Developments in global securities litigation

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Introduction

As securities markets become increasingly interconnected, multi-national public corporations continue to be a part of a significant sea change in the globalization of securities fraud litigation—a change that began with the U.S. Supreme Court's 2010 decision *Morrison v. National Australia Bank Ltd.*[1] In *Morrison's* wake, foreign and American investors are largely foreclosed from accessing American courts to litigate claims against foreign issuers whose shares do not trade on a U.S. exchange. Further, access to American courts was extinguished for "F-cubed" cases (foreign investors, suing a foreign issuer, traded on foreign exchanges). As such, shareholder plaintiffs barred from U.S. courts are looking to courts in foreign jurisdictions to provide the best forum to litigate alleged securities fraud and seek redress. To understand and prepare for this sea change, multi-national defendants facing securities litigation around the globe should be aware of jurisdictions in which they could be sued, as well as those in which they may be able to obtain global relief.

While class actions are commonplace in U.S. securities litigation, jurisprudence in several countries is developing to respond to these emerging issues. However, each country is developing a slightly different approach to the structure of a potential class or collective action, the type of claimants with ability to sue, and the scope of claims subject to redress and settlement. For example, changes to the laws governing class actions combined with amendments to provincial securities acts have prompted an increase in the filing of securities class actions in Canada. The rise of private third-party litigation funding in Australia has set the stage for a potentially rapid and truly global expansion of securities litigation. And the

1 130 S. Ct. 2869 (2010).

Netherlands, which views itself and is seen by others as a jurisdiction to handle significant, multi-national matters, has become an increasingly popular venue for pursuing international securities class action claims because of its procedures for court-approved, opt-out class-settlements. In 2013, the European Union ("EU") promulgated a non-binding recommendation regarding collective redress, which invited member states to adopt a collective redress framework. On January 25, 2018, the EU's European Commission published its Report on the implementation of the recommendation, finding that many of the member states had not adopted the recommended features, and explaining that the implementation of safeguards against potential abuse is still not consistent across the EU. It concluded that these deficiencies would be addressed in an initiative in spring 2018. How the law will evolve globally and at the national level in the EU is one of the most important securities law developments to watch in the coming years.

While securities litigation around the world is at an important crossroads, international companies must be aware of the key takeaways of the changing landscape. For example, the sheer size of the settlements alone has been remarkable. While the law in the United States is still being developed under *Morrison,* American law firms are at the forefront in bringing massive actions on behalf of classes around the world. The extraterritorial reach of certain jurisdictions like the Netherlands is seemingly competing to replace the pre-*Morrison* U.S. court system. Jurisprudence is developing not only in the EU, but in other regions as well, such as Australia, Canada, and Asia, causing not only increasing interest in private securities litigation, but also issues relating to forum shopping. Also, questions remain regarding the role of third-party funding and the true enforceability of opt-out settlements. As securities markets become increasingly more global, not only do countries need to recognize that fact and possibly adapt their countries' mechanisms and jurisprudence accordingly, but international issuers need to be prepared to defend themselves around the world while the law continues to develop.

Multinational defendants facing securities litigation around the globe should be aware of jurisdictions in which they could be sued, as well as those in which they may be able to obtain global relief.

In Part II, we describe recent developments in U.S. actions in a post-*Morrison* world, where it has become increasingly difficult to bring a class action against foreign issuers in a United States federal court under U.S. securities laws. Part III reviews the current status of shareholder rights' litigation in the Netherlands, the United Kingdom, Germany, France, Italy, Spain, Canada, Australia, Hong Kong, Japan, and India, and how those laws are (or are not) currently enforced through examples of class or collective litigation. Finally, Part IV summarizes key findings, observations, and trends issuers should be aware of to understand and actively defend themselves against these developments around the world.

Post-*Morrison* global landscape

In June 2010, the U.S. Supreme Court decided *Morrison v. National Australia Bank Ltd.,*[2] a landmark ruling which narrowed the reach of key provisions of the Exchange Act with respect to the purchase and sale of securities outside of the United States. The Court held that the antifraud provisions in the Exchange Act apply only with respect to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[3] The Court stated that these key provisions of the Exchange Act do not have extraterritorial application since Section 10(b) of the Exchange Act lacks an explicit statement of extraterritorial effect.[4]

Post-*Morrison*, it has become increasingly difficult to bring a class action in a U.S. federal court under U.S. securities laws to litigate claims against foreign issuers. Further, access to U.S. courts was extinguished for "F-cubed" cases (foreign investors, suing a foreign issuer, traded on foreign exchanges). Nonetheless, the impact of *Morrison* continues to evolve; in 2016, there were 39 class action filings against non-U.S. issuers in the United States.[5] And the number of filings against non-U.S. issuers in United States increased to 50 in 2017, which was well above the 1997-2016 average of 23 filings. This record number comes at a time when federal courts in the U.S. saw the highest number of securities cases filed in 2017, with the number of filings against European companies tripling the 1997-2016 average and increasing 50% from 2016.[6]

Recent Applications of *Morrison*

Recent applications of *Morrison* have further limited or added additional hurdles to securities actions brought in U.S. courts. In *In re Petrobras Securities Litigation,* the Second Circuit opened a new chapter in *Morrison* jurisprudence, clarifying class certification requirements.[7] Petrobras, a multinational oil and gas company headquartered in Brazil, was accused of engaging in a multi-year, multi-billion dollar money-laundering and kickback scheme, which prompted a class action by holders of Petrobras equity and debt securities.[8] Petrobras sponsors American Depository Shares ("ADSs"), which are listed and traded on the New York Stock Exchange.[9] In February 2016, the district court certified two classes of investors who purchased Petrobras ADSs or notes in "domestic transactions" under *Morrison*.[10] In addressing an issue of first impression, on July 7, 2017, the Second Circuit looked at the need to consider the individualized nature of determining whether a plaintiff engaged in a "domestic" transaction under *Morrison*.[11] The Second Circuit held that the court must analyze the issue of a transaction's domesticity to determine whether common questions outweigh individual ones. The Court affirmed in part and vacated in part the district court's class certification order and remanded the case to the district court for this purpose. However, the Second Circuit noted that on the available record, the issue of transactional domesticity appeared to raise individualized questions—i.e. "who sold them the relevant securities, how those transactions were effectuated, and what forms of documentation might be offered in support of domesticity."[12] A petition for a writ of certiorari was filed in November 2017.[13]

The scope of securities actions that may be brought in the United States was also narrowed in *In re Vivendi, S.A. Securities Litigation*.[14] There, U.S. shareholders who acquired stock during the course of a merger between

2 *Id.*
3 *Id.* at 2874.
4 *Id.* at 2883.
5 *Securities Class Action Filings, 2017 Year in Review*, Cornerstone Res., 24 (Jan. 2018).
6 *Id.* at 24-25.
7 *In re Petrobras Sec. Litig.,* 862 F.3d 250 (2d Cir. 2017), *petition for cert. filed* (U.S. Nov. 1, 2017) (No. 17-664).
8 *Id.* at 256.
9 *Id.* at 258.
10 *In re Petrobras Sec. Litig.,* 312 F.R.D. 354 (S.D.N.Y. 2016).
11 862 F.3d at 269-70 n.21.
12 *Id.* at 273.
13 *Petroleo Brasileiro S.A. - Petrobras, et al. v. Universities Superannuation Scheme Ltd., et al.,* No. 17-664 (petition for cert. filed Nov. 1, 2017).
14 *In re Vivendi, S.A. Sec. Litig.,* 838 F.3d 223, 264 (2d Cir. 2016).

three foreign companies argued that they incurred "irrevocable liability" since they purchased their shares while present in the U.S. The Second Circuit rejected this argument, noting that parties to a transaction incur irrevocable liability when they "becom[e] bound to effectuate the transaction" or "enter[] into a binding contract to purchase or sell securities."[15] To the extent that the merger was the relevant transaction in question, the Court found that the location of the parties to the merger did not necessarily determine where they incurred "irrevocable liability" and whether the second *Morrison* prong was satisfied.[16] At various stages of litigation, the *Petrobras* and *Vivendi* decisions created hurdles to plaintiffs attempting to circumvent *Morrison's* broad reach.

Application of *Morrison* on Domestically Traded ADRs

In addition, several recent cases demonstrate how courts in the U.S. have applied *Morrison* to domestic transactions involving foreign issuers, specifically in relation to American Depository Receipts ("ADRs"). Aside from the location of the issuer, the shareholder and the market on which the security was issued, courts also look at the structure of the security at issue in determining whether a claim must be dismissed under *Morrison*. Although ADRs involve securities that are issued on foreign markets, these recent cases show that courts look at whether the issuer intended to target U.S. shareholders to purchase its securities. The amount of control the issuer has over the security sold in the U.S., whether the security is subject to U.S. regulations, and whether the issuer intended to target U.S. shareholders all can have an impact on how courts view foreign-issued securities post-*Morrison*. How these issues impact other types of securities remains to be seen.

In *Stoyas v. Toshiba Corp.,*[17] Judge Pregerson of the Central District of California held that unsponsored ADRs traded over-the-counter in the U.S. were not sufficient to satisfy *Morrison*. The putative class in *Stoyas* included all persons who acquired Toshiba American Depositary Shares or Receipts between May 8, 2012 and November 12, 2015, as well as all citizens and residents of the U.S. who acquired shares of Toshiba common stock during the same period.

The Court first held that over-the-counter markets—where the plaintiffs purchased the ADRs—are not national stock exchanges under the first prong of *Morrison*.[18] With respect to *Morrison's* second prong, the defendants focused on the distinction between "sponsored" and "unsponsored" ADRs. The defendants argued that Toshiba did not sell the ADRs[19] to any plaintiffs because the ADRs were sold by a depositary bank without any connection to Toshiba; therefore, Toshiba had no connection to any domestic transaction.[20]

Although ADRs involve securities that are issued on foreign markets, these recent cases show that courts look at whether the issuer intended to target U.S. shareholders to purchase its securities.

The court agreed, holding that the transactions at issue did not satisfy the second prong of *Morrison*.[21] The court stated, despite the fact that the transactions occurred domestically, "Plaintiffs have not argued or pled that Defendant was involved in those transactions in any way."[22] The Court went on to explain that plaintiffs had not alleged or provided evidence of any "affirmative act" by Toshiba related to the purchase or sale of securities in the U.S.[23] There were simply no allegations that the alleged fraudulent actions "were connected to Toshiba selling its securities *in the United States.*"[24] Thus, the *Toshiba* court held that unsponsored over-the-counter ("OTC") ADRs do not satisfy *Morrison*. The case is currently on appeal to the Ninth Circuit.[25]

15 *Id.* at 265.
16 *Id.*
17 *Stoyas v. Toshiba Corp.,* 191 F. Supp. 3d 1080, 1090 (C.D. Cal. 2016) *appeal filed,* No.16-56058 (9th Cir. June 4, 2015).
18 *Id.* at 1090.
19 *Id.* at 1091-92.
20 *Id.*
21 *Id.* at 1094.
22 *Id.*
23 *Id.* at 1095.
24 *Id.*
25 Bonnie Eslinger, *Toshiba Investors Tell 9th Circ. Morrison Backs Fraud Suit,* LAW 360 (Nov. 9, 2017).

By contrast, in *In re Volkswagen*, the Court held that the U.S. securities laws did apply to OTC transactions in the U.S. of Volkswagen's sponsored ADRs.[26] The plaintiffs represented a proposed class of all persons who purchased Volkswagen-sponsored Level 1 ADRs on an OTC market in the United States.

The defendants moved to dismiss, arguing in part that U.S. securities laws did not apply to the transactions in which the plaintiffs had acquired their Volkswagen ADRs. Specifically, the defendants argued that the Volkswagen ADRs represented foreign shares on a foreign exchange in Germany.[27] First, the court held that the OTC market on which the Volkswagen ADRs traded was not a "domestic exchange," and thus the first *Morrison* prong was not satisfied.[28] However, under *Morrison's* second prong, the court noted that the ADRs were not independent from Volkswagen's foreign securities or from Volkswagen itself; instead, Volkswagen sponsored the ADRs, and thus was directly involved in the domestic offering of the ADRs.[29] The court stated that Volkswagen "took affirmative steps to make its securities available to investors here in the United States." It also noted that the deposit agreements were entered into between Volkswagen and J.P. Morgan of New York and were governed by New York law.[30] Additionally, Volkswagen was required to submit Form F-6 Registration Statements to the SEC to make the ADRs available in the U.S. The court ultimately denied the motion to dismiss based on *Morrison*.[31]

The *Volkswagen* decision was relied on for guidance in a similar case involving sponsored ADRs, *Vancouver Alumni Asset Holdings Inc. v. Daimler AG*.[32] The plaintiffs in *Daimler* had purchased sponsored Level 1 ADRs that were marketed to and purchased by U.S. investors.[33] Daimler argued that it had delisted its U.S. securities from the SEC and sold ADRs and thus did not avail itself of the U.S.'s markets, but the court disagreed.[34] While the ADRs did not satisfy the first prong of *Morrison*, which required that the securities be listed on domestic exchanges, the court found that, as in *Volkswagen*, Daimler "actively and voluntarily contracted with an American depositary bank to sell ADRs to American investors."[35] The court remarked how Daimler was sponsoring the ADRs, directly involved in the process of offering the ADRs in the U.S., and exclusively using American brokers and agents to target U.S. purchasers.[36] Daimler's ADRs therefore satisfied the second prong of *Morrison*.[37] Daimler's ADRs were also required to be registered under and subject to SEC Rule 12g3-2(b), which the court noted when denying Daimler's motion to dismiss for lack of personal jurisdiction.[38] The holding in *Daimler* indicates that courts applying *Morrison* will look at the character of the security, and the nature of the involvement of the foreign company with the domestic security.

