Original Article

F[3]: Securities class actions around the world after *Morrison*

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Report prepared jointly by the International Institutional Tort Recovery Association (IITRA) and Institutional Protection Services Ltd (IPS).

ABSTRACT **Institutional investors globally are increasingly recognising the need to monitor and respond to the now many different securities class action and group investor action systems around the world, to recoup investment losses arising from corporate (or adviser) non-disclosure, misrepresentation or fraud. Securities class actions started in the United States, still in volume terms the main home of class actions, but have spread quite rapidly to other jurisdictions around the world. The US Supreme Court's *Morrison* decision in 2010 that sought to exclude so-called 'foreign-cubed' investors from US cases has accelerated the export of the class action style process to other jurisdictions and increased shareholder class action activity outside the United States. Whereas the US class action process is somewhat familiar (at least to some investors), the variety of processes outside the United States is less well known and the landscape continues to change rapidly. This article looks at some of the selected non-US jurisdictions to give a brief introduction to the new evolving global class action landscape.**

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INTRODUCTION

Background

The BP oil platform disaster in 2010, the Royal Bank of Scotland recapitalisation, the collapse of Lehman Brothers in 2008 and other major failures sparked a renewal of concern by institutional investors around the world about the proper management of companies they had invested in. In particular, institutions have been exploring the remedies available to recover at least part of sometimes significant losses – and especially the remedies available through securities class action lawsuits, initially pioneered in the United States, but since spreading in one form or another to the rest of the world.

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Class actions have hitherto gained notoriety in the United Kingdom and Europe mostly through films and novels, often detailing the advantages (and abuses) of such proceedings;[1] but now they are entering the institutional mainstream. Class actions involve the courts treating a group of aggrieved persons as a group, rather than requiring them to sue individually; this has the advantage of reduced costs, which are also generally funded, and simpler litigation; and from the defendant's perspective, the ability to draw a line under claims. Securities class actions are a subset involving losses arising from the purchase or holding of shares and securities.[2]

Scope of this note

While US practice in class actions is well documented (at least in the United States), there is less familiarity about similar procedures in other parts of the world where institutions and others seek to recover losses arising from fraud, misrepresentation or non-disclosure. This note explores in brief selected non-US jurisdictions, but is neither exhaustive as to possible jurisdictions, nor as to procedure in the jurisdictions discussed. It is largely based on materials prepared by law firms around the world who have an interest in the topic, and research institutes, although it might be noted that in practice the larger law firms find themselves invariably conflicted out of being involved in the leading cases, certainly as plaintiff (complainant) lawyers and may be inclined to approach this subject more from the defendants' perspective.

The usual caveats apply; the article is based on research conducted elsewhere (wherever possible appropriately credited), is limited in extent and application, and should not be used to take decisions on whether or not to sue without further investigation and advice. It is also worth noting that this is a rapidly changing area and certain developments in particular jurisdictions may not be reflected here. Instead the article is intended as a broad and very introductory guide to (at least some of) the new class action landscape.

Why US practice differs

Practice in the United States differs from that in the rest of the world, largely because of three principal differences.

- First, the costs rules are very different. With some exceptions, in the United States each side pays their own costs, so that even successful defendants pay the costs of their defence; this is rare in other jurisdictions. The principle encourages US defendants to settle before trial to avoid the cost and disruption of litigation, and lowers the risk to complainants of unsuccessful claims. The costs regime in most other countries actively operates to discourage more speculative claims.
- Second, the securities class action system in the United States is 'opt out' so that all investors who meet the eligibility criteria are, by default, included in the suit and any case settlement or judgment is binding against all members of the class whether they file a claim or not, unless they opt out by the relevant deadlines. Most (but not all) other jurisdictions require claimants to make an affirmative decision to participate at all in securities litigation (that is, 'opt in').
- Third, the constitutional structures and cultural norms of the United States encourage litigation as part of the normal checks and balances of powers and interests between companies and shareholders, balances which in most other countries are managed using other techniques. For example, shareholders rights and codes are much stronger in Europe than the United States.

Growth of non-US litigation

Despite the impediments to non-US group litigation, class actions have begun to spread across the globe to other jurisdictions where they have hitherto been rare, largely because the sums of money involved have become significant, because individual remedies are expensive to pursue, because institutional investors are inclined to pursue losses in relevant situations and because, as will be explained below, the US courts are seeking to limit their role in respect of non-US investors. Such litigation does not necessarily follow the US model. Indeed, no other jurisdiction has adopted the totality of US procedure, whether for cultural reasons, for historical reasons or because the appetite for litigation endemic under the US system is less pronounced. However, it does have similar objectives, that is recovery of investment losses caused by fraud, misrepresentation or non-disclosure. As is shown later, despite policy objectives in many non-US jurisdictions intent on reducing the volume and frequency of recourse to the courts, several jurisdictions have made in the last few years (or are proposing to make) amendments to their jurisdictional arrangements to admit, in one form or another, class action process.

