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Global Securities Litigation Trends

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Introduction

As companies rapidly expand globally and securities markets become increasingly interconnected, multinational companies must prepare for a new era of global securities litigation. As explained in "Developments in Global Securities Litigation," a white paper prepared by Dechert last year ("White Paper")1, this sea change is at the forefront of potential risks for multinational companies. The U.S. Supreme Court's 2010 decision in *Morrison v. National Australia Bank Ltd.* set the stage for the current legal landscape. *Morrison* extinguished access to U.S. courts for "F-cubed" cases (foreign investors, suing a foreign issuer, trading on foreign exchanges). But since its publication, lower courts have grappled with the scope of its holding and its effects on international law have been far reaching and substantial.

This post serves as an update to the above-mentioned White Paper addressing recent developments. In Part I, we describe recent developments in U.S. actions in a post-*Morrison* world, where courts continue to struggle with the application of *Morrison*. Part II reviews the more significant updates to shareholder rights' litigation in the European Union, Netherlands, Germany, Italy, Spain, Canada, Australia, and Japan. Finally, Part III summarizes key findings, observations, and trends of which issuers should be aware to understand and to best position themselves to actively defend against these developments around the world.

Post-*Morrison* U.S. landscape

In June 2010, the U.S. Supreme Court decided *Morrison v. National Australia Bank Ltd.*, a landmark ruling which narrowed the reach of key provisions of the Securities Exchange Act of 1934 ("Exchange Act") with respect to the purchase and sale of securities outside of the U.S. Under its two-pronged standard, the Court held that Section 10(b) of the Exchange Act applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." Post-*Morrison*, access to U.S. courts was extinguished for these "F-cubed" cases. Nonetheless, the impact of *Morrison* continues to evolve; in 2018, there were 54 class action filings against non-U.S. issuers in the U.S. This number comes at a time when securities suit filings remained at near record levels in 2018. Of the eighteen filings against Asian headquartered companies, fifteen were against companies headquartered in China. Moreover, of the eighteen filings against European companies, six were against firms headquartered in Ireland.

While some courts have evaluated securities litigation cases involving American Depositary Receipts ("ADRs") of non-U.S. companies without any analysis relating to *Morrison*, the post-*Morrison*landscape continues to evolve.

Specifically, in 2018, the Ninth Circuit issued a decision in *Stoyas v. Toshiba Corp*., which opened courtroom doors to U.S. securities litigation claims against foreign issuers based on third-party transactions in the U.S. In 2015, plaintiff Mark Stoyas filed the action in the U.S. District Court for the Central District of California on behalf of a putative class of plaintiffs that purchased, in over-the- counter ("OTC") transactions in the U.S., unsponsored ADRs referencing Toshiba stock listed in Japan. The district court dismissed the case on the grounds that the OTC market through which ADRs are sold was not a "national exchange" within the meaning of *Morrison*, and that the plaintiff had failed to identify any domestic transaction between ADR purchasers and Toshiba.

On July 17, 2018, the Ninth Circuit reversed and remanded the case so that the plaintiffs could have the opportunity to plead facts to establish that the securities laws applied regardless of the fact that the ADRs were unsponsored. First, the Ninth Circuit concluded that Toshiba's ADRs are "securities" under the Exchange Act. Next, the court held that the over-the-counter market on which Toshiba's ADRs trade is not an "exchange" under the Exchange Act. Citing *Morrison*, the court also concluded that an "amended complaint could almost certainly allege sufficient facts to establish that [the lead plaintiff] purchased [its] Toshiba ADRs in a domestic transaction." Indeed, the Ninth Circuit explained that the lead plaintiff purchased ADRs in the U.S.; the lead plaintiff is a U.S. entity, located in the U.S. and that coordinates activities in the U.S.; the OTC platform on which the ADRs were traded is located in the U.S.; and four Toshiba ADR depositary banks where ADR holders can exchange their ADRs for Toshiba common shares are in the U.S. As such, the Ninth Circuit ultimately determined that, under *Morrison*, Section 10(b) would apply to claims against Toshiba based on domestic transactions involving OTC purchases in the U.S. of unsponsored ADRs referencing Toshiba stock listed in Japan. The Ninth Circuit departed from Second Circuit case law and reached this decision, despite the fact that Toshiba had not created the ADRs or entered the U.S. securities market, and despite the fact that Toshiba's allegedly fraudulent conduct occurred in Japan, and Toshiba was being investigated by Japanese authorities.