Non-U.S. companies, many with ADRs trading in the U.S., will continue to be hit with U.S. securities lawsuits. Based on *Toshiba, Volkswagen* and *Daimler,* the key issue for non-U.S. companies will likely be whether ADRs are sponsored ADRs. In sum, these cases show where some courts are drawing the line after *Morrison* with respect to how far U.S. jurisdiction extends for investors bringing claims against foreign issuers.

26 *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Litig.,* No. 2672 CRB (JSC), 2017 WL 66281 (N.D. Cal. Jan. 4, 2017) *rev'd in part on other grounds*, No. MDL 2672 CRB (JSC), 2017 WL 2798525 (N.D. Cal. June 28, 2017).

27 *Id.* at *3-7.

28 *Id.* at *4.

29 *Id.* at *5.

30 *Id.* at *6.

31 *Id.* at *7.

32 2017 WL 2378369 (C.D. Cal. May 31, 2017).

33 *Id.* at *8.

34 *Id.*

35 *Id.*

36 *Id.* at *11.

37 *Id.*

38 *Id.* at *8.

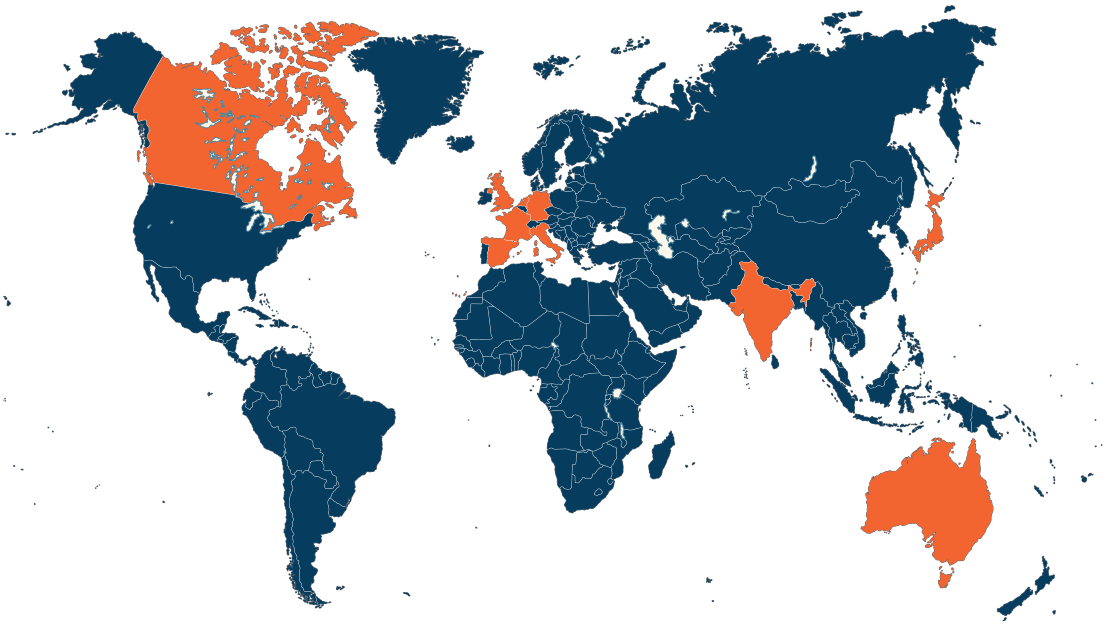
Securities litigation goes global

Post-*Morrison*, accessing U.S. courts has been more difficult, causing publicly traded corporations to face the risk of battling securities litigation in multiple jurisdictions with materially different results. Indeed, jurisdictions like the United Kingdom had some form of collective action prior to *Morrison*, and have only become more receptive to the concept of class actions since it was decided.[39] Other countries, like France, historically disfavored collective actions, and have adopted safeguards in order to limit any potential litigation abuse their newly developed collective actions might bring.[40]

The following chart highlights those countries that we discuss below and whose jurisprudence has reacted the most in response to the recent globalization of securities litigation. Notably, the law is developing not only in the EU, but in other regions as well, such as Canada, Australia and Asia.

Securities litigation around the world

The Netherlands
England
Germany
France
Spain
Italy
Canada
Australia
Hong Kong
Japan
India



39 *See* Ken Daly, *The Growth of Collective Redress in the EU: A Survey of Developments in 10 Member States,* U.S. Chamber Inst. for Legal Reform 19 (Mar. 2017).

40 *Id.; see also, e.g., infra* pp. 21-22

European Union

The EU is one area in particular that has experienced a rapid proliferation of collective actions in the recent past.[41] Most of the EU member states now have some form of collective action, and the trend for the EU is to make it easier for parties to sue collectively.[42] In 2013, the EU's European Commission (the "Commission") published the Collective Redress Recommendation, which recommended to member states a series of common collective redress mechanisms.[43]

The Commission recommends two collective redress mechanisms. The first recommendation is known as a group litigation, where individuals who have suffered the same harm collectively bring and jointly manage their claims.[44] The second action the Commission recommends is the representative action, similar to France's *actions en représentation conjointe,* where qualified institutions are granted permission to bring cases on behalf of third parties.[45] The recommendation is non-binding, and there has not been a comprehensive system enacted by the EU thus far.[46] However, the recommendation does provide insight into what a European collective redress system may eventually look like, should one eventually become law. The recommendation also notes that the Commission will assess the progress that member states have made on collective redress mechanisms on "access to justice, on the right to obtain compensation, on the need to prevent abusive litigation and on the functioning of the single market, on SMEs, the competitiveness of the economy of the European Union and consumer trust."[47] In the four years that have passed since the recommendation was published, however, none of the member states have adopted all of the features the recommendation suggests.

This indicates that different countries in the EU have their own opinions on what features a collective action should have, and whether the additional safeguards provided in the EU's recommendation are necessary. Should the Commission decide in its assessment that the collective action mechanisms of its member states are inadequate, it is foreseeable that the EU could decide to develop a uniform and binding procedure.

In May 2017, the EU began a consultation phase to assess how the mechanisms the commission recommended were being implemented by member states.[48] On January 25, 2018, the Commission published its Report on the implementation of the recommendation, finding that many of the member states had not adopted the recommended features, and explaining that the implementation of safeguards against potential abuse is still not consistent across the EU. It concluded that these deficiencies would be addressed in an initiative in spring 2018, signaling that improving collective action mechanisms remains a priority.[49]

Netherlands

The Netherlands, since adopting its collective action proceeding, has become a popular venue for pursuing international class action claims; however, the lack of specific restrictions regarding which representative organizations can file a claim in the Netherlands puts it at odds with the EU's recommendation.[50] Additionally, the binding "opt out" provision of the Netherlands' collective settlements or WCAM process could create points of contention between the Netherlands and other countries.

Collective Actions

The Netherlands' collective action mechanism has been

41 Daly, *supra* note 39, at 17-20.

42 *Id.*

43 *See* Recommendation (EC) No. 2013/396, of 11 June 2013, O.J. (L 201/60).

44 Marguerite Sullivan & Rüdiger Lahme, *Class/Collective Actions in Europe: Overview of Applicable EU Law Principles,* Prac L. (Jul. 1, 2015).

45 *Id.; see also infra* pp. 21-22.

46 *Id.*

47 Recommendation (EC) No. 2013/396, *supra* note 43, art. 5 para. 41.

48 *Call for Evidence on the Operation of Collective Redress Arrangements in the Member States of the European Union,* Eur. Comm'n (May 22, 2017).

49 Commission to the European Parliament, the Council and The European Economic and Social Committee, *Report 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 (2013/396/EU)*, COM (2018) 40 final (Jan. 25, 2018), at 20-21.

50 Daly, *supra* note 39, at 22-23.

met with mixed reviews. On one hand, its globally binding settlement agreements make it an attractive venue for shareholders to bring their claims, but some criticize the Dutch system for the lack of scrutiny it puts on the representative bodies that may bring claims on behalf of shareholders. In the Netherlands, collective actions are governed by Article 3:305a BW of the Dutch Civil Code (*Burgerlijk Wetboek*).[51] A representative organization or "foundation" with the legal capacity to sue on behalf of a group of injured individuals or entities that have "opted in" to the foundation may file a collective action.[52] Third party litigation funding has been available in the Netherlands for the past five years.[53] Foundations are not heavily regulated in the Netherlands: there is no requirement that they be created by a non-profit, nor any prerequisites relating to knowledge or experience.[54] The lack of restrictions regarding who may file a claim in the Netherlands has led some to criticize the country's collective proceedings as ripe for abuse.[55]

Currently, collective actions may only seek declaratory or injunctive relief, *not* money damages.[56] Interestingly, since only declaratory or injunctive relief may be sought, the foundation does not need to establish causation or damages.[57] Any judgment in the collective action is binding between the defendants and all individuals covered by the judgment's terms unless those individuals opt out of the agreement in writing.[58] By contrast, in order to obtain money damages, members of the foundation must bring individual suits and establish causation and damages.[59]

On November 16, 2016, the Minister of Security and Justice submitted a bill on collective damages actions to the lower house of the Dutch Parliament. The bill seeks to remove the restriction on monetary damages in collective actions. The proposed bill includes a jurisdictional test and a collective action for damages must be sufficiently connected to the Netherlands.[60] At the time of this article, the bill has not been approved by the Dutch Parliament.

While contingency fees are not allowed to fund litigation, lawyers are allowed to enter into arrangements for "success fees" if they win.[61] The prevailing party is also entitled to recover a certain amount of its costs.[62] Therefore, in collective actions, the foundation, or its members, could be liable to fund the litigation and certain additional costs if its case fails.

BP Jurisdiction

There are, however, limitations on foundations or associations filing a legal action in the Netherlands against a foreign defendant. In a September 28, 2016 decision in VEB (the Dutch association for retail shareholders, *Vereniging van Effectenbezitters*) versus British Petroleum P.L.C. ("BP"), the lower court of Amsterdam confirmed that there are such limitations.[63] VEB filed an action against BP in April 2015 in the lower court of Amsterdam. The action related to information disclosed before and after the oil spill in the Gulf of Mexico in April 2010 and was aimed at obtaining a judgment against BP on behalf of all investors who had invested in BP shares through a Dutch financial intermediary between January 2007 and June 2010.[64]

51 Art. 3:305a, *translated.*

52 Art. 3:305a para. 1BW.

53 Sara Liesker, *Litigation Funding in Europe and the Netherlands,* Legal Bus. World (Jan. 10, 2017).

54 Daly, *supra* note 39, at 22-23.

55 *Id.*

56 Art. 3:305a para. 3; *see also* Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding,* 79 Geo. Wash. L. Rev. 306, 312 (2011).

57 Tomas Arons & Willem H. Van Boom, *Beyond Tulips and Cheese-Exporting Mass Securities Claim Settlements from The Netherlands,* Eur. Bus. L. Rev. 864 (2010); Hensler, *supra* note 56, at 312.

58 Jan de Bie Leuveling Tjeenk & Bart van Heeswijk, *Netherlands,* The Class Action L. Rev. (May 2017).

59 *Id.*

60 Ianika Tzankova, *New Dutch Bill Proposing a Collective Damages Action Submitted to Dutch Parliament* (Dec. 5, 2016).

61 Art. 25 para. 2 Gedragsregels; *see also* Hensler, *supra* note 56, at 311-12.

62 Hensler *supra* note 56, at 312; *see also* Arons & Van Boom *supra* note 57 at 862.

63 *Another Major Blow to Dutch Claim Foundations and Associations Involved in Non-U.S. Securities Litigation: VEB Claim Against British Petroleum Dismissed Due to Lack of Jurisdiction,* Deminor Recovery Serv., *see also* Kevin LaCroix, *Dutch Court Dismisses Collective Investor Action Against BP on Jurisdictional Grounds,* D&O Diary (Oct. 13, 2016).

