress mechanisms: first, group actions in which two or more individuals suffering the same harm collectively bring and jointly manage their claims; and second, representative actions in which qualified entities are authorized to bring suits on behalf of aggrieved third parties.[28] Reflecting upon the EU Recommendation, the Commission in 2018 published its Report on the Implementation of the EU Recommendation and found that many of the member states had not yet implemented many of the recommended features.[29]

Building upon the EU Recommendation, the EU has steadily advanced a proposal as part of its "New Deal for Consumers" designed to make member states' collective redress schemes more uniform for consumers. Though this is not a shareholder-specific mechanism, these consumer-centric reforms likely portend the types of protections and powers that could be granted to shareholder groups. Indeed, the New Deal proposal is designed to provide a cohesive system by which plaintiffs across the EU can seek redress for harms caused by the same event.[30]

Introduced in 2018 as part of the New Deal, the directive, titled "Representative actions for the protection of the collective interests of consumers," is currently undergoing interinstitutional negotiations.[31] Also known as "trilogues," interinstitutional negotiations allow legislators from the three primary legislative bodies of the EU (Parliament, Council and Commission) to informally negotiate legislative language that may subsequently be advanced formally.[32] Having entered this trilogue period on January 13, 2020, it is unclear how long the legislative process will continue.

As with previous years, differences between the various EU countries' collective action proceedings continue to be a risk for issuers, as enterprising plaintiffs have the opportunity to engage in forum shopping. Moreover, the potential for large payouts and access to third-party litigation funding ("TPLF") provides the incentive for shareholders to pursue more claims. TPLF arose largely in response to the "loser pays" system prevalent in many non-U.S. jurisdictions in which contingency fees are not permitted and instead each party bears its own costs.[33] Allowing financial firms to invest in lawsuits in exchange for a share of any settlement or judgment eases a litigant's financial burden and risk, and the potential for large payouts has incentivized these firms to provide shareholders the capital to pursue more claims.[34] TPLF is paving the way for large collective investor actions and fueling the globalization of securities litigation.

The European Commission has made recommendations aiming to ensure that financing terms do not create an incentive for abusive litigation or conflicts of interest, such as proposing a general disclosure rule regarding the origin of

26 *See, e.g.*, Ken Daly, *The Growth of Collective Redress in the EU: A Survey of Developments in 10 Member States*, U.S. Chamber Institute for Legal Reform, 17–20 (Mar. 2017), July 2019 Report, *supra* note 2, at 9–10.

27 Commission Recommendation 2013/396 of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013 O.J. (L 201).

28 *Id.*

29 Report from the Commission to the European Parliament, the Council and The European Economic and Social Committee on the Implementation of the Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law, at 20-21, COM (2018) 40 final (Jan. 25, 2018).

30 Jenny Gesley, *European Union: New Directive Amends Consumer Protection Rules*, Law Library of Congress (Feb. 10, 2020).

31 Key events, *2018/0089(COD): Representative actions for the protection of the collective interests of consumers*, Legislative Observatory, European Parliament (last accessed Mar. 23, 2020).

32 Trilogues explained, *Interinstitutional negotiations for the adoption of EU legislation*, Ordinary Legislative Procedure, European Parliament (last accessed Nov. 2, 2020).

33 *See, e.g.*, Peter Butler & Christine Tran, *Brave New World: The Impact of Third Party Litigation Funding on Commercial Litigation*, Who's Who Legal (Nov. 29, 2016).

34 *Id.*

funds used, or prohibiting charging excessive interest rates.[35] Time will tell how the EU and its member states take steps to address issues relating to this evolving phenomenon.

As more EU member states adopt differing collective redress mechanisms, and the size of claims continues to grow, issuers should continue to be aware of potential forum shopping and monitor new procedures and legislation.

Netherlands

The Netherlands continues to be at the forefront of the globalization trend in securities litigation. In 2016, the Netherlands became home to the largest non-U.S. securities litigation settlement.[36] Arising from the 2008 financial crisis, Ageas (formerly known as Fortis) agreed to settle pending shareholder claims for €1.204 billion (approximately US$1.5 billion). This unprecedented settlement, showcasing the magnitude of liability exposure for issuers, firmly established the Netherlands as a burgeoning venue for securities litigation and class actions generally.

As explained in the White Paper, the Netherlands has become a popular venue for pursuing international class claims.[37] Indeed, the Netherlands has traditionally been an attractive forum, both for plaintiffs seeking relief on behalf of a worldwide class and defendants seeking a binding opt-out resolution of claims involving worldwide investors.