A petition for writ of certiorari was filed on October 15, 2018, whereby the question presented was "whether the Exchange Act applies, without exception, whenever a claim is based on a domestic transaction, as the Ninth Circuit held below, or whether in certain circumstances the Exchange Act does not apply, despite the claim being based on a domestic transaction, because other aspects of the claim make it impermissibly extraterritorial, as the Second Circuit has held." Amicus briefs, advocating for not only Supreme Court review, but also reversal of the Ninth Circuit decision were submitted, and included entities such as the U.S. Chamber of Commerce; Ministry of Economy, Trade and Industry of Japan; the Government of the United Kingdom of Great Britain and Northern Ireland; and European issuers Économiesuisse, International Chamber of Commerce Switzerland and Association Française des Entreprises Privées, showing the importance of this closely-watched matter. However, in May 2019, the United States filed an amicus brief, arguing, among other things, that U.S. Supreme Court review should be denied because the purchases of ADRs in the United States were "undisputedly 'domestic transactions'" and that Toshiba's involvement or non- involvement in the unsponsored ADRs has no bearing on extraterritoriality analysis. Ultimately, the Supreme Court declined to review the action. Thus, the fate of the reach of exposure for multinational companies remains uncertain across jurisdictions.

While courts continue to struggle with the application of *Morrison* at various stages of litigation (including, as discussed below, at the class certification phase), non-U.S. companies may also be subject to litigation that could result in significant settlements. In particular, in 2018 significant settlements were reached in two cases, Petrobras investors—which had applied *Morrison* at earlier points in the litigation. In *In re Petrobras Securities Litigation*, the Second Circuit opened a new chapter in *Morrison* jurisprudence, clarifying class certification requirements. By way of background, Petrobras is an oil and gas company whose operations are centered in Brazil. It has ADRs listed on the New York Stock Exchange ("NYSE"). Amidst the wake of an investigation involving a multi-year, multi-billion dollar bid-rigging and kickback scheme, Petrobras delayed issuing financial statements, causing the prices of certain of its securities to fall. In October 2015, plaintiffs moved to certify two broad classes of Petrobras investors—an Exchange Act class and a Securities Act class—covering anyone who purchased Petrobras securities in "domestic transactions." In addressing an issue of first impression, on July 7, 2017, the Second Circuit affirmed in part and vacated in part the district court's decision to grant the plaintiffs' class certification motion. The Second Circuit held in part that the District Court "committed legal error by finding that Rule 23(b)(3)'s predominance requirement was satisfied without considering the need for individual *Morrison* inquiries regarding domestic transactions." The Second Circuit therefore vacated the predominance portion of the certification order and remanded the case to the District Court for consideration of that issue. A petition for writ of certiorari was filed in November 2017, urging the Supreme Court to take up the matter because the "rulings in this case [would] have a significant impact on the global financial markets, the ability of issuers to utilize those markets, and the due process rights of both plaintiffs and defendants in federal class actions." Instead of continuing to litigate the matter, on June 28, 2018, the District Court granted final approval of a US$3 billion settlement.

In *In re Volkswagen*, pending in the U.S. District Court for the Northern District of California, the court held that the U.S. securities laws did apply to OTC transactions in the U.S. of Volkswagen's sponsored ADRs. The plaintiffs represented a putative class of all persons who purchased Volkswagen-sponsored Level 1 ADRs on an OTC market in the U.S. On January 4, 2017, the court entered an order granting in part and denying in part the defendants' motions to dismiss the first consolidated complaint.