64 Deminor Recovery Serv., *supra* note 63, at 1.

BP defended itself primarily by stating that the Dutch court did not have jurisdiction to hear VEB's claims. BP argued that the EU Regulation of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters precluded the Dutch court from having jurisdiction.[65]

In its decision, the court of Amsterdam pointed out that VEB cannot file an action in the Netherlands based on the main rule of attribution of jurisdiction, which provides that actions have to be filed where the defendant is domiciled. BP, however, is located in the UK.[66] In addition, the Dutch court stated that, as an exception to the main rule for attribution of jurisdiction, the "place where the harmful event occurred" could also be sufficient for jurisdiction.[67]

The decision shows that although securities class actions are on the rise in the Netherlands, there still must be a sufficient connection between the alleged harm and the jurisdiction. Indeed, the fact that investors may have held securities in the Netherlands is insufficient, without more, for Dutch courts to have jurisdiction.[68]

Settlement of Collective Actions Under Dutch Law

Under Dutch law, the Act on Collective Settlement of Mass Damages (*Wet collectieve afhandeling massaschade* or "WCAM") provides a mechanism for a defendant and foundation to enter into legally binding, "opt-out" settlement agreements.[69] Similar to other collective actions, the foundation or association must represent the interests of a group of individuals who suffered losses from a similar cause.[70] Notably, while WCAM settlements may arise from a collective action brought under the Dutch Civil Code, parties may also petition the court to approve a settlement before any suit has been filed.[71]

Under the WCAM procedures, after parties reach a settlement, they may jointly petition the Amsterdam Court of Appeal to make the settlement binding on those who do not opt out of the settlement after receiving proper notice.[72] The settling parties must provide adequate notice of the proposed settlement to potential participants.[73] However, there may be problems enforcing the WCAM settlements in other countries of the EU, due to the fact that certain countries only have opt in.[74]

Although securities class actions are on the rise in the Netherlands, there still must be a sufficient connection between the alleged harm and the jurisdiction.

WCAM provides that settlement agreements must contain certain information, including:

- A description of the class and potential number of persons affected.
- The compensation that will be awarded to those persons.
- The eligibility requirements for individuals to receive compensation.
- An independent assessment of the compensation to be paid pursuant to the agreement.[75]

In addition, the court will also reject the settlement if the amount of the compensation is not reasonable, considering the extent of the harm suffered, the ease and speed with which the compensation can be obtained, and the possible causes of the damages.[76] The court may also reject the settlement if the number of class members is

65 *Id.*

66 *Id.* (citing EU Regulation art. 4, p. 1).

67 *Id.* (citing EU Regulation art. 7, p. 2).

68 Fons Leijten, *Stibbe Represents BP Plc in a Successful Defence in a Securities Class Action Initiated by Dutch Shareholders Association VEB before the Amsterdam District Court* (Sept. 29, 2016).

69 Art. 7:907 BW, *translated.*

70 *Id.* para 1.

71 Hensler, *supra* note 56, at 312; *see also* Art. 3:305a para. 2 BW (requiring that the foundation, before filing a collective action, first attempt to reach a settlement with the defendants regarding the claims of its members).

72 *See* Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping,* 92 Notre Dame L. Rev. 579, 627 (2016).

73 Art. 1013 para. 5 Rv *translated.*

74 Daly, *supra* note 39, at 37-39.

75 Art. 7:907 para. 2 BW *translated.*

76 *Id.* para. 3(b).

not sufficient.[77] Finally, the WCAM procedures allow for individuals to challenge or object to the settlement before the court's approval.[78]

After approval of the settlement, WCAM allows for an affected person to "opt out" of the settlement within three months.[79] The eligible individuals who have not opted out may collect their settlement payment within the time frames specified in the settlement agreement—up to one year—or risk forfeiting their rights.[80] The parties to the WCAM settlement may also negotiate an attorneys' fee award to the lawyers representing the foundation.[81]

The following are examples which illustrate the Dutch procedure for binding opt-out class settlements and Dutch courts' willingness to assert jurisdiction over a worldwide class, which in turn, may make the Netherlands a forum of choice for parties seeking to resolve global securities class actions.

Shell Settlement

The Shell settlement is significant because it was the first international application of the WCAM procedure as the court took jurisdiction over non-Dutch shareholders. In May 2009, the Amsterdam Court of Appeal approved a settlement worth more than US$350 million between Shell Petroleum N.V. and various foundations and associations representing the interests of a group of international investors who suffered losses following disclosure of a reduction in the number of proven oil and gas reserves.[82]

While the WCAM settlement was being negotiated, a U.S. class action suit on behalf of both U.S. and non-U.S. investors was simultaneously proceeding in the U.S. District Court for the District of New Jersey.[83] After announcing the WCAM settlement, Shell moved to dismiss the non-U.S. investors from the U.S. class action, and the U.S. lead plaintiffs sought to enjoin the settlement.[84] Eventually, the district court dismissed the non-U.S. investors, and Shell separately settled the U.S. class action suit.[85]

Vedior Settlement

In July 2009, the Amsterdam Court of Appeal approved a settlement worth approximately US$5.7 million relating to damage allegedly suffered by investors who had sold Vedior stock prior to a suspension in trading due to rumors about a Vedior acquisition.[86] Specifically, the investors alleged that as a result of rumors that Vedior was about to be acquired, the share price suddenly rose.[87] Another aspect of the Vedior settlement that makes it noteworthy is that Vedior was the first WCAM settlement to include North American investors.[88]

Converium Settlement

The Amsterdam Court of Appeal, in November 2010, provisionally approved preliminary jurisdiction in an international collective settlement relating to claims that Converium, a Swiss company, understated loss reserves.[89] A similar class action had already been settled in the United States, but that settlement excluded all non-US individuals who purchased Converium stock on a non-U.S. exchange.[90]

The Converium settlement is significant because the Amsterdam Court of Appeal approved the settlement despite the fact that none of the defendants and only some of the potential claimants were from the Netherlands. Following the precedent set by Shell and Vedior, the court applied the Brussels I Regulation and

77 *Id.* para. 3(g).
78 *Id.* para. 4.
79 *Id.* para. 2.
80 *Id.* para. 6.
81 Hensler, *supra* note 56, at 311.
82 *Shell: Landmark Decision Regarding International Collective Settlement of Mass Claims,* De Brauw Blackstone Westbroek (Aug. 2009).
83 Hensler, *supra* note 56, at 315-16.
84 *Id.* at 316.
85 *Id.*
86 *Id.* at 313; *see also* Gerechtshof Amsterdam [Court of Appeals of Amsterdam], Oct. 6, 2008, Hof's-Amsterdam 15 juli 2009, JOR 2009, 325 m.nt. Scholten en Van Achterberg (In de zaak van Randstand Holding, N.V.) (Petition for a declaration of binding force of a settlement agreement pursuant to BW art. 7:907).
87 Daan Lunsingh Scheurleer, Paul Olden & Ianika Tzankova, *Global Settlement Approved by Dutch Court,* Lexology (July 17, 2009).
88 M.-J. van der Heijden, *Class Actions,* 14.3 Electronic J. Comp. L. 1, 10 n. 50. (2010); Hensler, *supra* note 56 at 319.
89 Martin George, *Jurisdiction of the Amsterdam Court of Appeal in the Converium Settlement Case,* Conflict of Laws. Net (Dec. 4, 2010).
90 Daly, *supra* note 39, at 46.

the Lugano Convention to find jurisdiction over the claims based on the location of the settlement agreement and domicile of the settling foundation.[91] The Amsterdam Court of Appeal explicitly recognized that, post-*Morrison*, there is a need for a venue for global resolution of international securities class actions.[92]

Fortis Settlement

A closely-watched set of claims dating back to the 2008 global financial crisis has settled for a massive €1.204 billion (US$1.3 billion), making it one of the highest settlements ever and ushering in a new era in the globalization of securities laws.[93] Several shareholder foundations, led by American plaintiffs' firms, reached an agreement using Dutch collective settlement procedures to settle shareholder claims against Belgium-based Ageas (formerly Fortis). Securities practitioners have been watching the Fortis litigation develop since 2008, after the Belgium-based provider of banking and insurance services participated in the ABN AMRO acquisition and received a government "bailout" by Belgium, the Netherlands, and Luxembourg to prevent its collapse.[94]

On October 22, 2008, U.S. shareholders filed a securities class action lawsuit in the Southern District of New York against Fortis, and certain of its directors and officers for violations of Sections 10(b) and 20(a) of the Securities Exchange Act.[95] The complaint, as amended, alleged that Fortis and certain of its officers and directors misrepresented and failed to disclose material information concerning the company's deteriorating financial condition in order to induce shareholders to purchase securities.[96] Specifically, the complaint alleged that the defendants represented that the Company was relatively immune from the effects of the global credit crisis, that its exposure to the subprime market was minimal, and that Defendants concealed the adverse effect that Fortis's acquisition of ABN-AMRO would have on the Company's financial condition.[97] The securities class action was dismissed with prejudice under the applicable *Morrison* standards on February 18, 2010.[98]

Later, on January 10, 2011, the Stichting Investor Claims Against Fortis, a specially formed foundation representing investors in the U.S., Europe, the Middle East and Australia, brought a unique shareholder fraud action against Fortis. The foundation filed suit in Utrecht Civil Court seeking declaratory judgment against Fortis for defrauding investors through a 2007 rights issue to acquire ABN AMRO.[99] The foundation alleged that Ageas, formerly known as Fortis, and its officers and directors, as well as its underwriter, misled investors about the bank's financial health from the Fall of 2007 up to three days before the 2008 government bailout.[100] Additional shareholder foundations were also organized—Stichting FortisEffect, a Dutch shareholder foundation, and Dutch shareholder group VEB. A Belgium group separately filed actions in Belgium.[101]

This recent settlement agreement includes the Dutch shareholder foundations and the separate Belgium proceeding. Ageas agreed to pay a global amount of €1.2 billion to shareholders covered by the settlement without admitting any wrongdoing.[102] On May 23, 2016, the parties filed a request with the Court of Appeal to declare the settlement binding based on the WCAM.[103] On March 24, 2017, the Amsterdam Court of Appeal held a public hearing as part of the procedure set forth in the settlement agreement.[104] However, on June 16, 2017, the

91 George, *supra* note 89.

92 Daan Lunsingh Scheurleer, Ianika Tzankova, Stijn Franken, Paul Olden, Bart Gerretsen & Charles van Sasse van Ysselt, *Interim Ruling by Amsterdam Court of Appeal on International Jurisdiction in Collective Settlement Cases,* Lexology (Nov. 18, 2010).

93 Press Release, Ageas, DeMinor, Stichting FortisEffect, SICAF and VEB Reach Agreement Aiming at Settling All Fortis Civil Legacies (Mar. 14, 2016); Kevin LaCroix, *Massive $1.3 Billion Settlement of Fortis Investor Actions Under Dutch Collective Settlement Procedures,* D&O Diary (Mar. 14, 2016).

94 *Id.*

95 *See Copeland v. Fortis,* 685 F. Supp. 2d 498 (S.D.N.Y. 2010).

96 *Id.* at 499.

97 *Id.*

98 *Id.* at 501.

99 Press Release, Stichting Investor Claims Against Fortis (July 7, 2011).

100 *Id.*

101 Kevin LaCroix, *Massive $1.3 Billion Settlement of Fortis Investor Actions Under Dutch Collective Settlement Procedures,* D&O Diary (Mar. 14, 2016).

102 *Id.*

103 Press Release, Ageas Announces Next Step in Fortis Settlement Procedure: Public Hearing (Sept. 27, 2016).

104 Press Release, Next Step in the Fortis Settlement: Public Hearing

Amsterdam Court of Appeal issued an interim decision declining to declare the Fortis settlement binding. The Court of Appeal had reservations about the distribution of the settlement amount between active and non-active claimants, and offered the parties until October 17, 2017 to submit an amended settlement agreement.[105]

Volkswagen Collective Action

A group of investors, led by a U.S. plaintiffs' law firm, is pursuing investor claims against Volkswagen using the Dutch collective settlement procedures. According to a February 15, 2016 press release, Stichting Volkswagen Investor Settlement Foundation was formed due to claims arising out of the "disclosure that Volkswagen installed devices to circumvent mandatory emissions regulations for its diesel engines." The plaintiffs' firm Bernstein Litowitz Berger & Grossmann LLP, legal counsel in the U.S. securities suit, began working with the former President of the Enterprise Chamber of the Amsterdam Court of Appeal, the Honorable Huub Willems, to establish the Volkswagen Investor Settlement Foundation. The Foundation is designed to use the Dutch Collective Settlement Act to "recover investor losses on Volkswagen securities that were publicly traded outside the United States."[106]

Similarly, in the Netherlands, VEB, a Dutch investor association, was launched to assert a similar liability claim in Dutch court against VW, and on behalf of "Dutch and European investors who acted through a Dutch bank or broker."[107] As such, the VEB association is more limited in scope than the Foundation class, and appears to want to assert a "liability claim" as opposed to negotiate a settlement.[108]

Was Held (Mar. 24, 2017).

105 Press Release, Fortis Settlement Not Declared Binding in Current Format and Court Offers Opportunity for Amendments (June 16, 2017).

106 Press Release, Dutch Settlement Foundation Seeks to Resolve Securities Claims Both for the Benefit of Volkswagen and its Investors (Feb. 1, 2016).

107 *VEB Holds Volkswagen Liable for Investor Losses,* VEB (Sept. 25, 2015).

108 *Compare* Dutch Settlement Foundation Seeks to Resolve Securities Claims Both for the Benefit of Volkswagen and its Investors (Feb. 1, 2016), *supra* note 106, with *VEB Holds Volkswagen Liable for Investor Losses* (Sept. 25, 2015), *supra* note 107.