On January 1, 2020, the *Wet afwikkeling massaschade in collectieve actie*, or WAMCA, came into effect and brought substantial reforms to the Dutch collective action scheme.[38] WAMCA builds upon and makes adjustments to the country's previous class settlement procedure, known as *Wet collectieve afhandeling massaschade* (WCAM).[39] Under WCAM, claimants in a collective action could only pursue declaratory judgments regarding defendant liability.[40] If a claimant wished to obtain monetary damages, they would have to initiate a subsequent non-collective action relying upon the declaratory judgment obtained earlier.[41] Now, under WAMCA, claimants may bring actions for money damages within the collective action.[42] WAMCA also provides an opt-out mechanism for Dutch residents and an opt-in option for parties residing abroad.[43]

In addition to an opt-out mechanism, WAMCA imposes a jurisdictional requirement to ensure that the Netherlands only attracts litigation that has a sufficient connection with the country.[44] In order to satisfy this requirement under WAMCA, a claimant must demonstrate that the majority of individuals for whom the action is brought are resident in the Netherlands, the defendant is a domiciliary of and has a sufficient relationship with the Netherlands, or that the events upon which the action is based took place in the Netherlands.[44]

Given the large settlements obtained in this jurisdiction and the new ability to pursue monetary damages, the Netherlands is likely to continue to see growth in the number of collective actions, securities-related or otherwise, so long as plaintiffs can establish a sufficient connection to the Netherlands. However, the use of the Netherlands as a "universal" jurisdiction has been potentially constrained by WAMCA.

Volkswagen Collective Action

Volkswagen is currently in the midst of several actions worldwide, both by investors and consumers. As discussed in the White Paper, investors have brought suit against Volkswagen based on alleged misrepresentations in connection with diesel emission issues.[45] On May 27, 2020, the Volkswagen Investor Settlement Foundation was dissolved.[46] In addition, a consumer collective action is pending in relation to those European owners affected by the "diesel [emissions] scandal" in which purchasers of Volkswagen vehicles are pursuing a declaratory judgment entitling them to return their vehicles for a refund of the purchase price.[47] As explained in the July 2019 Report, the consumer litigation is organized into three primary phases.[48]

35 *A "Fair Deal" for Consumers?: An Update on EU Consumer Attitudes Towards Collective Actions and Litigation Funding*, U.S. Chamber Inst. for Legal Reform, 4, 16–25 (July 2018).

36 Kevin LaCroix, *The Top 25 Securities-Related Settlements Outside of North America*, The D&O Diary (Jan. 13, 2020).

37 Daly, *supra* note 26, at 22–23; *see also* White Paper, *supra* note 1, at 10–11, 15; July Report, *supra* note 2, at 10–12.

38 Albert Knigge & Isabella Wijnberg, *Class/collective actions in The Netherlands: Overview of class/collective actions and current trends*, Thomson Reuters: Practical Law (Sept. 1, 2020).

39 *Id.*

40 *See id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 Press Release, Dutch Settlement Foundation Seeks to Resolve Securities Claims Both for the Benefit of Volkswagen and its Investors (Feb. 15, 2016); White Paper, *supra* note 1, at 15; *see also* Volkswagen A.G., *2019 Annual Report* 183-84 (2020).

46 Home, The Volkswagen Investor Settlement Foundation (last accessed Oct. 27, 2020).

47 Progress of the lawsuit, Stichting Volkswagen Car Claim at "The Goal: Judicial Decision."

48 *Id.* at "Where We Are Now: Pre-trial review"; *see also* July 2019 Report, *supra* note 2, at 12.

In the first phase, the District Court of Amsterdam found itself jurisdictionally competent to hear the suit.[49] The second phase, in which the court may formally ask questions, investigate the facts and scope of the case, and determine the admissibility of the class foundation, completed on November 20, 2019.[50] Phase 3, in which the court "will assess the substance of the Foundation's claims," is underway.[51] The defendants have responded to the plaintiffs' claims and the court has provisionally scheduled hearings for May 17 to 28, 2021.[52] Though this litigation is not subject to the new provisions of WAMCA, claimants may nonetheless pursue damages in subsequent *individual* proceedings.[53]

Germany

Germany is a jurisdiction that illustrates some of the complexity and uncertainty issuers may face as the world of collective actions continues to develop. As explained in the White Paper, Germany does not have a formal procedure for multiple claims to be tried as a class action.[54] However, there is a process whereby decisions can be obtained on common elements of multiple claims referred to as "KapMuG."[55] The KapMuG allows a securities claimant to "opt in" and apply to have its claim tried as a model proceeding for a group of litigants.[56]

Like in the Netherlands, investor lawsuits have also been filed against Volkswagen in Germany under the KapMuG, and claims against the company worldwide (excluding the U.S. and Canada) total roughly €9.6 billion.[57] As anticipated by the July 2019 Report, the litigation was not resolved in 2019 and is projected to continue into 2021.[58]

49 Progress of the lawsuit, Stichting Volkswagen Car Claim, *supra* note 47, at "Where We Are Now: First phase completed – Court of Amsterdam competent."