The impact of *Morrison*

In 2010, the *Morrison v National Australia Bank*[3] case in the US Supreme Court decided that in order for proceedings to be brought under the jurisdiction of the US courts, such actions had to have some more definite nexus with the United States; the fact that the action that may have caused the loss occurred within the United States is not sufficient to allow US courts any jurisdiction where the shareholders were foreign, the stock exchange that intermediated was foreign and the reduction in value of the shares occurred outside the United States, the so-called foreign-cubed (F^3) condition. The decision meant that around a third of the 15–20 per cent of non-US cases, which would previously have normally been heard in the United States would henceforth need to be brought before non-US courts, underlining a material shift to international as opposed to US-focused securities class action activity.

Globalisation

Litigation across the world also now increasingly reflects the continued globalisation of commercial and investment activity. For example, many pension funds will now have more invested in international than domestic securities or instruments; and hence, must be conscious of legal processes not just domestically but internationally that affect such investments. As a result, there has been an increase in the frequency of overseas investors appearing as plaintiffs in securities class actions in the United States and conversely, US institutional investors are keeping a close watch on the developing class action processes outside the United States as non-US courts around the world adopt procedures reflecting US class action protocols.

Other issues

There are numerous side issues that are only touched on briefly in this note. These include the developing standards for subject matter jurisdiction over claims by foreign investors in US courts; the evolution of the class action device for securities claims in the major jurisdictions; whether there are potential strategic advantages for dual-listed companies in certain frameworks; and whether group shareholder litigation policy and practice will drive companies' international listing strategies and investors' trading strategies.

UNITED STATES

The United States is the original home of class actions generally and securities class actions in particular. This reflects the belief in the United States that the courts are a natural player in the drive to achieve equality of arms between shareholder (or the citizen generally) and large corporations. By way of contrast, in the United Kingdom, for example, corporate law embodies more rights than the United States for the shareholder, so that access to the courts may be less necessary.

There are particular issues in the United States (as mentioned) about the extraterritoriality of its own jurisdiction. Clearly because of the sympathetic law and process available, even non-US shareholders may be more comfortable in suing in the States rather than in their domestic jurisdictions. Indeed, as US class actions are an 'opt-out' as opposed to 'opt-in' process, non-US shareholders have been included in lawsuits against companies for many years, often without realising this or, often, without benefiting from the resulting compensation. Various studies, such as those written by Cox and Thomas, have reported on the billions of dollars that investors have left unclaimed as a result.[4]

The core legislation relating to shareholder rights, the Securities Act 1933 and the Securities Exchange Act 1934, is silent on extraterritorial application. In actions involving transnational securities fraud claims, US courts instead originally evaluated their subject matter jurisdiction under the court-constructed 'conduct' and 'effects' tests,[5] that is, 'whether the wrongful conduct occurred in the United States, and … whether the wrongful conduct had a substantial effect in the United States …'.[6] Conduct by a non-US issuer or its officers in the United States was not in itself ever sufficient to support subject matter jurisdiction if that conduct was 'merely preparatory' to a fraudulent scheme; instead, US conduct had to have 'directly caused' the claimed losses.[7] Similarly, the required domestic 'effects' of extraterritorial conduct had to be those that 'result[ed] in injury to purchasers or sellers of those securities in whom the United States has an interest [that is, securities traded on US exchanges], not where acts simply have an adverse effect on the American economy or American investors generally'.[8] These tests were those applied when investor complaints issued claims against non-US private issuers having shares that were dual-listed on a non-US exchange and in the United States. In those cases where a non-US plaintiff made purchases or sales of the dual-listed issuer's securities on a US exchange, the subject matter jurisdiction analysis should be similar to the analysis for an investor based in the United States.

In contrast, claims brought by so-called 'F^3' investors have tested the limits of federal subject matter jurisdiction.[9,10] F^3 investors are those who:

- reside outside the United States;
- have purchased securities of a non-US issuer; and
- have purchased such securities on a non-US exchange.