The court began by finding that the OTC market on which the Volkswagen ADRs trade is not a "domestic exchange." The court, however, explained that Volkswagen could nonetheless be sued for a violation of Section 10(b) because it took "affirmative steps to make its securities available to investors here in the United States." For example, the Deposit Agreements creating the ADRs were entered into between Volkswagen and J.P. Morgan of New York and provide specifically that the Agreements and the ADRs are governed by New York law. Volkswagen submitted Form F-6 Registration Statements to make the ADRs available in the U.S. The ADRs were and are offered to domestic investors on an OTC market located in the U.S., and the plaintiffs purchased the ADRs in the U.S. The court thus denied the defendants' motion to dismiss in part on the ground that applying Section 10(b) is "not an impermissible extraterritorial application" of the Securities Exchange Act as prohibited by *Morrison*. Later that year, after filing an amended complaint which was also granted in part and denied in part, discovery commenced. On May 10, 2019, the court approved a US$48 million settlement to be paid on behalf of all of the defendants for the benefit of those who purchased or acquired certain Volkswagen-sponsored ADRs.

As courts continue to struggle with the application of *Morrison*, non-U.S. companies face continued uncertainty regarding whether they will be subject to potential liability under the U.S. securities laws. Accordingly, cases involving non-U.S. companies that have survived dismissal may result in significant settlements in the U.S.

Securities litigation goes global

European Union

The EU has recently experienced a rapid proliferation of collective actions. Most EU member states now have some form of collective action, and the trend is to make it easier for parties to sue collectively. Starting in 2013, the EU's European Commission (the "Commission") published the Collective Redress Recommendation ("EU Recommendation"), which recommended to member states two common collective redress mechanisms. The first mechanism is known as a group action, whereby individuals who have suffered the same harm collectively bring and jointly manage their claims. The second mechanism is the representative action, similar to France's *actions en representation conjointe*, whereby qualified institutions are granted permission to bring cases on behalf of third parties.

On January 25, 2018, the Commission published its Report on the Implementation of the EU 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.

In response, the EU launched its draft directive called the "New Deal for Consumers" on April 11, 2018. This directive is a follow-on to the EU Recommendation and carves out additional collective action redress mechanisms for consumers. While it provides a general framework for collective injunctions and redress, it preserves member state autonomy relating to key features, such as whether to use opt-in or opt-out systems. It also significantly expands the range of cases for which collective redress is available and allows a qualified entity to bring a representative action not only for injunctions but also for a redress that may include the recovery of monetary compensation. Although these measures are directed at actions by consumers, the directive could have wide-reaching effects on member states' practices relating to investor class actions. The draft directive on better enforcement and modernization was provisionally agreed to by the European Parliament and the Council in April 2019. While the final adoption of the provisional agreement is expected in Fall 2019, work on the representative actions proposals continues in the European Parliament and Council.

In the meantime, differences between the various EU countries' collective action proceedings continue to be a risk for issuers, as enterprising plaintiffs have the opportunity to engage in forum shopping. Moreover, the potential for large payouts and access to third-party litigation funders provides the incentive for shareholders to pursue more claims. As more member states adopt differing collective redress mechanisms, and the size of claims continues to grow, issuers should continue to be aware of potential forum shopping and monitor new procedures and legislation.

Netherlands

The Netherlands is the EU member state at the forefront of this sea change in securities litigation as globally watched cases showcase the venue's popularity. As explained in the White Paper, this popularity has increased because of the Netherlands' procedures for court-approved, opt-out class settlements. Courts in the Netherlands have used a class settlement procedure, known as Wet Collectieve Afhandeling Massaschade, or WCAM, to create legally binding multinational settlements of class actions alleging securities fraud. Therefore, the Netherlands has become an attractive forum, both for plaintiffs seeking relief on behalf of a worldwide class and defendants seeking a binding opt-out resolution of claims involving worldwide investors.

Fortis Settlement

In 2016, a closely-watched set of claims dating back to the 2008 global financial crisis 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, and in 2018, the settlement was approved by the Amsterdam Court of Appeals. 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 "bail out" by Belgium, the Netherlands, and Luxembourg to prevent its collapse.