50 *Id.* at "Where We Are Now: Phase 2 – Oral pleading."

51 *Id.* at "Where We Are Now: Phase 3 – Date has been determined."

52 *Id.* at "Where We Are Now: Phase 3 – Hearing planned"

53 *Id.* at "The Goal: Judicial Decision."

54 White Paper, *supra* note 1, at 19.

55 July 2019 Report, *supra* note 2, at 13–14 (citing Burkhard Schneider & Heiko Heppner, *The International Comparative Legal Guide to: Class & Group Actions 2017: A Practical Cross-Border Insight into Class and Group Actions Work*, Global Legal Group (Nov. 18, 2016)).

56 *Id.*

57 Volkswagen A.G., *supra* note 45, at 183–84.

58 July 2019 Report, *supra* note 2, at 14 (citing Jenny Gesley, The Volkswagen Litigation, Law Library of Congress (Oct. 27, 2016)).

Italy

Italy is a jurisdiction that was reluctant to embrace a class action procedure, but has since amended its laws to embrace class action claims.[59]

In 2010, Italy adopted Article 140-*bis* of the Italian Consumer Code.[60] Article 140-*bis* allows plaintiffs to bring claims as a class action so long as the claimants' collective rights are "homogenous" and the claims entail breach of contract, unfair or anticompetitive practices, or products liability claims.[61] Since adopting Article 140-*bis* in 2010, Italy amended its law in 2012 to increase access to class actions, which had previously only been available where claimants' collective rights were "identical."[62]

Recently, Italy enacted legislation designed to repeal Article 140-*bis* in its entirety and replace it with a comprehensive title in the Codice di procedura civile (Code of Civil Procedure).[63] Most notably, Italy's class procedures will expand beyond consumer actions to any case implicating "homogenous rights," presumably opening the door for increased class action securities litigation.[64] The new law, which became effective on November 19, 2020,[65] also provides a procedural framework for class action proceedings. First, a putative class must submit an application for admissibility, which is subsequently published by the Ministry of Justice along with an initial hearing date.[66] Following the initial hearing, the court can proceed with scheduling the proceedings, ordering discovery, and establishing

59 Daly, *supra* note 26, at 20, 67.

60 Codice del Consumo, art. 140-*bis* (It.); *see also* White Paper, *supra* note 1, at 22.

61 Codice Del Consumo, art. 140-*bis*, para. 2 (It.); *see also* Micael Montinari & Filippo Frigerio, Italy: Class and Group Actions 2020, ICLG (Nov. 11, 2019).

62 July 2019 Report, *supra* note 2, at 14 (citing Gennaro d'Andria & Francesco Alongi, *Class Actions Global Guide: Collective Actions in Italy: overview*, Practical Law Company (July 1, 2018)).

63 Gennaro d'Andria, Class/collective actions in Italy: overview, Thomson Reuters: Practical Law (Aug. 1, 2020); *see also* L. n. 31/2019 (It.).

64 d'Andria, *supra* note 63 ("[T]he new definition of class action does not contain the word 'consumers' which means that it could be applied to the 'individual homogenous rights' of any class.").

65 L. n. 31/2019 (It.); L. n. 162/2019 (It.) (amending the original effective date of L. n. 31/2019 and various other legislative enactments); L. n. 28/2020 (amending the original effective date of L. n. 162/2019 and various other legislative enactments.)

66 d'Andria, *supra* note 63; L. n. 31/2019 (It.).

other class requirements.[67] Once the class is determined and the homogenous rights at issue are defined, the court then proceeds with addressing the merits of the action.[68] The new law provides a clearly delineated process outlining admissible forms of evidence, deadlines, and appeals.[69] The law also provides judges with discretion to award costs to plaintiffs.[70]

Under the current securities litigation scheme, Italian law treats alleged misrepresentations as torts, which do not allow for collective litigation.[71] As noted above, the new law expands beyond consumer actions to any case of "homogenous rights" and issuers should be prepared to be hauled into Italian courts for securities collective actions. Ultimately, regardless of the ultimate effect of L. n. 31/2019, it signals that even jurisdictions that have been historically reluctant may now also partake in the globalization of securities litigation.