Federal jurisdiction at one time existed over claims of F^3 investors when 'acts … within the United States directly caused such losses'.[11] However, increasingly, over the years, federal courts have concluded that they do not have jurisdiction to consider the claims of these investors, whether individually or as part of a larger class that includes US purchasers. In *Royal Dutch/Shell Transport Securities Litigation*, for example, the district court dismissed claims brought on behalf of F^3 investors because the allegedly fraudulent acts were centred in London and conduct in the United States was not essential to the accounting misstatements at issue. A much smaller class composed of only US investors was permitted to proceed in the US courts,[12] with a distinct settlement fund for non-US investors being agreed under Dutch law. Other courts have found that they lacked subject matter jurisdiction in securities fraud cases that involved similar facts.[13]

The Supreme Court's *Morrison* ruling in 2010 created a so-called bright line test for F^3 actions. *Morrison* held that federal securities fraud laws do not apply to 'transactions in securities listed on domestic exchanges, and domestic transaction in other securities'. Two later cases, *Porsche* and *RBS*, expanded the extent of *Morrison*. In *Porsche,* the Southern District of New York applied *Morrison* and dismissed hedge fund claims of fraud in connection with their purchase of security swap agreements. The case was dismissed, even though the swaps did not trade on any exchanges and all of the steps necessary to transact the swap agreements were allegedly carried out in the United States. In *RBS*, the court dismissed both 1933 and 1934 Act claims by plaintiffs who purchase RBS shares on a non-US exchange.

It may be premature to determine the true long-term impact of the *Morrison* transactional test on non-US securities class actions. But preliminary observations seem to suggest that there is indeed a material shift to increased international securities class action activity as a result, accelerating a process that had already begun.

NON-US JURISDICTIONS

Introduction

For investor plaintiffs, the United States clearly remains the most hospitable jurisdiction in which to assert claims of securities fraud. The structural advantages offered in the United States for this type of claim include:

- trial by jury;
- robust pretrial discovery;
- the 'fraud on the market' presumption of reliance;
- the 'opt-out' form of class action;
- an established securities plaintiffs' bar;
- contingency fees; and
- a tradition not to award legal costs in favour of the successful party.

Nevertheless, within the past several years, several jurisdictions have adopted procedural mechanisms similar (though different) to the US class action, including Australia, Canada, Denmark, Finland, France, Germany, Israel, Italy, the Netherlands, Norway, Portugal, South Korea, Spain, Sweden, Taiwan and the United Kingdom (England and Wales). Perhaps, owing to the perceived abuses of the American system, however, no other jurisdiction has fully adopted the US model.

Australia

Australian securities class actions have developed through legislative change over the last two decades and have been strengthened through recent developments in case law which have helped clarify how and when they can be used. Despite concern at the time that there may be an immediate glut of cases, the process was not embraced early on, though securities class actions have become much more prevalent following the high-profile collapse of a number of companies in the early 2000s and today they are quite common.

The Australian model permits class actions to be brought by representative plaintiffs based on standards that are similar to those under the US Federal Rule of Civil Procedure 23 (although no formal motion for class certification is required). As in the United States, class claims in Australia may be brought based on alleged misrepresentations to investors, but the availability of the 'fraud on the market' presumption of reliance remains an open question.

Unlike the United States, Australian class actions are 'opt in', requiring interested claimants to register at the outset of the case. Also unlike US practice, Australia does not provide for jury trials of securities claims. In addition, Australia follows the 'loser pays' (English) rule on fee shifting. Australian law also prohibits contingent fee arrangements, but it does permit 'no win no fee' arrangements that are similar.

Australia is a pioneer in third-party litigation funding arrangements and this has overcome the prior disincentive for applicants to bring an action owing to the risk of incurring significant costs. This is effectively a substitute for the American-style contingent fee in securities class actions.[14]

Belgium

Compared to the situation in some other European countries, class actions in Belgium are still undeveloped. However, in part stimulated by a number of European Union (EU) initiatives and in part by high-profile shareholders suits following the financial crisis, Belgium's interest in various forms of group litigation (particularly class actions), has increased. In April 2007, the then Minister for Consumer Affairs ordered a study by the University of Ghent into the possibility of introducing a class action equivalent into the Belgian legal system. Since then, although the topic has been extensively discussed by the legislature,[15] it has proved difficult to introduce specific legislation.

A draft bill on class actions proposed by the Minister of Justice and the Minister of Energy and Climate (who is also responsible for consumer affairs) was submitted in September 2009 to the Belgian Consumers Council. Unlike previous attempts, the bill provided for the introduction of a complete set of rules addressing a number of procedural aspects of the introduction of a class action system in the Belgian Code of civil procedure. It was the first integrated proposal contemplating class action as a specific and court-regulated procedure, with the class represented not by a lead plaintiff, but by a 'representative' which must be a legal entity or a *de facto* association.