Others are pursuing claims against Volkswagen in other jurisdictions as well, including Germany, estimated to total approximately US$9.2 billion.[109] As discussed below, such competing procedures may cause issues relating to enforcement.[110]

Not only will the sheer size of any potential settlement be noteworthy, but the use of the WCAM class settlement procedures to create binding, worldwide settlements will continue to increase the importance of the Netherlands in the international securities class action context. The Dutch procedure for binding opt-out class settlements and Dutch courts' willingness to assert jurisdiction over a worldwide class may make the Netherlands a forum of choice for parties seeking to resolve global securities class actions.

The use of the WCAM class settlement procedures to create binding, worldwide settlements will continue to increase the importance of the Netherlands in the international securities class action context.

United Kingdom

The United Kingdom (the "UK") has had collective proceedings in some form since before *Morrison*, though until recently they were not often used. However, since the UK eased restrictions on third party litigation funding and several high profile cases have been shown in the news, the UK is currently one of the preferred jurisdiction for collective action proceedings.[111]

Collective Actions

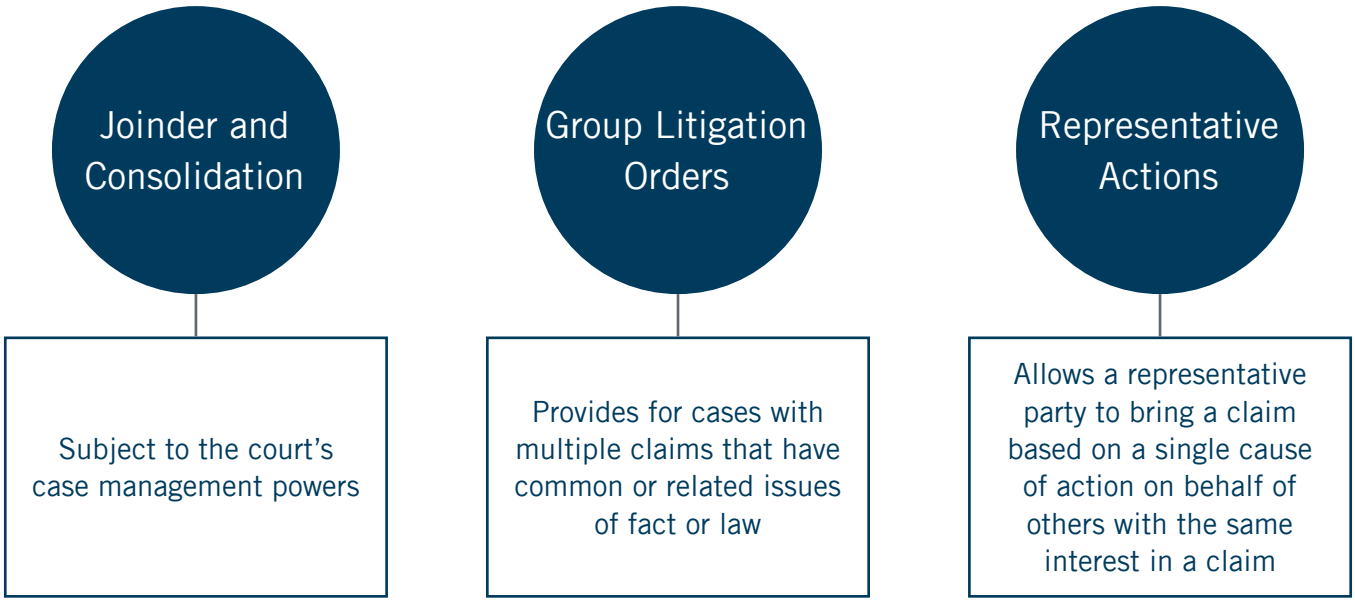
There are currently three procedures in the UK that

109 Karin Matussek, *VW Sued for a Record $9.2 Billion in German Investor Lawsuits*, Bloomberg (Sept. 21, 2016).

110 *See infra* p. 20.

111 Brexit raises the question of whether the UK may lose that status. Jerome Kortmann et al., *Collective Redress Tourism: Preventing Forum Shopping in the EU,* U.S. Chamber Institute For Collective Reform, at 24 (Oct. 2017).

Three Avenues for Collective Securities Litigation Actions in the UK



provide claimants the ability to pursue collective securities litigation actions: joinder and consolidation (similar to the same proceedings in the United States),[112] Group Litigation Orders ("GLOs"),[113] and representative actions.[114] There is another procedure for collective actions established by the Consumer Rights Act; but currently that statute is restricted to violations of commercial competition law.[115] These collective action vehicles come with their own restrictions and requirements that can have great impact on which claims can be brought as collective actions and who can bring them; however the judgments that can be awarded are generally governed by common law.[116]

A GLO is granted by a court where multiple claims brought before it have "common or related issues" of fact or law, and there are no restrictions regarding the citizenship of who may join a GLO.[117] The court determines if a group order is appropriate for resolving the common issues of the multiple claims.[118] If the court is satisfied that a GLO is necessary, it then: (a) establishes a register to publish the details of the claims that the GLO will manage; (b) determines the specific issues and claims that the GLO will manage; and (c) selects the court that is responsible for managing the claims.[119]

After a GLO is formed, the individual cases remain independent of each other but are managed as a group.[120] The lead action in the GLO goes forward to determine the common issues of law and fact.[121] After the determination of the issues in the lead case, the remaining cases then resolve any lingering issues from their claims through further proceedings.[122] The outcome of the GLO however, binds all of the parties listed on the group register to the court's decision on the issues on the register, unless otherwise ordered by the court.[123]

Representative actions are where a representative party brings a claim based upon a single cause of action on behalf of itself and others with the "same interest in a

112 The Civil Procedure Rules (CPR) §§ 7.3, 19.1.
113 CPR § 19.10.
114 CPR § 19.6.
115 The Consumer Rights Act 2015 c.15 § 47B, sch. 8 (Eng.).
116 Frances Murphy, Omar Shah & Roderick Farningham, *Global Class Action Guide: UK*, Prac. L. (Feb. 2017).
117 CPR § 19.10.
118 CPR § 19.11.
119 *Id.*
120 Alison Brown & Ian Dodds Smith, *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).
121 *Id.*
122 *Id.*
123 *Id.*

claim."[124] Unlike GLOs, representative actions are more restrictive in determining who can be members of the class.[125] However, representative actions also are not specifically restricted to citizens of the UK.[126] Another way the representative action differs from GLOs is that representative actions are "opt-out," allowing unnamed claimants to avoid having to bring their own claims or join a GLO registry.[127] The differences between representative actions and GLOs have led to GLOs becoming the preferred method for bringing collective securities litigation actions in the UK. [128]

Funding and Costs

The UK has historically prevented third parties from funding or encouraging litigation as "champertous;" however, that rule has since been relaxed.[129] Now, third party financing is permitted in certain circumstances, taking into account whether the funder has control of the claims, the fairness of the agreement, and whether the funding increases the party's access to justice.[130] Other mechanisms to entice claimants to bring their claims, including Conditional Fee Agreements—"no-win, no-fee" and "less (or nothing) if you lose" agreements—are also now available.[131]

The UK operates under a "loser pays" system, *i.e.* the unsuccessful party pays its adversary's legal costs.[132] Courts actively manage the costs expected to occur in proceedings and typically make preliminary determinations about how much the unsuccessful party will have to pay at the conclusion of the case.[133] In GLO proceedings, the court has discretion over how to spread the potential costs among the members of the group, typically with each party paying for its own costs and sharing the common costs.[134] "After the Event" insurance—where a claimant insures against the risk that it will have to pay for its opponents' costs in the event its claim is unsuccessful—is also available for claimants to purchase.[135]

Despite the availability of collective actions in the UK, their use is still rare.[136] The addition of alternative funding and cost reduction mechanisms, as well as several high profile collective action claims that have been brought for claims arising out of the UK's Financial Services and Markets Act, are expected to attract more collective securities litigation actions.[137]

Financial Services and Markets Act

The Financial Services and Markets Act ("FSMA"),[138] contains claims that resemble Sections 11 and 12(a)(2) of the Securities Act and Section 10(b) of the Securities Exchange Act.[139] Similar to Sections 11 and 12(a)(2) of the Securities Act, governing liability for material misstatements and omissions, Section 90 of the FSMA allows a securities purchaser to bring a claim for loss suffered as a result of any false or misleading statement or omission. Specifically, Section 90 holds liable any "person responsible for listing particulars" who causes an investor to suffer loss as a result of untrue or misleading statements or omissions from required disclosures.[140] And similar to Section 10(b) of the Exchange Act, provisions governing liability for fraud, Section 90A of the FSMA covers "misleading statement[s]" and "dishonest omission[s]" by issuers in "certain published information relating to the securities" or "a dishonest delay" in

124 CPR § 19.6.

125 Brown & Smith, *supra* note 120.

126 CPR § 19.6.

127 Michael Brown & Elizabeth Clay, *The English Class Action?*, Fin. Worldwide (Oct. 2015).

128 *Id.*

129 *See Arkin v Borchard Lines*, [2005] EWCA Civ 655 (UK).

130 Brown & Smith, *supra* note 120.

131 These conditional fee arrangements are similar to contingency fee agreements in the United States and are governed by strict regulations that must be complied with or else are unenforceable. The client pays either a reduced or waived fee, and in the event of the claim's success, the client must pay a standard fee plus a percentage increase based upon the risk of the claim. *See id.; see also* Shana Ting Lipton, *Changing Suits - The Evolution of Group Shareholder Actions or 'Class Action' Style Litigation in the UK*, The Review (Sept. 2016), at 22.

132 Brown & Smith, *supra* note 120.

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *See, e.g., infra* p. 18; *see also* Kevin LaCroix, *Law Firm Organizes U.K. Lawsuit Against Tesco, Financed by Litigation Funding Firm*, D&O Diary (Dec. 1, 2014).

138 Financial Services and Markets Act 2000, c. 8 (Eng.).

139 *Id.* §§ 90, 90A.

140 *Id.* § 90.

publishing the information.[141] Recently, shareholders of three large English companies have brought collective FSMA actions that were granted GLO status, perhaps signaling that collective securities litigation actions will become more commonplace in the UK.[142] These claims involve hundreds to tens of thousands of litigants with demands of billions of pounds, and will likely have a far reaching impact on the future of collective actions in the UK.[143]

Royal Bank of Scotland Settlement

Several investor groups have brought FSMA GLOs against the Royal Bank of Scotland ("RBS") and its directors[144] for violations of Section 90 based on the contents of a prospectus released during a 2008 rights issue. One of the larger GLOs, represented by Stewarts Law, has recently settled.[145] The final settlement agreement requires RBS to pay the various shareholder groups a total of £800 million.[146] The largest RBS GLO, with more than 27,000 members represented by 3 Veralum Buildings, settled with RBS, with each shareholder receiving roughly twice the amount per share compared to what other groups received.[147] The settlement has cost RBS about £900m.[148] A small number of shareholders are still pursuing claims against RBS.[149] The large settlements of the RBS case, as well as the increasing availability of litigation funding in the UK will likely encourage shareholders to bring more of these FSMA collective action claims in the future.[150]

With the UK easing restrictions on third party litigation funding, among other things, the UK may likely become an increasingly popular forum for collection actions.

Tesco Group Litigation Order

Another English company, Tesco, one of the largest retailers in the world, has also been the target of several collective action proceedings in the United States,[151] the UK,[152] and the Netherlands[153] for violations of various securities laws. The U.S. suit was brought in October 2014 by investors who had purchased Tesco American Depository Receipts based on allegedly false and misleading statements and omissions regarding Tesco's financial status, after it was revealed that Tesco had overstated its projected profits by more than US$400 million.[154] Shortly after the U.S. suit was filed, an English GLO was organized to bring claims for violations of the FSMA.[155] The English claim was again brought by Stewarts Law, and funded by the litigation funding firm Bentham Ventures B.V.[156] While the Tesco GLO is ongoing, Tesco has settled for £214 million with two English regulatory agencies for the same activities the GLO alleges, which may indicate how the GLO will be resolved.[157]

In the ensuing years, collective action proceedings will certainly gain more traction in the UK. With the UK

141 *Id.* § 90A.

142 Lipton, *supra* note 131, at 21-22.

143 *Id.* at 22-23.

144 U.S. investors were prevented from pursuing a similar suit as U.S. class action in *IBEW Local Union No. 58 Pension Trust Fund & Annuity Fund v. Royal Bank of Scotland Group, PLC*, 783 F.3d 383 (2d Cir. 2015), when the Second Circuit affirmed the lower court's dismissal of the class action brought against Royal Bank of Scotland for alleged false and misleading statements made during the same time period.

145 LaCroix, *supra* note 137; *RBS Rights Issue Group Action – Stewarts Law's Clients Settle Claim*, The Lawyer (Dec. 6, 2016).