United Kingdom

The United Kingdom is a preferred destination for collective shareholder litigation.[72] As described in the White Paper, the UK is a favored jurisdiction thanks to eased restrictions on TPLF and its proficient handling of several high-profile suits.[73]

In a recent lengthy UK court decision, *Sharp v. Blank*,[74] the High Court provided clarity on the duties owed by a publicly listed company and its directors to shareholders in connection with announcements made under UK Stock Exchange Listing Rules. The decision also contained analysis regarding causation issues. *Sharp* concerned Lloyds TSB Group's acquisition of HBOS plc just prior to the credit crunch of 2008.[75] Brought by a class of Lloyds shareholders, the suit alleged that former Lloyds directors were negligent, had breached fiduciary duties and misled investors relating to the acquisition of HBOS.[76] Specifically, the claims brought by a group of shareholders alleged: "(a) The Lloyds directors should not have recommended the Acquisition because it represented a dangerous and value-destroying strategy which involved unacceptably risky decisions ('the recommendation case') . . . (b) the Lloyds directors should have provided further information about Lloyds and about HBOS, in particular about a funding crisis faced by HBOS and the related vulnerability of HBOS's assets ('the disclosure case')."[77] The shareholders sought approximately £385 million in damages.[78]

In a November 2019 ruling, nearly two years after the trial ended, the High Court of Justice issued an approved judgment in which it disposed of the action in its entirety in favor of Lloyds.[79] The judge agreed that a reasonably competent chairman or director could have reached the same conclusion at the end of October 2008, that the acquisition was beneficial to Lloyd's shareholders and could reasonably have maintained that view until the shareholders' vote on the acquisition was taken.[80] The court also found that although there were "imperfections" in the bank's circular to shareholders regarding the acquisition, it was not misleading.[81] The judge stated, "the majority who approved the Acquisition did not do so under some misapprehension of the position. . . . They knew that the board assessed the chance of advantage as outweighing the risk inherent in the transaction."[82]

In addition, according to the opinion, the court was not persuaded that the failure to provide sufficient information was causative of any loss.[83] By relying on an "actual" causation analysis instead of a "but for" or theoretical causation test, the UK court set a bar that is significantly more difficult for plaintiffs to satisfy.[84] So long as UK courts apply this stringent causation test, issuers will have a powerful weapon to combat shareholder litigation.[85]

Among the UK's high-profile suits, the *Merricks v. Mastercard Inc. & Others* litigation is pending.[86] Although not an investor class action, the *Mastercard* case is significant because it stands as the largest collective litigation claim in UK history and is likely

67 d'Andria, *supra* note 63.

68 *Id.*

69 *Id.*; *see also, e.g.,* L. n. 31/2019, arts. 840-*quinquies*, 840-*sexies*, 840-*septies*, 840-*octies* (It.).

70 d'Andria, *supra* note 63; L. n. 31/2019, art. 840-*novies* (It.).

71 Paolo Giudici & Francesco Munari, *Recent advancements in securities litigation in Italy*, Thomson Reuters: Practical Law (July 1, 2015).

72 Jerome Kortmann, et al., *Collective Redress Tourism: Preventing Forum Shopping in the EU*, U.S. Chamber Institute For Legal Reform, 24 (Oct. 24, 2017).

73 White Paper, *supra* note 1, at 15–19.

74 [2019] EWHC 3078 (Ch).

75 *Id.* [1].

76 *Id.* [29]–[33].

77 *Id.* [29].

78 *Id.* [1].

79 *See id.* [964]–[965].

80 *Id.* [793], [955].

81 *Id.* [964].

82 *Id.*

83 *Id.*

84 Francis Kean & Kevin LaCroix, *Guest Post: Pyrrhic Victory For Shareholders in Epic Credit Crunch Claim against Directors*, The D&O Diary (Nov. 27, 2019).

85 *See id.*

86 *Merricks CBE v. Mastercard Inc. and Others* [2019] EWCA Civ 674.

to influence future collective actions. Stemming from Mastercard allegedly charging improper fees, the consumer plaintiff class seeks approximately £14 billion in damages.[87] In April 2019, in a landmark unanimous judgment, the Court of Appeal decided that the Competition Appeal Tribunal ("CAT") erred in rejecting certification of the class action against Mastercard, arguably lowering the initial certification hurdle.[88] On July 24, 2019, the Supreme Court of the United Kingdom granted leave for Mastercard to appeal the order of the CAT, allowing the suit to proceed as a collective action.[89] The parties were heard in Spring 2020 and judgment is pending.[90]

Australia

Australia has recognized the concept of collective proceedings for decades.[91] Having recently permitted TPLF,[92] Australia is now seeing an increase in the number and scale of class action filings.[93] Outside of North America, Australia has become one of the most likely venues for a securities class action lawsuit.[94] Its class action mechanism, however, is still evolving.

