Securities Litigation

Contributing editors

Antony Ryan and Philippe Z Selendy

2019

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Securities Litigation 2019

Contributing editors

Antony Ryan

Cravath, Swaine & Moore LLP

Philippe Z Selendy

Selendy & Gay PLLC

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2019
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2015
Fifth edition
ISBN 978-1-83862-091-2

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Global overview 5

Antony Ryan
Cravath, Swaine & Moore LLP

Philippe Z Selendy and Sean P Baldwin
Selendy & Gay PLLC

Canada 7

Alexander D Rose and Sinziana R Hennig
Stikeman Elliott LLP

England & Wales 15

Keith Thomas and Laura Jenkins
Stewarts

Germany 21

Burkhard Schneider
Clifford Chance Deutschland LLP

Greece 26

Nicholas Moussas,Maria Malikouti, Konstantina Theodosaki, Georgia Patsoudi and Stamatia Leontara
Moussas & Partners Attorneys At Law

India 31

Arindam Ghosh and Moin Ladha
Khaitan & Co

Ireland 38

Paul Gallagher and Ellen Gleeson
Law Library of Ireland

Korea 44

Jin Yeong Chung and Cheolhee Park
Kim & Chang

Nigeria 48

Anthony Idigbe and Tobenna Nnamani
Punuka Attorneys & Solicitors

Switzerland 53

Harold Frey, Patrick Schleiffer and Patrick Schärli
Lenz & Staehelin

United States 58

Antony Ryan
Cravath, Swaine & Moore LLP

Philippe Z Selendy and Sean P Baldwin
Selendy & Gay PLLC

Preface

Securities Litigation 2019

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Securities Litigation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Greece, Korea and Nigeria.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Antony Ryan of Cravath, Swaine & Moore LLP and Philippe Selendy of Selendy & Gay PLLC for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
February 2019

Global overview

Antony Ryan Cravath, Swaine & Moore LLP

Philippe Z Selendy and Sean P Baldwin Selendy & Gay PLLC

This fifth edition of *Getting the Deal Through: Securities Litigation* is a practitioner's guide to how securities litigation is conducted across the world, and the unique strategies and important differences that litigating securities cases presents in 10 jurisdictions. In an increasingly globalised securities landscape, understanding how securities claims are resolved around the world is critical to ensuring proper handling of securities issues. We hope that the fifth edition of *Securities Litigation* can be a useful guide to the important and challenging aspects of securities litigation around the world.

Global securities markets

Modern investors and companies have numerous choices when they choose to invest or raise capital. Whereas, at one time, investors and companies seeking to enter securities markets were limited to a few national exchanges, modern markets now give easy access to exchanges and private transactions across the globe. According to the World Federation of Exchanges, by August 2018, the total market capitalisation for equity securities was approximately US$85.9 trillion, of which US$38.2 trillion was in the Americas, US$29 trillion in the Asia–Pacific region and US$18.7 trillion in Europe, Africa and the Middle East.

The ease with which securities can be bought and sold transnationally has increased both cross-border enforcement cooperation and disputes involving multiple countries.

Private securities litigation

The United States has had a robust system of private securities litigation for many decades. Private rights of action for certain kinds of securities-law violations have existed under federal law since the early 1930s, and under state law for even longer. Two developments came together by the early 1970s, however, and created American private securities litigation as it largely still exists today. First, in 1966, the rules of civil procedure used in federal courts were amended to add the opt-out damages class action. Under Rule 23(b)(3) of the Federal Rules of Civil Procedure, a court may certify a plaintiff class if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and a subsequent settlement or judgment in the class action will be binding on absent class members unless, upon notice, they exclude themselves from the class. Second, in 1971, the United States Supreme Court, following the lead of a number of lower courts in previous cases, recognised an implied private right of action under Rule 10b-5 of the Securities and Exchange Commission (SEC), a rule broadly prohibiting fraud in connection with the purchase or sale of securities (see *Superintendent of Ins v Bankers Life & Cas Co*, 404 US 6 (1971)). This decision permitted private actions under Rule 10b-5 by plaintiffs who had lost money on investments, in addition to enforcement actions by the SEC. In the following years, the Supreme Court issued a series of opinions defining the scope of private securities litigation, which led to a significant increase in the scale and number of new cases. This development culminated in the recognition of the 'fraud on the market' presumption, which allows plaintiffs to rely on the market price of a security without needing to show that they received and relied upon the alleged misrepresentations at issue (see *Basic, Inc v Levinson*, 485 US 224 (1985)).