146 *Id.*

147 Jill Treanor, *RBS Court Case Called Off but Some Investors Still Refuse Settlement*, The Guardian (June 7, 2017).

148 *Id.*

149 Melissa Lipman, *UK Litigation Roundup: Here's What You Missed in London*, Law 360, (October 20, 2017).

150 Lipton, *supra* note 131.

151 Kevin LaCroix, *Tesco Securities Suit: Applicability of U.S. Securities Laws to Unlisted ADRs?*, D&O Diary (Oct. 4, 2015).

152 Press Release: Tesco to Face Legal Claim from Shareholders Over its Overstatement of Profits (Nov. 25, 2014).

153 *See, e.g.*, *About Us*, STICHTING INV. CLAIMS AGAINST TESCO; *"Stichting" on Behalf of Shareholders of Tesco PLC*, IN RE TESCO PLC INV. CLAIMS FOUND.

154 LaCroix, *supra* note 151.

155 Press Release, *supra* note 152.

156 LaCroix, *supra* note 137.

157 James Davey, *Tesco to Pay 214 Million Pounds to Settle False Accounting Charges*, Reuters (Mar. 28, 2017).

easing restrictions on third party litigation funding, among other things, the UK may likely become an increasingly popular forum for collection actions.

Germany

Germany is another jurisdiction that shows some of the complexity and uncertainty issuers face in the developing world of collective actions. Complications abound when trying to determine how a decision against a particular issuer in Germany might impact litigation that is ongoing against the same issuer in another country, like the Netherlands.

Collective Actions

Germany does not have a formal procedure to permit multiple claims to be tried as a class action; however, there is a process whereby decisions can be obtained on common elements of multiple claims.[158] The German Capital Investors Model Proceedings Act (*Kapitalanleger-Musterverfahrensgesetz,* or KapMuG) allows a securities claimant to "opt in" and apply to have its claim tried as a model proceeding for a group of litigants.[159] The model proceeding application is then published on a register and the underlying claim is stayed.[160] If nine or more claims are added to the register within six months, issues common to the claims are tried before a Higher Regional Court (*Oberlandesgericht*).[161] The Higher Regional Court then selects one of the claims on the register to be the model.[162] The remaining claims retain their individuality, but are stayed until the Higher Regional Court decides on the common issues.[163] Once the common issues are decided, the individual claims are litigated in the lower courts.[164]

The KapMuG was originally set to expire in 2012, but has been extended until 2020 with some modifications.[165] With the added modifications, claimants can now join the model proceeding by filing their claim with the higher court that is hearing the model claim, as opposed to individually filing their complaints in lower courts.[166] Another change is that the model ruling is binding on all parties with claims with those issues, including those parties that have not joined the model proceedings.[167] Claimants who do not wish to join the model claim do have the opportunity to opt out within a month of the higher court's stay on the actions, but they thereby waive their claims.[168] Additionally, any court-approved settlement in the model claim is binding on all other claims unless individual parties opt out, or if thirty percent of all claimants opt out of the settlement.[169]

Costs and Third Party Funding

Germany maintains a "loser pays" legal system in which the unsuccessful party to a litigation may be responsible for paying its adversary's costs, either the costs of bringing or defending against the litigation.[170] This system has been seen as a barrier to securities litigation in the past, due to the disparity between the potential costs an unsuccessful individual claimant could incur when compared to the likelihood of success.[171] The development of the KapMuG, as well as the availability of third party litigation funding, has led some commentators to believe, however, that collective securities litigation actions in Germany will likely gain in popularity.[172]

Germany permits third party funding for collective actions.[173] The practice of third party litigation funding in Germany typically involves a silent partnership: the claimant selects and manages its legal representation while the funding party pays the costs, bears the risk of

158 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)

159 *Id.*

160 *Id.*

161 *Id.; see also* Peter Bert, *Class Actions in Germany: KapMuG Extended Until 2020 – Modest Change of Scope*, Disp. Resol. In Ger. (July 13, 2012).

162 Schneider & Heppner, *supra* note 158.

163 *Id.*

164 *Id.*

165 Bert, *supra* note 161.

166 *Id.*

167 Schneider & Heppner, *supra* note 158.

168 *Id.*

169 *Id.; see also* Bert, *supra* note 161.

170 Schneider & Heppner, *supra* note 158.

171 John C. Coffee, Jr., *The Globalization of Securities Litigation*, CLS Blue Sky Blog (Sept. 19, 2016).

172 Tyler Mamone, *Overseas Securities Litigation is Coming of Age,* Law360 (Feb. 18, 2016).

173 *Id.*

loss, and has a right to a percentage of the final award.[174] This risk pooling has made shareholder litigation more attractive in Germany and third party funders are expected to become increasingly utilized for KapMuG claims, particularly in light of high-profile third party funded KapMuG groups arising out of the Volkswagen shareholder claim discussed below.[175] Bentham Europe, for example, is seeking €2 billion in damages against Volkswagen in the litigation they are funding.[176]

Volkswagen and the Potential for International Conflicts

As the KapMuG and other similar collective action vehicles in Europe develop, issues with enforcement and implementation begin to emerge. The Volkswagen case is an example of potential complications commentators anticipate will become more frequent.[177] This case was brought by investors from around the world, including large institutional investors such as the U.S. fund CalPERS.[178] The investors claim that Volkswagen hid the fact that their diesel vehicles were using software designed to manipulate emissions data in an effort to circumvent environmental regulations, which caused their stock value to drop when the truth emerged in 2015, and various fines and penalties were imposed around the world.[179]

Over 1,400 lawsuits were brought in the Regional Court of Braunschweig.[180] In August 2016, the Regional Court of Braunschweig referred the cases that applied to be models for a KapMuG proceeding to the Higher Regional Court of Braunschweig.[181] The Higher Regional Court earlier in 2017 selected Deka Investment GmbH to serve as the model case, and it is expected that the litigation will still likely take several years to litigate fully.[182] In the only comparable KapMuG of this size, involving 1,700 claims brought against Deutsche Telekom, it took twelve years for the model claim to be litigated.[183]

The complications in the Volkswagen case come from conflicts between the Dutch WCAM settlement process and the KapMuG.[184] The two conflicting statutes could allow the plaintiffs in Germany to receive a decision on the common issues and then use that decision as leverage to pursue a settlement under the WCAM that would apply to a larger group of potential class members. This would then make the KapMuG decision a *de facto* global "opt out" settlement class action.[185] Then again, the WCAM could lead to competing stichtings groups in the Netherlands, leading German plaintiffs to settle in Germany to avoid the uncertainty of the rival stichtings.[186] French shareholders also have the opportunity to bring a collective action against Volkswagen, adding an additional layer of uncertainty as to how all of these various collective action claims might impact each other, particularly since French collective actions may award compensatory damages.[187] Yet, the possibility of multiple competing claims in different jurisdictions could provide Volkswagen with leverage to shop for the lowest settlement offer.[188] It is as yet unclear how these, or other, issues might impact the developing field of collective securities litigation actions in Europe.[189]

France

French law has traditionally had mixed responses to the concept of collective actions.[190] Some commentators

174 *Id.*

175 Kevin LaCroix, *Litigation Funding Firm Announces German Securities Action on Behalf of Volkswagen's German Shareholders*, D&O Diary (Oct. 04, 2015).

176 Karin Matussek, *In Pursuit of a 10,000% Return*, Bloomberg Mkt. (Nov. 21, 2016).

177 Symposium on Class Actions, John C. Coffee, Professor, Colum. L. S. *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, U. PA. L. S., 13-16 (2017).

178 *VW Institutional Investors File $3.61 Billion Suit in Germany*, Reuters (Mar. 14, 2016).

179 Jenny Gesley, *The Volkswagen Litigations*, Libr. Cong. L. Library (Oct. 27, 2016).

180 *Id.*

181 *Id.*

182 *Case Spotlight: Volkswagen Shareholder Class Action*, Fin. Recovery Tech. (Apr. 5, 2017); *Dieselgate: Update from Stichting Volkswagen Investors Claim*, Better Fin., (Dec. 16, 2016, 17:26).

183 Gesley, *supra* note 179.

184 Coffee, Jr., *supra* note 171.

185 *Id.;* Coffee, Jr., *supra* note 177, at 15.

186 *Id.*

187 *See, e.g., Class Action Volkswagen*, WeClaim.

188 *Id.*

189 *Id.*

190 Audrey Lemal, *The French Class Action and the English Group Litigation Order: Two Collective Actions Restoring Equality of Arms*

believe that one of the reasons for France's hesitation to adopt a collective action was due to how negatively France viewed the United States' class action procedures.[191] Despite its historical distaste for collective actions, France has had some of the most rapid and dramatic changes to its collective action proceedings. Unfortunately for issuers, the trend has been for France to make it easier for people to bring claims collectively.[192]

Collective Actions

Collective actions in France have been routinely debated and developing gradually for over a hundred years.[193] The first collective action procedure was developed by the French judiciary, allowing groups of parties to organize a "*ligue de défense*" to defend their shared interests in justice.[194] Later, in 1973 the French legislature created a collective action specifically for French consumers, known as the Royer Act.[195] Collective actions were then further expanded in 1992 to include claims other than for the protection of consumers, including claims by investors.[196] Now, certain parties with common injuries can bring what is referred to as "*actions en représentation conjointe*" or common representative actions.[197]

Common representative actions have no restrictions on whether defendants have to be French citizens, nor are there restrictions on whether foreign plaintiffs can join a French claim.[198] Damages in class actions are limited to compensation of the loss suffered.[199] Additionally, there are no restrictions as of yet barring claims from being brought against companies domiciled outside of France.[200] Only approved associations representing consumers or investors at a national level are permitted to bring common representative actions.[201] These associations have to be approved by the government before they can participate in a common representative action.[202]

Despite its historical distaste for collective actions, France has had some of the most rapid and dramatic changes to its collective action proceedings.

For claims involving investments specifically, article L.452-1 and 452-2 of the Monetary and Financial Code provide the specifics for investor protection associations to bring claims on behalf of investors.[203] Representative actions under L.452-1 and 2 are "opt in," where two or more investors who have been injured by the acts of the same person must request an accredited investor defense association to sue for damages and other remedies, including injunctive relief, on their behalf.[204] The investors' request must be given in writing by each person "opting in" to the action, and any person can rescind their request without explanation.[205] The association representing the common parties is permitted to advertise the action in order to attract more parties to join the action, but such advertisements are generally limited to newspapers and magazines.[206] The association may, however, obtain approval from both the court and the parties the association represents to advertise through additional media, including television and radio.[207] Once the action is brought to trial, the court's decision is

Between Victims, Le Petit Juriste (Sept. 22, 2015).

191 Daly, *supra* note 39, at 19.

192 *Id.*

193 Lemal, *supra* note 190.

194 Véronique Magnier, *Class Actions, Group Litigation & Other Forms of Collective Litigation Protocol for National Reporters: France* 3-4 (2007).

195 Lemal, *supra* note 190.

196 Carole Sportes & Valérie Ravit, *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); Code Monétaire Et Financier [C.M.F.] art. L. 452-1 (Fr.) *translated*.

197 Sportes & Ravit, *supra* note 196.

198 Daly, *supra* note 39, at 44.

199 Alexandre Bailly, Xavier Haranger, Frances Murphy, Omar Shah & Roderick Farningham, *Global Class Action Guide: France*, Pract. L. (Nov. 2016).

200 Elizabeth Oger-Gross, Anastasia Pitchouguina, Elodie Valette & Anaïs Harlé, *Litigation and Enforcement in France: Overview*, Pract. L. (Jan. 2017).

201 Magnier, *supra* note 194, at 10.

202 *Id.*

203 [C.M.F.] art. L. 452-1 (Fr.); [C.M.F.] art. L. 452-2 (Fr.) *translated*.

204 Sportes & Ravit, *supra* note 196.

205 Magnier, *supra* note 194, at 10.

206 *Id.*

207 *Id.*

binding on the parties – if the investors lose, their individual claims are forfeited; if the investors succeed, then they may only be awarded personal damages to compensate them for their individual injuries.[208]

Rapid Developments

Recently, a more formal collective action process in France has been enacted under the Hamon law, passed in 2014.[209] While currently the Hamon law does not include securities litigation in the types of actions that may be brought under it, the rapid expansion of the law has led some commentators to believe that the law will be expanded to include securities litigation in the upcoming years.[210] Despite these rapid changes, at this stage, it is unclear if and how France's laws may change in the future to be more accommodating to collective actions.

Another development in French law is the use of third party funders. Currently there is no restriction against third party funding in France.[211] Like elsewhere in the world, third party funding is expected to be more widely used in the future in France.[212]

Italy

Italy is another jurisdiction that was reluctant to embrace a class action procedure, but has since amended their laws to permit more class action claims to come forward.[213] For example, in 2012, Italy's class action law was amended to lower the typicality requirement for class certification from "identical" to "homogenous."[214] Lowering these restrictions is expected to result in fewer class action proceedings being dismissed for typicality grounds, but as of yet class actions are still not as popular in Italy as they are in other jurisdictions.