As one of the most active jurisdictions for securities class actions, it is perhaps unsurprising that Australia is also home to some of the world's largest securities class action-related settlements. Of the 25 largest settlements of all time outside of North America, 17 came out of Australia.[95] These settlements range from US$34,037,550 to US$240,543,320, with an average value of US$89,185,119.[96]

Not all cases settle, however; 2020 marked Australia's first-ever defense verdict at trial.[97] In *Crowley v. Worley Limited*—only the second securities lawsuit to go to trial in Australia—the plaintiff alleged that the company violated Australian law by issuing and then reaffirming optimistic earnings guidance (which was subsequently revised downward) because:

– the company did not have a reasonable basis for its FY14 earnings guidance as it was based on an unreasonable FY14 budget;

– due to the company's underperformance in the early months of FY14, Worley did not have a reasonable basis for maintaining its FY14 earnings guidance and failed to correct its FY14 earnings guidance statement; and

– the company was aware of a consensus expectation of market analysts and was aware that its earnings would likely fall materially short of the consensus expectation.

After a five-week trial, Justice Jacqueline Gleeson of the Federal Court of Australia found for the defense in a 171-page judgment. After reviewing the evidence, Justice Gleeson rejected Mr. Crowley's interpretation of the facts, finding his case was based on hindsight and that his claims were not supported by detail that substantively contradicted the evidence submitted by the company. Specifically, the Court found that:

– the process by which the FY14 budget was developed was reasonable;

– the FY14 guidance stated by the company, through its Board, was based on reasonable grounds (being the FY14 budget);

– the company, through its Audit & Risk Committee, was "very careful in its choice of language in its earnings guidance"; and

– as a result of the FY14 budget and the monitoring of monthly financial performance and budget reforecast processes, the Board and the CEO individually had reasonable grounds for the FY14 guidance representation at all relevant times.

With respect to the "consensus" case, the Court assumed a 5% materiality threshold and found that at no stage did any director or officer know or believe the company's FY14 earnings would fall materially short of the consensus range.[98] After this big win for the defense, defendants facing securities class actions in Australia may be more willing to take cases to trial, especially

87 *Id.* [4].

88 *Id.* [63].

89 *Walter Hugh Merricks CBE v Mastercard Incorporated and Others*: Status, Competition Appeal Tribunal (last accessed Nov. 30, 2020).

90 *Id.*

91 *See* Federal Court of Australia Amendment Act 1991 (Cth) (Austl.); *see also* Federal Court of Australia Act 1976 (Cth) (Austl.).

92 July 2019 Report, *supra* note 2, at 16 (citing *Campbells Cash and Carry Pty Ltd. v. Fostif Pty Ltd.* [2006] HCA 41 (Austl.)).

93 Elisa Mendoza, *Navigating the Australian Securities Class Action Landscape*, ISS Securities Class Action Services, 2 (Oct. 23, 2018).

94 *Id.*

95 *The Top 25 Non-North American Settlements: Largest Securities-Related Settlements Outside of North America of All-Time*, ISS Securities Class Action Services, 4 (Dec. 31, 2019) (hereinafter "Settlement List").

96 *See id.*

97 Kevin LaCroix, *Rare Australia Securities Class Action Trial Results in First-Ever Defense Verdict*, The D&O Diary (Oct. 27, 2020).

98 Herbert Smith Freehills, *First defendant win in a shareholder class action: Crowley v Worley Limited [2020] FCA 1522.*

given that securities trials in Australia are conducted before sophisticated judges who consider both the facts and the law, rather than juries of laypeople.[99]

Because of its active role in collective litigation, Australia is often looking to reform its class action laws and procedures. As a very recent example, in response to the COVID-19 pandemic, and in an effort to shield corporations from opportunistic class actions, Australia's government has temporarily eased (but not eliminated) corporations' continuous disclosure requirements.[100] These measures have so far been effective, but heading into 2021 and beyond, there very well may be a number of COVID-19-related securities class actions filed in Australia, particularly relating to the cruise line, healthcare, technology, and capital raising industries.[101]

COVID-19 measures aside, the Australian Law Reform Commission ("ALRC"), a body tasked with performing research on behalf of the Attorney-General of Australia, has considered, among other things, reforms related to TPLF, settlement approval, competing class actions, and access to justice.[102] In its report issued in December 2018 (the "ALRC Report"), the ALRC explained that the litigation funding market in Australia has been growing and industry revenue is forecast to grow at an annualized 7.8% through 2022–2023.[103] The ALRC outlined six recommendations regarding regulation of litigation funders, including: prohibiting counsel from recovering unpaid legal fees from the representative plaintiff or plaintiff group if the action is funded by a third party; requiring funders provide security for costs; enabling courts to award costs against third-party funders and insurers; enabling courts to amend or reject funding agreements; and requiring litigation funders to report annually to Australian authorities regarding their compliance with the law.[104]

99 *See id.*

100 Corporations (Coronavirus Economic Response) Determination (No. 2) 2020; Josh Frydenberg MP, *Temporary changes to continuous disclosure provisions for companies and officers* (May 25, 2020).