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

The 2016 settlement agreement includes the Dutch shareholder foundations and the separate Belgium proceeding. Ageas agreed to pay a global amount of €1.204 billion (US$1.3 billion) to shareholders covered by the settlement without admitting any wrongdoing. After facing a number of objections which led to an amended settlement, the Amsterdam Court of Appeals approved the €1.3 billion settlement on July 13, 2018. The principal objections related to the division of the settlement proceeds between active and inactive shareholder claimants and attorneys' fee recoveries. The court ultimately approved settlement terms that awarded active and inactive shareholder claimants the same base damages. This, shareholder attorneys argued, could serve to dis-incentivize institutional investors from joining the stichting at all because there is no reward for the effort and cost of bringing the claims in the first place, creating a free rider problem. Indeed, as the largest shareholder collective action settlement ever outside the U.S., this settlement's sheer size is unprecedented and represents the magnitude of liability exposure for issuers.

Collective Actions

As explained in the White Paper, collective actions in the Netherlands are governed by Article 3:305a BW of the Dutch Civil Code (*Burgerlijk Wetboek*). 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.

Currently, collective actions may only seek declaratory or injunctive relief, not money damages. On November 16, 2016, the Minister of Security and Justice submitted a bill introducing a collective damages action to the lower house of Dutch Parliament, seeking to remove the restriction on monetary damages in collective actions. The proposed bill includes a jurisdictional test and proposes that a collective action for damages must be sufficiently connected to the Netherlands. On January 29, 2019, the Dutch Parliament's lower house adopted the bill. On March 19, 2019, the Dutch Senate finally approved the legislation, which is expected to go into effect in July 2019.

With the potential for money damages and other provisions aimed at making the collective action mechanism more efficient and effective, the proposed new opt-out regime would undoubtedly attract even more claimants, some with potentially attenuated ties to the Netherlands. In an effort to protect against this type of forum shopping, the bill contains proposed revisions related to standing. Specifically, "a claim vehicle" can only bring a collective action if the legal claim has a "sufficiently close relationship with the Netherlands." A claimant can demonstrate a "sufficiently close relationship" if "1) the majority of persons whose interests the legal action aims to protect have their habitual residence in the Netherlands; or 2) the party against whom the legal action is directed is domiciled in the Netherlands and additional circumstances suggest a sufficient relationship with the Netherlands; or 3) the event to which the legal action relates took place in the Netherlands. If the claim is not sufficiently related, the claim vehicle has no standing."

Volkswagen collective action

In addition to the Volkswagen litigation pending in the U.S., as described in the White Paper, a group of investors brought claims against Volkswagen using the Dutch collective settlement procedures in 2016. The claims arose out of the "disclosure that Volkswagen installed devices to circumvent mandatory emissions regulations for its diesel engines." The Volkswagen Investor Settlement Foundation has filed an action now pending in the Amsterdam district court requesting that the court declare Dutch Volkswagen car owners eligible to return the affected vehicles. As is noted above, the procedural mechanism for money damages in collective actions is currently in flux. Thus, the plaintiffs currently seek a declaratory judgment authorizing Dutch car owners to return the impacted vehicles to Dutch Volkswagen dealers for a full refund of the purchase price. The suit will take place in three phases. First, the court will address the question of whether it has jurisdiction to adjudicate the suit. Second, the court will investigate the parties' claims and gather facts. Finally, it will evaluate the foundation's claims and Volkswagen's defenses on the merits. On November 6, 2018, the pre-trial review took place, which split up the process into three phases.

Because the former board members of Volkwagen objected to the jurisdiction of the District of Amsterdam, the Foundation decided to remove the former directors from the current proceedings. The second phase then proceeded, whereby the Court will raise a number of formal questions

after which it will examine the content of the claim in phase three. An oral pleading will be held in October 2019.

United Kingdom

The United Kingdom is currently one of the preferred jurisdictions for collective action proceedings. As explained in depth in the White Paper, there are currently three procedures in the UK that provide claimants the ability to pursue collective securities litigation actions: joinder and consolidation (similar to the same proceedings in the U.S.), Group Litigation Orders ("GLOs"), and representative actions.

The UK's Financial Services and Markets Act ("FSMA") contains claims that resemble Sections 11 and 12(a)(2) of the Securities Act and Section 10(b) of the Exchange Act. Similar to Sections 11 and 12(a) of the Securities Act, which govern liability for material misstatements and omissions in a company's registration statement or prospectus, 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. And similar to Section 10(b) of the Exchange Act, a provision regulating allegedly fraudulent material misrepresentations and omissions in public filings by issuers, 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 publishing the information.