Collective Actions

Italy adopted a class action system (*azione di classe*) in Article 140-*bis* of the Italian Consumer Code, effective January 1, 2010.[215] This law allows all users and consumers with homogenous rights to bring three types of claims as a class action:

- Breach of contract.
- Unfair and anticompetitive practices.
- Products liability.[216]

With features unique to the structure of Italy's class action, such as the less-popular opt-in model, Italy historically has not seen as much activity in securities class action proceedings as other European countries.

Users or consumers are defined as "any natural person who is acting for purposes which are outside his trade, business or profession."[217] Such users may only bring class actions against business entities, which includes both corporations and individuals or entities acting within the scope of business.[218] Under these definitions, investors may bring a securities litigation as a class action.[219] Currently, there is no restriction in the law regarding the nationality of either the plaintiffs or the defendants, and so presumably non-Italians are permitted to join class action proceedings in Italy, and class action claims can be brought against non-Italian issuers.[220]

To achieve admissibility as a class, a tribunal must hold a hearing to find none of the following disqualifying factors are present:

- The claim is unfounded.
- The promoter has a conflict of interest.

208 *Id.* at 11, 19.
209 Code de la Consommation [C. Con.] art. R. 623-1 (Fr.) *translated*
210 Kevin LaCroix, *Class Action Litigation Developments in France*, D&O Diary (Nov. 20, 2016).
211 Daly, *supra* note 39, at 33, 64.
212 *Id.*
213 Daly, *supra* note 39, at 41.
214 Gennaro d'Andria & Francesco Alongi, *Class/collective Actions in Italy: Overview*, PRACT. L. (Jan. 2017).
215 Codice Del Consumo, art. 140-*bis* (It.).
216 *Id.* para. 2.
217 *Id.* art. 4 para. 1(a).
218 Matteo Bay, Antonia Distefano, Alessio Aresu & Fabrizio Santoni, *Overview of Class/Collective Actions and Current Trends* at 234.
219 *See, e.g.,* Press Release, Saipem: Received Notice of Legal Proceedings Before the Court of Milan (Apr. 29, 2015).
220 D'Andria & Alongi, *supra* note 214.

– The individual claims are not homogenous.
– The promoter is incapable of adequately protecting the class's interests.[221]

If admissible, the plaintiffs may only seek restitution or damages.[222]

Class actions, however, have not been particularly popular in Italy for several reasons. First, Italy utilizes the less-popular opt-in model, called *adesione* (adhesion).[223] Second, the "promoter"—the individual who first brings the action—must cover all litigation funding.[224] Third party funding is available, but since there are limitations on how much a class can be awarded, they are rarely used.[225] Further, if the court should find that the action was brought in bad faith or due to serious misconduct, the promoter may be ordered to pay damages to the defendant.[226]

Given the lack of success of class actions in Italy, the Senate is currently considering a substantial amendment to Article 140.[227] The proposed bill, which has passed parliament and is currently pending before the Senate Committee, would add a new section to the Italian Civil Procedure Code providing clear requirements for each phase of the class action.

Saipem Collective Action

Italian investors brought a securities collective action against Saipem S.p.A. ("Saipem") in the Court of Milan in April of 2015.[228] Plaintiffs accuse Saipem, an Italian oil and gas contractor, of failing to adequately disclose its financial condition, ultimately leading to a substantial drop in stock value.[229] The class consists of 64 institutional investors.[230] The case is currently pending.[231] While additional cases against Saipem are still being brought, the statute of limitations for claims arising out of the alleged activities is December 2017.[232]

With features unique to the structure of Italy's class action, such as the less-popular opt-in model, Italy historically has not seen as much activity in securities class action proceedings as other European countries. This likely will remain the case until Italy further develops its jurisprudence in this area.

Spain

Despite not having a specific procedure governing collective actions, Spain regulates what are known as "group claims," and collective interest actions constitute one such type of group claim.

Collective Actions

While there is not a specific collective action procedure in Spain, Article 11 of the Spanish Law of Civil Procedure (*Ley de Enjuiciamiento Civil*) ("LEC") regulates a mechanism by which certain entities may bring group claims on behalf of users and consumers.[233] In Spain, claimants are free to "opt in" but not to "opt out" of the proceedings.[234] There are two types of group actions under the LEC. In collective interest actions, the members of the affected group are easily identifiable.[235] In diffuse interest actions, the affected members of the group are difficult to identify.[236] A consumer association or user representing the general interests of users and consumers may institute an action.[237]

In addition to monetary damages, certain qualified bodies are allowed to seek injunctive relief on behalf of consumer interests in Spain.[238] Investors have brought securities claims as class actions.[239]

221 Codice Del Consumo, art. 140-*bis*, para. 6.
222 *Id.* para. 1.
223 *Id.* para. 3.
224 Francesca Rolla, *Class Action in Italy*, Who's Who Legal (July 2012).
225 Daly, *supra* note 39, at 33, 67.
226 D'Andria & Alongi, *supra* note 214.
227 S. Doc. No. 1950 (2016) (It.).
228 Saipem (Italy), Labaton Sucharow (Jan. 27, 2017).
229 *Id.*
230 *Id.*
231 *Id.*
232 Andrew Laskey, *Case Spotlight: Saipem SpA* (Oct. 12, 2017).
233 Ley De Enjuiciamiento Civil (L.E. Civ.), art. 11 (2001) (Spain).
234 Paul G. Karlsgodt, World Class Actions 306 (Oxford University Press 2012).
235 L.E. Civ. para. 2.
236 L.E. Civ. para. 3.
237 L.E. Civ. art. 11, para. 1.
238 Pablo Gutierrez de Cabiedes Hidalgo, *Group Litigation in Spain: National Report*, Global Class Actions Exchange (2010), at 4, 13-14.
239 *See, e.g.*, *Spain's Bankia Hit by Class Action Lawsuit Over 2011 Listing*, Yahoo Fin. (Feb. 4, 2016).

Spain follows a "loser pays" system.[240] However, the unsuccessful party's fee for the other party's legal expenses is capped at one third the amount of the claim. Therefore, the fees incurred often outstrip the recoverable amount. Additionally, because consumers' and users' associations are largely financed by government subsidies, the individual claimants bear very little of the financial risk. Contingency fees are permitted in Spain, and thus private agreements between a lawyer and client for a minimum fee will be enforceable.[241] Third party funding is not explicitly prohibited and thus theoretically permissible, although it is not commonly used.

Securities Regulation and Cross-Border Issues

While private securities claims may be brought under the Civil Procedure Code, the purchase and sale of securities in Spain is also regulated through the Securities Market Act ("LMV"), approved on October 23, 2015.[242] The National Securities Market Commission ("CNMV") is charged with implementing and enforcing such provisions.[243]

With respect to jurisdiction, EU regulations grant Spanish courts power to hear civil and commercial matters when the contracting parties consent or when the defendant is domiciled in Spain.[244] Jurisdiction will also exist over defendants domiciled in another EU member state where the contract on which the claim is based was performed in Spain or where there is more than one defendant and one is domiciled in Spain.[245] In regards to securities litigation, there are also two instances in which Spanish courts have jurisdiction over defendants not domiciled in any member state: first, when the dispute arises out of the operations of a branch or agency of the defendants situated in Spain; and second, when the claim arises out of contracts between the defendant and Spanish consumers, on the condition that the defendant has engaged in commercial activities in Spain.[246]

240 L.E. Civ., art. 394, para. 3.

241 S.T.S. Nov. 4, 2008 (R.J. No. 5837/2005) (Spain).

242 Royal Legislative Decree (R.D.L.) 2015, 4 (Spain).

243 Comisión Nacional Del Mercado De Valores.

244 EU Regulation 1215/2012 (Brussels I *bis*).

245 *Id.* art. 7.1, 8.1 Brussels I *bis.*

246 *Id.* art. 7.5, 17.1(c) Brussels I *bis.*

Bankia Litigation

A Supreme Court ruling in 2016 against Bankia, a Spanish bank holding company, has had a significant impact on securities litigation in Spain. On January 27, 2016, the Supreme Court ordered Bankia to reimburse two small individual investors for investment losses stemming from a 2011 stock flotation. In affirming the decision of two regional courts, Spain's Supreme Court found that Bankia's 2011 prospectus contained "serious inaccuracies" and ordered the reimbursement of the two investors.[247] Bankia was also unsuccessful in attempting to delay the case until after the outcome of a separate criminal suit against former head of Bankia, arising out of related events.[248]

The case was unsurprisingly a boon to similarly situated investors. Based on the Supreme Court's ruling, in February 2016 legal counsel representing 660 individual investors sued Bankia in a Madrid court for investment losses stemming from the same 2011 stock flotation. The plaintiffs sought an approximately US$7 million recovery for their losses based on the misleading prospectus.[249] The class action litigation culminated in an offer of settlement by Bankia to pay all of its minority shareholders for their losses plus one percent interest in connection with its 2011 market listing.[250] However, the compensation agreement did not include institutional investors whose claims against Bankia are less promising. The ruling by the Supreme Court in January of 2016 suggested that individuals, unlike institutional shareholders, do not have the ability to dig beyond the publicly available documents, and thus are more justified on relying on the terms of the prospectus.[251]

The Bankia litigation is important in two respects. First, the Supreme Court's ruling clarified that civil courts may resolve cases even while parallel criminal proceedings are

247 Raphael Minder, *Spanish Supreme Court Orders Bankia to Repay 2 Investors in its IPO*, N.Y. Times (Jan. 27, 2016); Kevin LaCroix, *Spanish Class Action is the Latest Collective Investor Action Filed Outside U.S.*, D&O Diary (Feb. 7, 2016).

248 Minder, *supra* note 247.

249 LaCroix, *supra* note 247.

250 *Bankia Announces It Will Repay €1.8 Billion + 1% Interest to Minority Shareholders*, Spain Report (Feb. 17, 2016).

251 Ian Mount, *Bankia to Pay Retail Investors for €2bn IPO Loss*, Fin. Times (Feb. 17, 2016).

pending. And secondly, the ruling outlined a distinction between institutional investors and individual investors, suggesting that institutional investors will be held to a higher standard given their status and relative power.

In sum, as shown below, the procedures that have developed in the EU all come with differences such as who can join the proceeding, how the litigation is funded, or whether the judgment can include monetary compensation or strictly injunctive relief.[252] It has now become increasingly important for issuers to understand how current cross-border and foreign actions may affect them; how actions are handled outside of the United States; and whether mass global settlements could provide a solution.

EU Litigation Procedures: Differences by Jurisdiction

	Who Can Bring the Action?	Third Party Funding	Opt In/Opt Out	Monetary/Declaratory Relief
 Netherlands	Foundations with the legal capacity to sue on behalf of a group of individuals or entities.	Third party litigation funding is permitted.	Foundations: opt in; WCAM settlements: opt out.	Collective actions may only seek declaratory or injunctive relief.
 UK	Any interested party.	Third party litigation funding is permitted in the United Kingdom under certain circumstances, depending on the amount of control the funding party has over the claims.	Representative actions: opt out, GLOs: opt in.	Judgments that can be awarded are governed by common law.
 Germany	Model cases are selected from claimants who filed suit in German court.	Third party litigation funding is permitted.	KapMuG proceedings: opt in; KapMuG settlements: opt out.	Monetary damages can be awarded under the KapMuG; individual claimants then litigate their own liabilities.
 France	Approved associations representing consumers or investors at a national level bring claims on behalf of injured parties.	There is no restriction against third party litigation funding.	Opt in.	Monetary damages are limited to compensation of the loss suffered.
 Italy	All users and consumers with homogenous rights to a claim as other members of the class.	Third party litigation funding is permitted, though the practice is rarely used.	Opt in.	The class can seek restitution or damages.
 Spain	Users and consumer associations representing the general interests of users and consumers.	There is no restriction against third party litigation funding.	Opt in.	Monetary damages generally, qualified bodies can seek injunctive relief.

252 The Netherlands, Germany and the UK limit remedies to declaratory and injunctive relief, for example, in those countries common issues of fact are litigated and then individual plaintiffs may use the judgment to determine individual liability in future proceedings, whereas France, Italy and Spain permit economic remedies in their collective proceedings, *see supra* pp. 10-25.

EU Forum Shopping

With the wave of differing collective action mechanisms and procedures arising from EU member state to member state, the rise of potential forum shopping unsurprisingly is at the forefront of developments in global securities litigation.[253] Not only do litigants have relative freedom to choose among jurisdictions with the various procedural mechanisms outlined above, there are also no rules specific to the allocation of jurisdiction among the various EU member states regarding securities class actions.[254] As such, litigants have tended to choose one of the commonly preferred jurisdictions (currently, the Netherlands and the UK).[255] Indeed, as discussed above, the opt-out systems such as those used in representative actions in the UK or the WCAM in the Netherlands contrast with the opt-in systems of other member states.[256] And the fact that "global" collective actions such as the *Volkswagen* and *Petrobras* cases outlined above[257] are likewise being filed in the Netherlands without an immediately apparent connection to the jurisdiction begs the question as to whether litigants are presumably seeking a forum with the most liberal access and fewest procedural safeguards.[258] Nonetheless, as indicated above, the *BP* decision restricted jurisdiction in the Netherlands. While it is perhaps an outlier, it should be noted that courts are aware of the potential abuse.[259] As more member states continue to adopt collective redress mechanisms, differing procedures continue to arise, and the size of claims continues to grow, issuers should continue to be aware of potential forum shopping on the part of litigants and monitor new procedures and legislation that may auger against it.