101 Kevin LaCroix, *Guest Post: The Potential for COVID-19-Related Securities Class Actions in Australia*, The D&O Diary (July 9, 2020).

102 *See, e.g., Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (ALRC Report 134),* Australian Law Reform Commission, 47–68, 89–128 (Dec. 2018) (hereinafter, "ALRC Report").

103 *Id.* at 49.

104 *Id.* at 10.

Though these reforms have not yet been acted upon, Australia's balanced scheme and consistent willingness to address known issues mean it will continue to be a frequent home to shareholder class actions.

Canada

Unlike the U.S., Canada's securities regulation is decentralized. Each of Canada's 13 provinces and territories has its own securities-regulating body with its own unique set of regulations and procedures.[105] Despite this, Canada has seen its number of securities actions grow over the last decade and a half.[106]

Since 2006, Canada's total number of annual class action filings has increased by nearly 300% from five in 2006 to 14 in 2019.[107] Of those 14 actions in 2019, nine were filed in Ontario.[108] Interestingly, though the number of securities actions has increased between 2006 and 2019, the number and size of settlements has steadily decreased during the same time. In 2019, four cases reached settlement, half the total seen in 2018. Of these four cases, the median settlement was US$13.5 million with a high settlement of US$37.7 million.[109] So far in 2020, at least two class actions reached settlement—one for US$69 million[110] and another for US$13 million.[111] As securities litigation continues to expand globally and Canada continues to focus on centralizing its securities laws, these numbers—the volume of litigation and settlements—will likely increase.

Realizing the challenges posed by 13 unique schemes, the Canadian government has considered centralizing securities regulation, though a timeframe for this change is not yet set.[112] In 2018, the Supreme Court of Canada held that an inter-provincial cooperative regulatory body was constitutional.[113] Though this holding provided an opportunity for such agencies

105 Kevin LaCroix, *Class Actions in Canada: A Critical Commentary*, The D&O Diary (Mar. 23, 2015); *see also* David Murchison, *Backgrounder: A New Canadian Securities Regulatory Authority*, Department of Finance Canada (2010).

106 *See* Bradley A. Heys, et al., *Trends in Canadian Securities Class Actions: 2019 Update*, NERA Economic Consulting, 3 (Mar. 19, 2020).

107 *Id.* at 2.

108 *Id.* at 1.

109 *Id.* at 6.

110 *Bausch Health Resolves Canadian Securities Class Action*, PR Newswire (Aug. 5, 2020).

111 *Siskinds LLP Announces that a Settlement Has Been Reached in the Class Action Against Canadian Solar,* PR Newswire (Aug. 19, 2020).

112 *See, e.g.*, Murchison, *supra* note 105 at 2.

113 Reference re Pan-Canadian Sec. Reg., 2018 SCC 48, para. 116 (Can.).

to centralize securities regulation in Canada at the federal level,[114] those reforms have yet to take place. Instead, the various provinces have continued to work together within non-binding advisory and cooperative bodies.[115] One of these organizations, the Canadian Securities Administrators (CSA), strives to develop "a harmonized approach to securities regulation across the country."[116] The organization, comprised of each member's leading securities regulator, has enacted measures such as the "passport system" in which issuers answer only to their "home" regulator while operating under a common set of laws.[117] If accomplished, a uniform set of laws—however achieved—would allow multinational companies to operate more efficiently throughout Canada and more accurately assess their risks.

It is important to note, however, that each province or territory currently is still responsible for its own securities enforcement.[118] In early 2020, for instance, Ontario created a task force to review its securities laws for the first time in more than 15 years.[119] Legislation known as the Class Proceedings Act (the "CPA") was amended in July 2020 and became effective October 1, 2020. Among its changes, the amended CPA raised the bar to certify proposed class actions—whereas the former standard required that class members' issues be "common," the new test under the CPA further requires that a class action be a superior resolution and that the common issues predominate each member's case.[120] With the approval of the CPA, Ontario's class certification process now more closely aligns with the requirements in the U.S.

Israel

Israel is also an active jurisdiction relating to class actions, as it has embraced modern class actions for more than 25 years.[121] Israel's collective litigation scheme shares much in common with the U.S. system, such as the availability of opt-out mechanisms, similar class certification standards, and approved settlements.[122] There are, however, differences. Israeli law permits class actions by incorporating class procedures within many of its substantive laws.[123] Additionally, unlike in the U.S., Israeli judgments in collective proceedings tend to be relatively modest.[124]