American private securities litigation has been the subject of considerable criticism from some observers in the United States. For example, the Paulson Committee (established by the then-Secretary of the Treasury) wrote in its report that 'the potential deterrent function of private securities litigation is debatable because virtually all the costs fall on the corporation and its insurer, which means they are ultimately borne by the shareholders' (Interim Report of the Committee on Capital Markets Regulation 78, 30 November 2006). Consistent with these criticisms, both Congress and the Supreme Court have acted since the 1990s to cut back somewhat the scope of private securities litigation. Most notably, in 1995 Congress passed the Private Securities Litigation Reform Act, which sought to deter 'strike suits' by making it more difficult to plead private securities actions under Rule 10b-5. Notwithstanding these reforms, private securities litigation remains active in the United States, with more than 400 new securities class actions filed in 2017, and hundreds of private actions brought by individuals.

For decades, no other country had systems of private securities litigation comparable to the United States. In recent years, however, many countries have begun to move toward more vibrant systems of private securities litigation, sometimes borrowing elements from US law and at other times striking out in new directions. These developments have taken place in both common and civil law jurisdictions. For example, among common law jurisdictions, the Canadian province of Ontario has permitted opt-out class actions since 1992. In 2005, Ontario amended its Securities Act to permit shareholders to bring private rights of action for misrepresentations in the secondary market. As a result, many significant private class actions have been brought in Canadian courts over the past decade. Similarly, Australia permits opt-out class actions and provides a private statutory remedy for misleading disclosures in the secondary market. The first Australian securities class action, *King v GIO Australia Holdings Ltd* (2000) 100 FCR 209, was brought in 1999, and a number of such actions are now brought in Australia each year, assisted by the rise of litigation funding arrangements.

Other common law jurisdictions, in contrast, have moved more slowly. The United Kingdom has had statutory prospectus liability since 1890, the modern version of which is section 90 of the Financial Services and Markets Act 2000 (FSMA). While the UK recently enacted a provision for secondary-market liability (FSMA, section 90A), relatively few cases have been brought under either statutory provision. The comparatively low level of securities litigation may be due to the limitations in English courts on group litigation; initial attempts at 'collective procedure orders' in England have not succeeded. Likewise, Ireland has a statutory provision for prospectus liability, but not for secondary market disclosure, and has limitations on group proceedings.

Even in civil law jurisdictions, however, securities litigation has grown. For example, Germany enacted the Capital Investors' Model Proceeding Law (KapMuG) in 2005, and adopted important amendments in 2012. The KapMuG allows securities plaintiffs with similar claims to submit one claim to a model proceeding, which determines common questions of fact and law. The KapMuG has been used, for example, in a high-profile set of cases against Deutsche Telekom. Germany has also been considering the introduction of a collective redress model. Likewise, Italy has enacted a number of statutes providing for investor claims for misconduct in the capital markets, and now recognises opt-in class actions for damages. Spain also recognises opt-in class actions for damages in certain cases, including securities cases. While major European countries, such as France, have not yet provided for securities class actions, laws of this kind are likely to be enacted across Europe as the European Union continues to make collective redress a focus.

Israel is another country that has adopted a robust regime for private securities litigation. As a result of a securities law that provides a private remedy for misleading statements or omissions in both prospectuses and periodic reports, and an opt-out class action law enacted in 2006, Israel has seen a rapid increase in securities litigation.

South Korea also adopted a securities class-action law in 2005. The law allows shareholders to file as an opt-out class for manipulation of price or false disclosure. China and certain other East Asian countries have also adopted various forms of private securities litigation, and litigation in these countries may be one of the more important growth areas globally.

Transnational securities litigation

Recent changes to American law have significantly limited American courts' ability to hear securities claims concerning securities issued by multinational companies that are not traded on American exchanges. In 2010, the United States Supreme Court held that section 10(b) of the Securities Exchange Act does not apply extraterritorially, and instead applies only to transactions in securities listed on an American exchange and transactions in the United States in other securities (*Morrison v Nat'l Australia Bank Ltd*, 561 US 247 (2010)). This has had a significant impact on transnational cases (eg, *In re Vivendi Universal, SA Sec Litig*, 838 F3d 223 (2d Cir 2016)), where, pursuant to *Morrison*, the court affirmed the dismissal of claims associated with the vast majority of the securities at issue (Vivendi common stock traded on the Paris Bourse).