Canada

While Canada's provinces and territories have enacted securities laws, Canada does not have a national securities regulator. Thus, litigation can vary quite significantly across the country depending on where the suit was specifically brought.

Collective Actions

Unlike the United States, Canada does not have a federal class action process. Rather, class action claims in Canada must be brought in one of Canada's thirteen provincial and territorial governments, each with independent authority over its own civil procedure.[260]

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With the exception of Quebec, which operates under a civil law system, each jurisdiction is governed by common law. Nine of Canada's common law provinces have passed substantially similar class action legislation which, in certifying a class, generally require:

- A sustainable cause of action.
- An identifiable class of two or more persons.
- Common issues.
- That a class proceeding be the preferable procedure.
- Adequacy of a representative plaintiff.[261]

Moreover, unlike all other major industrial countries, Canada does not have federal regulatory authority over its securities market. The purchase and sale of Canadian securities is regulated through laws and agencies established by Canada's thirteen jurisdictions. Each province or territory has its own securities commission or

253 *See* Kortmann, *supra* note 111, at 1.
254 *Id.*
255 *Id.* at 1, 17.
256 *See supra* pp. 10-18.
257 *See supra* pp. 6-7, 10-15.
258 *See* Kortmann, *supra* note 111, at 1, 17.
259 *See supra* pp. 11-12.
260 Kevin LaCroix, *Class Actions in Canada: A Critical Commentary.*, D&O Diary (March 23, 2015).
261 Jill Lawrie & Daniel Szirmak, *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).

regulator and has approved its own provincial or territorial securities legislation (collectively, "the provincial acts").[262]

However, concerns with the provincial securities system have led to repeated calls for a national securities system in Canada. Proponents of a single central regulatory body have noted that the diversity of regulations among the provinces and the limited enforcement authority held by each of the individual provincial agencies makes it difficult to effectively regulate the market and coordinate with other regulators in monitoring risks and responding to crises.[263] Currently, the government of Canada is working towards establishing a national securities regulatory system in order to better protect investors and more effectively regulate the securities market.[264]

Secondary Market Civil Liability

Beginning in 2005, Canada's various provinces enacted substantially similar legislation governing the civil liability of public companies to purchasers and sellers of securities in the secondary market. A "responsible issuer," defined to include a "reporting issuer," or any other publicly traded issuer with a "real and substantial connection" to that province, may be exposed to liability under the provincial acts.[265]

Of the nine Canadian securities cases filed in 2016, six included parallel class actions filed in the United States involving Volkswagen AG, Goldcorp Inc., Concordia International Corp, Silver Wheaton Corp., Nobilis Health Corp., and Amaya Inc. The latter five cases involve issuers whose securities were listed both on the Toronto Stock Exchange and on one of the major U.S. exchanges. However, Volkswagen AG is the last in a line of five Canadian securities cases in which the issuer was not listed on a Canadian stock exchange.[266] These cases, which would not be permitted under U.S. securities laws following *Morrison*,[267] continue to negotiate the boundaries of the "responsible issuer" definition in the provincial securities acts.[268]

Despite the provincial acts' wider reach, the risk of being sued in Canada is statistically less than it is in the United States. While the statutory advent of secondary market civil liability in Canada created an upward trend in the number of securities filings, the pace of filings has slowed down in recent years. Only nine securities class actions were filed in Canada in 2016, which is below the rate recorded from 2010 to 2014. By contrast, securities filings have grown each of the last four years in the United States and are at their highest level since the aftermath of the dot-com crash in the early 2000s. The recent decline of securities actions in Canada may be explained by higher costs and lower expected return for class counsel, in part due to damage limits under the provincial securities acts.[269]

Australia

When it comes to the concept of collective proceedings, Australia has not been as hesitant as certain countries in Europe. Indeed, Australia has had some form of collective proceeding for 25 years.[270] Until recently, class actions were not widely utilized, however that changed when Australia loosened its restrictions on the availability of third party litigation funding.[271] As seen elsewhere, third party litigation funding has greatly increased the number of class actions filed yearly.[272]

Collective Actions

Australia began permitting representative proceedings at the federal court level in 1992 when Part IVA was added to the Federal Court of Australia Act 1976.[273] Part IVA

262 David Murchison, *Backgrounder: A New Canadian Securities Regulatory Authority*, Can. Dept Fin. (2010).

263 *Id.*

264 Rick Baert, *Proposal for National Securities Regulator in Canada Gains Traction*, Pensions And Inv. (Jan. 23, 2017).

265 *Secondary Market Liability in Canada, A Legal Overview*, Stikeman Elliott (Nov. 2012), at 1, 3, 38.

266 Bradley A. Heys & Robert Patton, *Trends in Canadian Securities Class Actions: 2016 Update,* NERA (Feb. 22 2017), at 6.

267 130 S. Ct. 2869 (2010).

268 Heys & Patton, *supra* note 266, at 6.

269 *Id.* at 1, 6, 16.

270 *Federal Court of Australia Amendment Act 1991* (Cth); *Federal Court of Australia Act 1976* (Cth).

271 *See Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 (Austl.).

272 Vince Morabito, *An Empirical Study of Australia's Class Action Regimes – Fourth Report Facts and Figures on Twenty-Four Years of Class Actions in Australia* (2016), at 8.

273 *Federal Court of Australia Amendment Act 1991* (Cth); *Federal*

proceedings are designed to efficiently adjudicate related claims as a class, and as such they require potential class members to "opt out" or else be bound by the decisions of the court.[274] The court heavily manages claims brought under Part IVA, and is granted the ability to decide issues that affect the class, sub-divisions, and individual parties, or to order alternative proceedings if need be.[275]

Several Australian states have their own representative proceedings as well.[276] Victoria has a representative proceeding regime that is similar to Part IVA, Part 4A of the Supreme Court Act 1986.[277] New South Wales also permits class actions arising out of negligence or violations of New South Wales statutes, though the New South Wales proceedings require more strict definitions of who is included in the affected class.[278] Additionally, Queensland has recently introduced its own class action mechanism largely modelled on the other Australian representative proceedings.[279]

The formal requirements for bringing a representative proceeding under Part IVA are: (a) at least seven persons with claims against the same person or persons; (b) arising out of the same, similar or related circumstances; and (c) with at least one substantial common issue of law or fact.[280] The requirements for bringing a representative proceeding are not overly restrictive. However, there is no class certification process prior to bringing a representative proceeding, nor is there a requirement for the common issues to predominate over the non-common issues.[281]

Third Party Litigation Funding

Third party litigation funders have had a significant effect on representative proceedings brought in Australia. In the first six years of its enforcement, 66 Part IVA claims were filed, of which zero were financed by third parties.[282] The lack of third party funding in the early years of Part IVA is not surprising, as third party litigation funding was largely not permitted in Australia until 2006.[283] However, since then, third party funding has greatly increased. In the six years between April 2010 and March 2016, for instance, 107 Part IVA claims were filed, of which 53 were supported by third party litigation financiers.[284]

The addition of third party litigation funding has had a number of effects on how Part IVA proceedings are conducted, particularly with regard to the availability of "opt in" provisions for funded claims.[285] With the addition of third party funding for Part IVA proceedings, firms began to construct their claims in a way to restrict the class to persons who had affirmatively joined the representative claimant in some way,[286] hoping to transform the proceeding into a quasi "opt in" claim to control the size of the class and the firm's fees. Eventually, firms were permitted to define the class of claimants by specific characteristics, for example those people who had joined the litigation funding agreement.[287] More recently, the Australian Federal Court approved, for the first time, a "common fund" open class action, where third party funders are permitted to obtain fees from class members who "opted in" to the proceeding but did not sign a litigation funding agreement.[288] This latest development is expected to have a tremendous impact on the use of litigation funding and class actions in Australia in general.[289]

Court of Australia Act 1976 (Cth).

274 Colin Loveday & Andrew Morrison, *Class & Group Actions 2017*, Global Legal Group (Nov. 18, 2016).

275 *Id.*

276 *Id.*

277 *Id.*

278 *Id.*

279 Colin Loveday & Bonnie Perris, *Is it Time to Revisit Australia's Class Action Procedure?,* Who's Who Legal (June 2017).

280 Loveday & Morrison, *supra* note 274.

281 *Id.*

282 Morabito, *supra* note 272.

283 *See Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 (Austl.).

284 Morabito, *supra* note 272.

285 Greg Houston, Svetlana Starykh, Astrid Dahl & Shane Anderson, *Trends in Australian Securities Class Actions*, NERA (May 2010), at 9.

286 *See Dorajay Pty Ltd v Aristocrat Leisure Ltd,* [2005] 147 FCR 394 (Austl.).

287 *See Multiplex Funds Mgmt Ltd v P Dawson Nominees Pty Ltd,* [2007] 164 FCR 275 (Austl.).

288 *Money Max Int. Pty Ltd (Trustee) v QBE Ins Grp Ltd,* [2016] FCAFC 148 (Austl.).

289 Kevin LaCroix, *Class Action Litigation in Australia Poised for Further Growth*, D&O Diary (Dec. 14, 2016).

Hong Kong

Hong Kong maintains rigid requirements for representative proceedings. In part, due to some of these requirements, Asia has yet to consider Hong Kong to be at the forefront of developing securities class action litigation. However, with recent developments, Hong Kong is proving that it is also capable of being a major player in the international scene.

Collective Actions

In Hong Kong, multi-party litigation must proceed through representative proceedings, which requires a showing of identical issues of law and fact among plaintiff class members, namely that:

- The same contract exists between class members and defendants.
- Any purported defenses apply equally to all class members.
- The same relief is claimed by all class members.

This "same interest" requirement has been criticized as rendering multi-party litigation in Hong Kong inefficient and restrictive.[290]

On May 28, 2012, the Law Reform Commission published a report recommending the adoption of a comprehensive class-action regime in Hong Kong. The regime was aimed at promoting greater access to justice for deserving plaintiffs, facilitating a final resolution of issues for defendants, and promoting judicial efficiency.[291] The commission proposed phasing the implementation of the class action regime by starting with consumer cases. But while the Competitive Ordinance allowing for consumers class actions, under limited circumstances, has been in effect since December of 2015, the proposed class action regime has yet to become effective through implementing legislation.[292]

290 L. Reform Commission of H. K., Class Actions Sub-Committee, *Consultation Paper on Class Actions*, at 1-2; L. Reform Commission of H. K., *Report, Class Actions,* (May 2012), at 11-12.

291 L. Reform Commission of H. K., *Report, Class Actions*, at 63-64 (May 2012).

292 *Is Hong Kong Ready to Enact Consumer Class Actions?*, Bauhinia Found. Res. Ctr. (March 9, 2016).

New Companies Ordinance

Meanwhile, on March 3, 2014, the Hong Kong New Companies Ordinance ("NCO") went into effect which introduced a number of new provisions regarding the duties and liabilities of directors and officers of Hong Kong companies.[293] The NCO requires directors to exercise the care, skill, and knowledge "that may reasonably be expected of a person carrying out" similar functions. It also requires a subjective consideration of a director's "general knowledge, skill and experience."[294]

Additionally, officers of a company may be held liable as "Responsible Persons" under the NCO, which is defined as a director or officer who "authorizes or permits, or participates in," violations of the ordinance.[295] Importantly, in enacting these provisions, the NCO removed the "willful" misconduct condition under the prior Companies Ordinance, thereby increasing the exposure to liability faced by Hong Kong directors and officers.[296]

International Arbitration Hub

Despite its shortcoming on the class action front, Hong Kong has endeavored to position itself as a leader on the international arbitration stage. In a 2015 survey, Hong Kong ranked among the top five most preferred and widely used international arbitration venues.[297] In recent months, Hong Kong has garnered even more praise for adopting laws explicitly permitting third-party funding for arbitrations.[298] While Hong Kong has yet to provide plaintiffs a class-wide mechanism for dispute resolution, it has emerged as a major player on the international arbitration scene.

293 Gov't of the H. K. Spec. Admin. Region, *New Companies Ordinance*, Companies Registry (Feb. 24, 2017); *see also* Kevin LaCroix, *The Hong Kong New Companies Ordinance: Director Liability and D&O Insurance Implications,* D&O Diary (Feb. 28, 2014).

294 Companies Ordinance, (2014) Cap. 622, § 465, *translated.*

295 *Id.* § 3.

296 LaCroix, *supra* note 293.

297 Paul Friedland & Loukas Mistelis, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, Queen Mary Univ. of London, White & Case, at 2.

298 Abudlali Jiwai, *A Big Step for Hong Kong As An International Hub*, Law360 (June 28, 2017).

Japan

Japan only just implemented its formal collective action procedure in late 2016, so as of yet there has not been a large number of collective actions brought. However, issuers may take some comfort that Japan has developed one of the more conservative collective action mechanisms. Japan, for example, does not permit third party litigation funding except in very limited circumstances. Their collective action procedure only permits a select few types of cases to be brought collectively, and they utilize a "loser pays" system. On the other hand, Japan's newly formed securities laws carry less of a burden of proof for plaintiffs than some of their international analogues.