As explained in the White Paper, shareholders of two large English companies, Royal Bank of Scotland and Tesco, brought collective FSMA actions that were granted GLO status. These claims—most of which have been settled—involve anywhere from hundreds to tens of thousands of litigants seeking redress in millions or even billions of pounds. A few claims remain pending due to complications in distributing the settlement funds. Overall, these cases have set the stage for investor collective actions in the UK, perhaps signaling that collective securities litigation actions will become more commonplace in the future.

Mastercard case

Although not an investor class action, the recent Mastercard case is significant because it is the largest collective action claim filed in the UK's history and has the potential to influence other types of collective actions and damage awards in the UK, including those brought by investors. In 2016, a £14 billion damages claim—the first ever to be filed under the Consumer Rights Act on behalf of all UK consumers—was filed at the Competition Appeal Tribunal (CAT) in London. The claim arose out of Mastercard's alleged improper card fees imposed on businesses that accepted Mastercard debit and credit cards in the EU. The case alleges that these fees translated to higher prices for consumers. In July 2017, the court dismissed the case under Section 47B(6) of CA 1998, the Competition Act, finding that the claims were not suitable for resolution under the collective proceeding framework because there were several issues not common to all members of the potential class. In April 2019, in a landmark unanimous judgment, the Court of Appeal decided that the CAT erred in rejecting certification of the class action against MasterCard, arguably lowering the initial certification hurdle. As a result, the CAT will now reconsider whether to certify the class and the claims worth billions of pounds may potentially be recovered.

Germany

Germany is another jurisdiction that illustrates some of the complexity and uncertainty issuers face in the developing world of collective actions. As explained in the White Paper, 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. 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.

As described in the White Paper, more than 1,400 lawsuits relating to the Volkswagen case were filed under the KapMuG in the Regional Court of Braunschweig, where they were ultimately transferred to the Higher Regional Court of Braunschweig. The claims arose out of a sharp decline in Volkswagen's stock price following its admission in 2015 that it had used software to manipulate emissions data in an effort to circumvent environmental regulations. In June 2018, the Higher Regional Court of Braunschweig ruled that the suit will also include Porsche SE, which controls fifty-two percent of Volkswagen's voting stock, giving investors another chance to submit further claims and further underscoring the expansive reach of this global action.

On September 10, 2018, the Volkswagen trial began. To succeed, plaintiffs must show that Volkswagen's public disclosures regarding the manipulative software were inadequate or untimely and that senior management deliberately concealed this information. Investors are suing for more than €9 billion. Although a decision is expected in 2019, a judgment has not yet been handed down—and given that the only other comparable model case in Germany involving a similar number of claimants took twelve years to reach a resolution, the case may not be resolved anytime soon.

Italy

Italy is another jurisdiction that was reluctant to embrace a class action procedure, but has since amended its laws to permit more class action claims. As explained in the White Paper, Italy adopted a class action system (*azione di classe*) in Article 140-bis of the Italian Consumer Code, effective January 1, 2010. The law used to require that the class members all seek to protect "identical" rights, but was amended in 2012 to lower the threshold and require only that claims be "homogenous." The Senate is considering an additional amendment to Article 140, which is the statutory basis for collective actions in Italy. The proposed bill would add a new section to the Italian Civil Procedure Code providing clear requirements for each phase of the class action. As of the date of this article, the bill is still under consideration in the Italian Parliament's Senate committee.

Regarding significant collective action litigation pending in Italy, in 2015, Italian investors brought a securities collective action against Italian oil and gas contractor Saipem S.p.A. ("Saipem") accusing it of failing to adequately disclose its financial condition, which led to a substantial drop in its stock value. The class consists of 64 institutional investors. The statute of limitations for claims arising out of the alleged activities expired in December 2017. On November 9, 2018, the Court of Milan dismissed the case for failure to demonstrate ownership of Saipem shares during the class period. The court ordered plaintiffs to pay €100,000 in legal expenses to Saipem.