In Israel, litigants generally may only pursue class actions if the substantive cause of action expressly provides for it.[125] Creative plaintiffs, however, have attempted to employ a broad general procedure akin to the U.S. joinder mechanism to create quasi-class actions, and lower Israeli courts have sanctioned such attempts (despite the Supreme Court of Israel's attempts to rein in these quasi-class actions).[126] In 2006, the Knesset (Israel's legislature) enacted a comprehensive update to its class action scheme. Titled the "Class Action Law," or CAL,[127] it establishes detailed procedural mechanisms concerning class certification, fees and awards, and settlements.[128] It also provides courts with the ability to certify a class under either an opt-in or opt-out regime.[129] Though the law preempted all existing class action laws, it nonetheless maintained that class actions are only available where a substantive law provides for it.[130] Israeli securities laws provide for class actions and, in certain circumstances, the Israeli Securities Authority can provide public funds to support these private suits where doing so is in the public interest.[131]

Since CAL's enactment in 2006, Israel has seen a steady increase in the number of class action filings.[132] Fortunately for issuers, shareholder actions represent a small portion of those filings, with the large majority (78%) instead pertaining to banking and insurance *consumer* actions.[133] Though the number of securities actions remains low in Israel, issuers should nonetheless remain vigilant. In 2011, in the *Makhteshim Agan Industries Limited* securities case, the

114 Saad Gaya, *Reference re Pan-Canadian Securities Regulation: A Unified Approach to Securities Regulation*, thecourt.ca (Nov. 14, 2018); July 2019 Report, supra note 2, at 15–16.

115 Who We Are, Canadian Securities Administrators, at "Overview" (last accessed Nov. 2, 2020).

116 *Id.*

117 *Id.*

118 *Id.*

119 Barbara Shecter, *Ontario appoints task force for first review of securities regulation in more than 15 years*, Financial Post (Feb. 6, 2020).

120 Class Proceedings Act, 1992, S.O. 1992, c. 6 § 5(1.1).

121 Alon Klement & Robert Klonoff, *Class Actions in the United States and Israel: A Comparative Approach*, 19 Theoretical Inquiries L. 151, 152, 171 (2018).

122 *Id.* at 153.

123 *Id.* at 171 (noting the "substance-specific nature of the class action chapters").

124 *Id.* at 153.

125 *Id.* at 171.

126 *Id.*

127 Class Action Law, 5776-2016, SH No. 2054 p. 264 (Isr.).

128 Klement & Klonoff, *supra* note 121, at 172.

129 *Id.* at 172–74.

130 *Id.* at 173.

131 Class Actions and Derivative Actions, Israeli Securities Authority.

132 Klement & Klonoff, *supra* note 121, at 189–90.

133 *Id.* at 190.

parties settled for US$44,946,326—an amount representing the 22nd-largest settlement outside of North America.[134] With this settlement, Israel stands as one of only five nations on the list of the largest non-North American securities settlements, along with the Netherlands, United Kingdom, Australia and Japan.[135] Accordingly, issuers are wise to remain apprised of Israeli developments in securities law and class action procedures.

Japan

As a relative newcomer to the class action scene—Japan formally implemented its collective action procedure in 2016[136]—there have been few collective actions filed in Japan so far. Further, the law providing for collective actions only allows their use for a discrete set of circumstances related to contractual obligations, warranty claims, unjust enrichment, and consumer-related torts.[137] Japan's securities laws, however, are more plaintiff-friendly, and groups of investors have successfully brought mass securities actions even without access to formal class-action mechanisms.[138] The primary securities law—the Financial Instruments and Exchange Act, or FIEA, enacted in 2006—provides plaintiff-friendly standards regarding intent and creates a presumption of damages against defendants.[139] With both its class action and primary securities act being less than 20 years old, the Japanese class action landscape is continuing to evolve in response to the new global economy.

Despite the country's class procedures and limited number of actions so far, Japan has seen its fair share of large securities-related actions. In addition to the 2017 Olympus settlement for US$92.4 million,[140] ongoing Toshiba Corporation litigation may also yield a significant result. Started in October 2016 and consisting of 45 Toshiba investors, the plaintiffs are seeking approximately US$162 million in damages arising from Toshiba's improper accounting methods revealed in 2015.[141] As noted by the White Paper, Toshiba faces a total of 26 lawsuits, with plaintiffs including large institutional investors and banks.[142] The litigation against Toshiba is ongoing.

As evidenced by the litigation discussed above and Japan's plaintiff-friendly securities laws, issuers should expect the proliferation—both in volume and scale—of suits in Japan to continue.

134 Settlement List, *supra* note 95, at 4.

135 *See id.*

136 Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (Japan) (the "Act on Special Measures"); *see also* White Paper, *supra* note 1, at 30.

137 Act on Special Measures, art. 65; White Paper, *supra* note 1, at 30.

138 Before Japan developed its formal collective action procedure, two or more plaintiffs with an issue arising out of the same facts could still pursue multi-party litigation. *See, e.g.*, Minki Soshōhō [Minsōhō] [C. Civ. Pro.], 1996, art. 30 (Japan).