Collective Actions

Japan has not had a long history of securities laws. In 2006, the Financial Instruments and Exchange Act ("FIEA") was enacted, creating new causes of action relating to the sale of securities.[299] The FIEA is a particularly plaintiff-friendly standard; plaintiffs are not required to show intent or reliance, and defendants have the burden of rebutting a presumption of damages after causation has been found.[300] On October 1, 2016, Japan implemented a formal class action mechanism by adopting the Act on Special Provisions of Civil Court Procedures for Collective Recovery of Property Damage of Consumers (the "Collective Recovery Act").[301]

The Collective Recovery Act adopts a two-step procedure for class action claims. First, a Specified Qualified Consumer Organization ("SQCO") files for a declaratory judgment finding the defendant company liable for obligations owed to a "considerably large number" of aggrieved consumers.[302] Second, if the court finds that the defendant is liable, consumers opt-in to the litigation, wherein the court determines damages. An entity can become a SQCO only through certification by the Prime Minister.[303]

Only certain types of claims may be brought under the Act. Specifically, a claim must fall into one of the following categories:

- A claim for performance of a contractual obligation.
- A claim pertaining to unjust enrichment.
- A claim for damages based on nonperformance of a contractual obligation.
- A claim for damages based on a warranty against defects.
- A claim for damages based on a tort committed in conjunction with a consumer contract.[304]

Japan prohibits the use of third-party funding for litigation, unless specifically permitted by statute.[305] However, contingency fees arrangements are permissible.[306] Additionally, Japan does not follow a "loser pays" system; rather, like in the U.S., each party bears its own litigation costs.[307]

More changes to the Japanese class action landscape are expected in the near future. In May 2016, Japan passed a bill amending the Consumer Contract Act (Act No. 61 of 2000), which will allow consumers to extend the limitation period to rescind contacts. The bill took effect on June 3, 2017.

Current Litigation

Because Japan's class action mechanism just passed into law in October 2016, the impact of the new law in practice has not yet been observed. However, because Japan has a plaintiff-friendly securities action framework, groups of investors have nonetheless successfully brought mass securities actions even without the formal class action system, and that trend is expected to escalate in light of the new law.[308]

299 Paul J. Hinton & Makoto Ikeya, *A Model for Olympus Shareholder Litigation*, Law360 (Jan. 2012).

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

301 Act on Spec. Provisions of Civ. Ct. Proc. for Collective Recovery Property Damage Consumers, Act No. 96 of 2013 (Japan).

302 *Id.*; "considerable number" is not defined by the Act; however, the Japanese government stated during the drafting process that "tens of people" would be sufficient.

303 Act No. 96 of 2013, *supra* note 30 1 art. 65.

304 *Id.* art. 3, para. 1.

305 Attorney Act, Act No. 205 of 1949, art. 72 (Japan).

306 Kevin LaCroix, *Securities Litigation in Japan*, D&O Diary (June 21, 2016).

307 *Id.*

308 Before Japan developed its formal collective action procedure under the Act, two or more plaintiffs with an issue arising out of

Olympus Settlement

In December 2016, a court in Tokyo approved an 11 billion yen ($92 million) settlement for 60 investors in Olympus Corporation, an electronics manufacturer, stemming from the company's accounting fraud.[309] The case was brought by DRRT, an international law firm and litigation funder that is representing several cases worldwide in the developing field of global securities litigation.[310] In November 2011, the Company admitted to falsely representing its financial health by concealing losses that stemmed back decades.[311] The plaintiffs recovered 45 percent of the recoverable losses claimed in the lawsuit on June 28, 2017, when the parties settled the case.[312]

Toshiba Collective Action

In October 2016, a group of 45 investors of Toshiba Corp, including global institutional investors like Allianz Global Investors, sued the company in a Tokyo court, alleging 16.7 billion yen ($162.3 million) in damages arising from a 2015 accounting scandal.[313] Toshiba has been faced with numerous lawsuits arising from the scandal, including a group action brought by fifty shareholders in December 2015.[314] This may be the first major securities litigation brought since the adoption of the new class action system, and will be one to watch closely at it unfolds. Since Toshiba's accounting practices came to light, a total of twenty-six suits have been brought, most recently by a group of seventy plaintiffs, including international banks and institutional investors.[315]

the same facts could still form multi-party litigations as co-parties. *See, e.g.* Minji Soshōhō [Minsōhō] [C. Civ. Pro.], 1996, art. 30 (Japan).

309 *Settled Cases*, Deminor (last visited Jul. 27, 2017).

310 Kevin LaCroix, *Securities Litigation Developments Outside the U.S.: Interview with Shareholder Attorney Alexander Reus*, D&O Diary (Apr. 16, 2015).

311 *New, Ongoing, and Settled Cases*, Labaton Sucharow (last visited July 27, 2017).

312 *Id.*

313 *Foreign Investors Sue Toshiba over Accounting Scandal*, Fortune (Oct. 13, 2016).

314 Makiko Yamazaki, *Toshiba Shareholders Sue in Tokyo for $2.45 Million After Stock Plunge*, Reuters (Dec. 6, 2015).

315 *Toshiba Facing Nearly $1bn in Claims from Accounting Scandal*, Nikkei Asian Rev. (June 14, 2017).

The recent changes to Japan's securities laws and collective action procedures continue the trend around the globe of jurisdictions making it easier for shareholders to bring claims for securities fraud. Despite the lack of third party litigation funding, the large settlements awarded in the Toshiba and Olympus cases will likely lead to an increase in similar cases being filed.

India

Recognizing the global shift and recent developments in global securities litigation, India has recently enacted a statutory vehicle by which shareholders can bring class action suits. Because the law is still new, it is unclear at this stage whether India will be a popular forum for securities class action proceedings.

Collective Actions

In India, class actions are a "relatively new phenomenon."[316] Class actions are governed by Section 245 of the Companies Act, 2013 (the "Companies Act"), which the Ministry of Corporate Affairs notified on June 1, 2016.[317] Under Section 245(1) of the Companies Act, "members, … depositors or any class of them" may institute a class action, seeking to challenge "the management or conduct of the affairs of the company," by alleging that they are "being conducted in a manner prejudicial to the interests of the company or its members or depositors."[318] A class action may be filed by members or depositors of a company against the company or its directors, the auditor, or any expert, advisor, consultant, or "any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part."[319] In addition, Section 37 of the Companies Act provides that a lawsuit may be filed by "any person, group of persons or any association of persons affected by any misleading statement or the

316 Arjya B. Majumdar & Sneha Bhawnani, *Class Action Suits – Genesis, Analysis and Comparison*, Book Series On Corp. L. And Corp. Aff. (Dec. 12, 2016), at 23.

317 The Companies Act, 2013; *see also* Jasleen K Oberoi, *Class/collective actions in India: overview*, Prac. L. (Nov. 1 2016).

318 The Companies Act § 245(1), *supra* note 317.

319 *Id.* § 245(1)(g)(i)-(iii).

inclusion or omission of any matter in the prospectus."[320] Though the Companies Act does not outline whether a foreign plaintiff may bring suit, under India's Code of Civil Procedure, it is likely that a foreign plaintiff may bring suit as if they were citizens of India as long as they reside in a country not at war with India.[321]

The Companies Act requires that the number of members necessary to maintain a class action must be as follows:

- [I]n the case of a company having a share capital, not less than one hundred members of the company or not less than such percentage of the total number of its members as may be prescribed, whichever is less,
- [O]r any member or members holding not less than such percentage of the issued share capital of the company as may be prescribed, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;
- [I]n the case of a company not having a share capital, not less than one-fifth of the total number of its members.[322]

The Companies Act further requires that the number of depositors necessary to maintain a class action must be as follows:

- [N]ot [] less than one hundred depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever is less,
- [O]r any depositor or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed.[323]

Class action claims are filed before the National Company Law Tribunal ("NCLT"). Under Rule 86 of the NCLT Rules, 2016 (the "NCLT Rules"), a class action member may "opt-out of the proceedings at any time after the institution of the class action, with the permission of the [NCLT]. "[324] A class member that opts out is not precluded from "pursuing a claim against the company on an individual basis under any other law, where a remedy may be available, subject to any conditions imposed by the [NCLT]."[325]

Satyam Scandal

The Companies Act was spurred, in part, by the 2009 Satyam scandal, also known as "Indian Enron."[326] Satyam Computer Services Ltd. was an information technology services company. Its chairman at the time, Ramalinga Raju, sent an email to the Securities and Exchange Board of India ("SEBI") on January 7, 2009 confessing that the company had, among other things, misreported its revenue.[327] With this confession, Raju notified SEBI of his intent to resign as chairman, and stated that he was "prepared to subject [himself] to the laws of the land and face consequences thereof."[328]

Five years later, on July 15, 2014, SEBI entered its order against the former executives of Satyam and found that the company had, among other things, "misreport[ed] financial performance, fabricat[ed] and manipulat[ed] … records[,] and deliberately convey[ed] a false picture of … finances to the investing public and concerned authorities."[329] SEBI required the former executives to disgorge their "wrongful gain."[330]

Because Satyam was listed not only on the Indian Stock Exchange, but also had issued ADRs in the United States, class actions were filed on behalf of the ADR purchasers in U.S. courts. While the consolidated securities class action litigation in the Southern District of New York resulted in

320 *Id.* § 37.

321 *See* Code Civ. Proc. § 83 (providing that "alien friends[] may sue in any Court otherwise competent to try the suit, as if they were citizens of India").

322 *Id.* § 245*(3)(i).*

323 *Id.* § 245*(3)(ii).*

324 Nat'l Company L. Tribunal R. 86(1) (2016).

325 *Id.* 86(3).

326 Tanvi Kini, *The Significance of Derivative Action in India: An Analysis of Section 245 of the Companies Act, 2013*, 2 L. Mantra 5, 6 (2015).

327 Satyam Comput. Servs. Ltd., WTM/RKA/SRO/64-68/2014 at 1-3 (Secs. and Exch. Bd. of India July 15, 2014).

328 *Id.* at 3.

329 *Id.* at 34.

330 *Id.* at 65.

Satyam ultimately settling for $125 million,[331] because securities class actions were a foreign concept in India, Indian shareholders had no vehicle to seek similar relief. Thus, "[i]t was partly to meet this anomaly (highlighted during the Satyam scam) that the Indian legislature decided to introduce [S]ection 245 [of the Companies Act.]"[332] With such a high-profile case and with recent developments to the law, new lawsuits in India in the ensuing years will certainly come to shape and mold the country's accommodation and approach to litigating securities class actions.

Key takeaways

As economies and businesses become more global, the securities litigation law around the world is rapidly changing. While the scope of the United States' territorial jurisdiction over non-U.S. securities and issuers after *Morrison* is still being developed, it is not surprising that shareholders have been finding alternative jurisdictions in which to bring their claims. Likewise, the law internationally is still being developed, or in some cases created, in competing jurisdictions with sometimes conflicting incentives and uncertain results.[333] Issuers should be aware of the globalization of securities litigation as jurisdictions confront such emerging trends in securities litigation around the world. Below are some key takeaways to help guide issuers in determining how the changes in global securities collective actions might affect their own businesses.

- In the United States, the law post-*Morrison* is still being developed. While *Morrison* has limited the number of foreign securities claims that can be brought, some courts have interpreted *Morrison* as allowing non-U.S. issuers to be sued in U.S courts after looking at the conduct of the issuer and structure of the security at issue.
- The Netherlands is seemingly on track to replace the pre-*Morrison* U.S. court system, giving availability to parties in F-cubed and other cross border securities class actions.
- Questions remain regarding the true enforceability of opt-out settlements, given that many EU countries have opt-in class structures. The differences between opt out and opt in among various countries create a problem where issues litigated in one jurisdiction may still not find global peace.
- U.S. securities litigation plaintiffs firms are at the forefront in forming the foundation of international investors bringing shareholder fraud actions.
- While the EU has offered guidance as to what features collective actions should have, the EU recommendation has not been entirely followed. Member states have been developing their collective actions organically and independently. Without some interference from the EU, the likelihood of a uniform procedure being developed there is slim.
- The law is not only developing in the EU, but in other locations as well, such as Canada, Australia and Asia. The legal, business, and cultural differences between the various countries, particularly when they do not share a common governing body such as the EU, is likely to result in even more different mechanisms for collective actions.
- Differences between the various countries' collective action proceedings are likely to result in certain jurisdictions being favored over others, resulting in these jurisdictions being ripe for forum shopping.
- Class or collective actions are becoming 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 is at risk of abuse.

331 *See* Oberoi, *supra* note 317, at 1; Notice of Filing of Stipulation and Agreement of Settlement with Def. Satyam Comp. Servs. Ltd., *In re Satyam Comp. Servs. Ltd. Sec. Litig.,* No. 1:09-md-02027-BSJ (S.D.N.Y. Feb. 16, 2011), ECF No. 252.

332 *Id.*

333 *See, e.g., supra* p. 20.

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