Given the current obstacles and risks associated with bringing class actions in Italy, the country will likely continue to lag behind other European nations in sheer numbers of class action suits until Italian law develops further and becomes more accommodating to litigants pursuing collective actions.

Spain

Spain does not have a specific procedure governing collective actions. Instead, Spain regulates what are known as "group claims." As discussed in the White Paper, "collective interest actions" constitute one such type of group claim. Specifically, 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.

In November 2018, several amendments were approved to the Spanish Securities Market Act. They included a clarification of the concept of "inside information," defined as "information . . . which has not been made public . . . and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments." Similarly, it clarified the meaning of "relevant information" to be "the remaining information . . . that any legal or regulatory provision obliges them to make public in Spain or that they consider necessary, due to their specific interest, to disseminate among investors." Issuers are permitted to delay the publication of insider information if they meet certain criteria and provide a written explanation for the delay to the National Securities Market Commission ("CNMV"). Issuers are relieved of that obligation if they disclose the delay itself to the CNMV. Finally, the amendments increased the threshold at which managers must disclose their transactions concerning shares or debt instruments of the issuer from 5,000 euros to 20,000 euros.

Canada

Unlike the U.S., Canada's securities regulation is decentralized such that each of Canada's thirteen jurisdictions have established laws and agencies that govern the purchase and sale of Canadian securities. Each province or territory has its own securities commission or regulator and has approved its own provincial or territorial securities legislation (collectively, "the provincial acts"). Each jurisdiction also exercises independent authority over the rules of civil procedure governing class actions within its region.

Recent trends

The decentralized nature of Canada's provincial securities system poses significant challenges for parties in securities class actions. Given these challenges, many have called for a national securities system in Canada. Currently, the Canadian government is working towards establishing a national securities regulatory system to better protect investors and more effectively regulate the securities market. In November 2018, Canada made an important step towards centralization when the Supreme Court ruled that an inter-provincial, cooperative system— entered into by the governments of Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island and Yukon—was constitutional. The Court held that both the proposed model and draft legislation were constitutional, and as a result, this holding could open

the door for all of the provincial and territorial governments, as well as the Canadian federal government, to coordinate to implement a unified approach to securities regulation.

While Canada works toward a national securities regulatory system, securities class actions in the country have lagged. Only eight new securities class actions were filed in Canada in 2018, one more than in 2017 and one fewer than in 2016. This is the fourth year in a row where the number of new cases filed has fallen below the average of nine new cases filed between 2008 and 2014.

Of the eight Canadian securities cases filed in 2018, five included parallel class actions filed in the U.S. This is largely consistent with recent trends, where approximately half of cases filed in Canada between 2011 and 2017 involved a parallel U.S. action.

In the wake of *Morrison*, Canada emerged as a contender to serve as the preferred forum for international securities litigation; however, a 2018 decision by the Court of Appeals of Ontario, where the majority of Canadian securities suits are filed, expressly rejected that possibility. This case involved a shareholder who purchased securities—on a Hong Kong stock exchange using a Hong Kong bank account—using a computer located in Canada. The Court of Appeals affirmed that "HSBC Holdings is not a responsible issuer under the Securities Act because it has no real and substantial connection to Ontario." In doing so, the Court confirmed that Ontario would not "become the default jurisdiction for issuers around the world whose securities were purchased by residents of Ontario."

Australia

Australia has recognized the concept of collective proceedings for decades. Only recently, however, has the country permitted third-party funding. With this change, Australia has seen an increase in the number of class action filings.

As discussed in the White Paper, the recent addition of third-party litigation funding has had a number of effects on how proceedings under Part IVA of the Federal Court of Australia Act 1976, which governs representative proceedings, are conducted, particularly regarding the availability of "opt-in" provisions for funded claims. 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. In doing so, firms were 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 investors who had joined the litigation funding agreement.

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 did not sign a litigation funding agreement. The purpose was to encourage litigants to proceed with an "open class" approach, however, it instead appears to have encouraged competing class actions, without the same consolidation procedures as the U.S. In other words, a defendant could have to defend itself in multiple proceedings, and may face potential liability for multiple or overlapping recoveries. This problem materialized in early 2018, when three separate class action lawsuits were filed against a single company, GetSwift Limited. In its November 2018

judgment dealing with the multiplicity issue, the Federal Court upheld a permanent stay on two of the proceedings, allowing only one to go forward.