139 Kin'yū Shōhin Torihiki-Hō [Financial Instruments & Exchange Act], Act No. 25 of 1948, art. 21, 38.

140 *Olympus (Japan): Deminor's clients achieve the highest recovery*, Deminor (Dec. 28, 2016); White Paper, *supra* note 1, at 31.

141 Reuters, *Foreign Investors Sue Toshiba over Accounting Scandal*, Fortune (Oct. 13, 2016); White Paper, *supra* note 1, at 31.

142 *Toshiba facing nearly $1bn in claims from accounting scandal*, Nikkei Asian Review (June 14, 2017); White Paper, *supra* note 1, at 31.

Key Takeaways

As economies and companies continue to globalize, securities litigation is undergoing similar rapid change. The post-*Morrison* landscape within the U.S. has limited the scope of jurisdiction in the U.S. over non-U.S. securities and issuers. As a result, shareholders have found alternative jurisdictions abroad in countries that have begun to develop their own legal legislative template for accommodating such actions. Below are some key takeaways to help issuers determine how the globalization of securities litigation may impact their own operations:

- In the U.S., the law post-*Morrison* is still developing. Cases such as *Stoyas v. Toshiba Corp.* limit *Morrison's* domesticity requirements and still allow plaintiffs to haul non-U.S. issuers into American courts.
- COVID-19 is likely to cause an influx of new securities suits around the world as markets endure significant fluctuations caused by the pandemic and companies' responses to the pandemic. Disclosures relating to its potential impact will be scrutinized by the plaintiffs' bar.
- Under its new collective litigation legislation, Netherlands will now allow for class entities to pursue damages. The Netherlands new system provides an opt-out mechanism and the availability of monetary damages. Coupled with the U.S.'s refusal to hear "F-cubed" cases due to *Morrison*, issuers can expect to see increased litigation in the Netherlands, so long as plaintiffs can establish the requisite connection.
- As securities litigation globalizes and differences continue to emerge among jurisdictions, issuers should expect that plaintiffs will undoubtedly attempt to file in jurisdictions which are most advantageous to their claims and ultimate goals. Jurisdictions with opt-out mechanisms, such as the Netherlands, will be sure to attract plaintiffs and lead to higher settlement demands.
- Absent new legislation, third-party litigation funding, or TPLF, will continue to disrupt the incentives for bringing collective claims against issuers. In "loser pays" jurisdictions, TPLF has allowed plaintiffs to bring a greater number of collective suits without fearing out-of-pocket costs. Left unchecked, however, TPLF could result in overly aggressive litigation driven by the desire for settlement rather than investor protection.
- Securities and collective action schemes continue to rapidly evolve as securities litigation further globalizes following the Morrison decision limiting jurisdiction in the U.S. Nations such as Canada, Italy, and the Netherlands are undergoing significant systemic changes to their collective litigation procedures—many of which increase the availability of litigation for shareholders.
- In jurisdictions such as Canada and the EU, there is not yet a uniform system of collective litigation or securities laws. This lack of uniformity has resulted in diminished litigation in certain jurisdictions, but litigation does still persist. Companies must remain vigilantly apprised of each nation's laws (or, in regard to Canada, each province's) and the associated inefficiencies, risks, and benefits that may accompany each jurisdiction in which they operate.
- Though the U.S. remains a leader in securities and collective litigation, the volume and scale of settlements outside of North America continue to grow. Of the 25 largest settlements outside of North America, 17 have occurred in Australia, with the remaining settlements occurring in the United Kingdom, the Netherlands, Japan, and Israel.
- As securities litigation globalizes, issuers risk facing duplicative litigation in multiple jurisdictions with no universal jurisdiction emerging. This leaves the question wide open of whether or not a settling issuer can find global peace upon settlement.
- Questions remain regarding the true enforceability of opt-out settlements, given that many EU countries have opt-in class structures and such opt-out structures are potentially deemed against public policy. The continued differences between opt-out and opt-in structures among various countries create a problem where issues litigated in one jurisdiction may still not be resolved elsewhere, thus preventing the issuer from obtaining global peace.
- Differences among the various countries' collective action proceedings are still likely to result in certain jurisdictions being favored over others, increasing the potential for forum shopping.
- Class or collective actions continue to be more prolific in light of third party litigation funders around the world. The potential for large payouts for third-party litigation funders has provided them the incentive to grant shareholders the capital to pursue more claims. Without proper restrictions on how much control third party funders may have over the conduct of the litigation, the practice continues to be susceptible to abuse.
- Legal and compliance departments need to be aware that their companies may face substantial liability not just in their home jurisdictions, but also abroad, and keep abreast of these emerging trends throughout the world.

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