The narrowing of the international reach of American securities law is unlikely to shrink the number or size of securities claims brought globally. Rather, the more likely effect will be that securities claims will shift to a more diversified mix of global forums. Indeed, this process has already begun. For example, following a federal district court's dismissal of a private securities action against a large Belgian/Dutch bank, a substantially similar claim was brought in a Dutch court (see *Copeland v Fortis*, 685 F Supp 2d 498 (SDNY 2010); Writ of Summons, Stichting Investor Claim Against Fortis/Ageas NV (Utrecht, 7 July 2011)).

In recent years, courts in a number of countries outside the United States have been called upon to adjudicate securities claims involving very large sums of money. Some of the largest transnational cases have been resolved in the Netherlands, under a unique set of procedures for class settlements set out in the Collective Settlements Act. In 2009, the Amsterdam Court of Appeals approved a multi-million-dollar settlement in a securities case against Royal Dutch Shell, followed in 2010 by court-approved settlements of actions against Ahold and Converium. The Royal Dutch Shell settlement was facilitated by the ruling of a federal court in the United States that it did not have jurisdiction over the claims of non-US investors. In July 2018, the Amsterdam Court of Appeals approved the largest settlement in the Netherlands to date, a €1.3 billion settlement of claims against Fortis, which had been dismissed in the US in 2010. Similarly, in 2009, the Superior Court of Ontario authorised the formation of a worldwide class in litigation against IMAX Corporation. As the IMAX action progressed toward settlement, the Ontario courts issued important decisions on how to handle parallel actions in Canada and the United States.

The globalisation of securities litigation is likely to continue as American courts implement the *Morrison* decision, and plaintiffs and courts around the world grow more familiar with bringing and adjudicating securities law claims. Increasingly, plaintiffs will realise they may have a choice as to where to bring their securities claims, and defendants will be faced with multiple, sometimes conflicting, securities actions in different countries. Courts have already begun to address transnational conflicts in securities litigation, and such conflicts will only become more common. Counsel for both plaintiffs and defendants will need to develop global strategies for the effective litigation of transnational securities cases.

Strengthened securities laws

In response to the recent financial crisis, many jurisdictions have enacted or are considering stronger securities laws.

In 2012, the United Kingdom retooled its securities enforcement scheme by splitting the Financial Services Authority into the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA). The PRA focuses on the supervision of large banking, insurance and investment firms, while the FCA focuses on consumer protection and market integrity. One of the goals of the split was to ensure that regulators remained focused on protecting the integrity of the market. Conversely, the fallout from the UK's exit from the European Union may make unavailable to UK plaintiffs certain expedited proceedings and additional remedies under European Union law for securities actions.

Likewise, the European Union has added a new regulatory body. The European Securities and Markets Authority, created in 2011, aims to harmonise the enforcement of European securities law. The Authority has also played a critical role in regulating credit rating agencies. India's Companies Act 2013 created a cause of action for reliance on a false or misleading prospectus and established the National Company Law Tribunal to hear securities class actions and other corporate governance matters. In August 2017, the Security and Exchange Board of India asked stock exchanges to stop trading in over 300 companies suspected of being shell corporations. Ireland's Companies Act 2014 also established a cause of action for detrimental reliance on false statements in a prospectus. In 2017, Japan introduced the Fair Disclosure Rules, which took effect in 2018 and subject prospectuses to agency oversight.

The United States also responded to the financial crisis by passing the Dodd–Frank Act, which made significant changes to the American regulatory regime. The Act also granted the Securities and Exchange Commission more powers. For example, section 929P(b) of the Dodd-Frank Act extended the jurisdictional reach of American anti-fraud provisions to transactions occurring outside the United States that cause an effect in the United States. The application of this statute is uncertain, but it may in effect overrule the *Morrison* case for enforcement actions brought by the SEC, but not for private actions by investors. While currently still in effect, the future of Dodd–Frank is uncertain as the US Congress looks to scale back a number of Dodd–Frank's financial regulations. Additionally, a record number of merger-objection cases were filed in US federal courts in 2016, potentially signalling a shift away from Delaware as the forum of choice for merger-related litigation and toward federal securities law remedies in federal court.

The full effect of new regulatory efforts has yet to be seen. However, a renewed global focus on securities regulation will undoubtedly change the securities litigation landscape in the years to come.

Cravath, Swaine & Moore llp

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

ISBN 978-1-83862-091-2