The Australian Law Reform Commission (ALRC) recently published a Final Report with recommendations to reform certain class action proceedings, including the issue of competing class actions, third-party litigation funding, and issues surrounding settlement approval, all of which may impact shareholder litigation in the future.

Japan

In late 2016, Japan first implemented a formal collective action procedure; thus, few collective actions have been filed to date. As explained in the White Paper, although it adopted a somewhat conservative collective action mechanism, its recent legislative changes reflect the global trend of easing restrictions to allow shareholders to bring claims for securities fraud.

Because Japan's securities class action mechanisms are relatively new, only a few cases have been litigated under the recently-adopted system. One of the largest suits to watch involves Toshiba Corp. In addition to the Toshiba litigation pending in the U.S. and discussed above, a group of 45 investors, including global institutional investors like Allianz Global Investors, sued the company in a Tokyo court in October 2016, alleging 16.7 billion yen (US$162.3 million) in damages arising from a 2015 accounting scandal. 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. The Toshiba litigation is still pending in Japan.

Key takeaways

As economies and businesses become more global, securities litigation law around the world is rapidly changing. While the scope of jurisdiction in the U.S. over non-U.S. securities and issuers after *Morrison* is still being developed, shareholders continue to find alternative jurisdictions in which to bring their claims. Below are some key recent takeaways to help guide issuers in determining how the changes in global securities collective actions might affect their own businesses:

- In the U.S., the law post-*Morrison* is still being developed. With the petition for writ of certiorari denied in the *Toshiba* matter, the reach of exposure for multinational companies remains uncertain across jurisdictions.
- The Netherlands continues to be on track to replace the pre-*Morrison* S. court system, giving availability to F-cubed and other cross board securities class actions. With the potential for money damages and other provisions aimed at making the collective action mechanism more efficient and effective, the proposed new opt-out regime would undoubtedly attract even more claimants to the Netherlands. However, Dutch courts still require a sufficient connection between the jurisdiction and the alleged harm.
- Questions remain regarding the true enforceability of opt-out settlements, given that many EU countries have opt-in class structures. The continued differences between opt-out and opt-in structures among various countries create a problem where issues litigated in one jurisdiction may still not be resolved elsewhere, thus preventing the issuer from obtaining global peace.

- S. securities litigation plaintiffs' firms continue to be at the forefront in forming the foundations of international investors bringing shareholder actions in non-U.S. jurisdictions.
- While the EU has offered guidance as to what features countries should consider and adopt when constructing procedural systems governing collective actions, the EU recommendations are not enforced and are not followed in their entirety. Member states are continuing to develop their procedures governing collective actions organically and independently. The proposed New Deal for Consumers brings the possibility of seeking monetary damages through collective actions, but because it applies to consumer class actions only, it is unclear whether this will impact investor suits even if it becomes a binding directive. Moreover, the New Deal preserves the discretion of member states to adopt their own procedural mechanisms, such as whether to use an opt-in or opt-out process, and thus is unlikely to increase uniformity among member states.
- The law is not only continuing to develop in the EU, but in other locations as well, such as Canada, Australia and Asia. It will be interesting to watch as Canada continues to take steps towards centralization of its securities regime, and to witness Australia's reforms to its collective action procedures, including attempting to reduce instances of competing actions.
- Differences between the various countries' collective action proceedings are still likely to result in certain jurisdictions being favored over others, increasing the potential for forum shopping.
- Class or collective actions continue to be more prolific in light of third party litigation funders around the world. The potential for large payouts for third party litigation funders has provided them the incentive to grant shareholders the capital to pursue more claims. Without proper restrictions on how much control third party funders may have over the conduct of the litigation, the practice continues to be susceptible to abuse.
- Legal and compliance departments need to be aware that their companies may face substantial liability not just in their home jurisdictions, but also abroad, and keep abreast of these emerging trends throughout the world.

The complete publication, including footnotes, is available here.