There has already been litigation in Belgium in which consumer or investor groups, comprising a few hundred to several thousand victims, have participated as claimants in relation to specific actions by one or a few related defendants (for example, the Lernout & Hauspie proceedings and the Fortis proceedings). These proceedings are not usually regarded as true class action proceedings because they instead bundle a (sometimes large) number of individual claims into one specific case. In particular, in these proceedings, each claimant is itself either personally present or represented by a specially appointed proxy. In practice there is a physical limit on the number of individual claimants, even if they are represented by a proxy, whose claims can be handled as process parties to proceedings.

Notwithstanding the legal hurdles, large group investor actions, coordinated largely by the investor rights group, Deminor, such as the case against Fortis are proceeding in Belgium and have attracted considerable support from institutional investors both within Belgium and around the world.

Canada

Securities class actions have been available across Canada since 2004 (though since 1992 in Ontario and since 1978 in Quebec) following amendments to each province's respective Securities Act. As there is no federal securities law or class action legislation in Canada (owing to the constitutional division of power), securities class actions can arise in more than one province in parallel.

Until quite recently, only traditional claims of fraud or misrepresentation were available to investors. For example, Under the Ontario Securities Act, investors have long had a private right of action for damages or rescission based on false or misleading statements that were made in a prospectus, an offering memorandum or a takeover proposal circular, referred to as 'primary market' disclosures. In those actions, the plaintiff's reliance is presumed once a misrepresentation has been established.[16] However, class claims for false or misleading statements in the much broader secondary market, including violations in an issuer's 'continuous disclosures' in annual and quarterly reports, could only be maintained under the common law and required each class member to establish reliance.[17]

However, since 2005, most Canadian provinces, including Ontario (in 2006), have amended their legislation to introduce a right of action for misrepresentations in the secondary market against issuers and other specified persons. This does not require plaintiffs to prove any reliance although it is usually accompanied by damages limitations and a loser-pays rule for costs. In addition, court approval is generally required before an action can be commenced. These two latter provisions are intended to deter 'strike suits', a perceived abuse of the American system.[18]

The arrival of these new causes of action has had an immediate impact on the number of securities class actions filing, with a noticeable surge of activity in the last 5 years.

England and Wales

Since 2000, English civil litigation rules have provided for the management of 'group litigation' (Scotland does not have a group litigation procedure). Unlike the American system, the law of England and Wales requires plaintiffs to 'opt in' to the action.

The group may be represented by a lead lawyer, but individual members of the group also can have their own lawyers. The rules provide for the management of claims that give rise to common or related issues of fact or law under a Group Litigation Order. It provides for the establishment of a group register and sets out the issues that identify the claims to be managed. A managing judge is appointed and assumes overall responsibility for management of the claims.[19]

The unavailability of contingency fees and the 'loser pays' fee shifting rule have thus far provided two substantial hurdles to the prosecution of group actions in England on a scale similar to securities class actions in the United States. In the 2003 group action brought against Railtrack by 55 000 shareholders, the court required the plaintiffs' group to provide approximately £2 million as security for the government's defence costs before trial began; approximately 6000 plaintiffs withdrew from the litigation. Eventually the plaintiffs were unable to establish malice, a necessary element of the claim, and the court dismissed the claim after a 4-week trial.[20]

However, the emergence of third-party litigation funding in the United Kingdom and re-evaluation of contingency fees look set to overcome some of the funding issues and with cases against UK companies being dismissed from the US courts on *Morrison* grounds, there is likely to be more group action activity in the United Kingdom, particularly in the securities arena, even without streamlined class action procedures.

European Union

There have been developments within the EU seeking the introduction of collective redress, driven more by the perceived need for consumer protection rather than shareholder protection, but with the incidental consequence of allowing securities class actions.[21] European Commission figures in 2008 suggested unsurprisingly that '76 per cent of consumers would be more willing to defend their rights in court if they could join together with other consumers'. Financial services (39 per cent), telecoms (12 per cent), transport (8 per cent) and package tourism (7 per cent) were identified as the sectors in which consumers find it most difficult to obtain redress for mass claims.

Former Competition Commissioner Neelie Kroes proposed draft rules in 2009 to make it easier for consumers who wished to claim against companies that fixed prices or abused their dominant market position to initiate proceedings. The proposals were shelved after criticism from companies concerned about the unintended consequences of introducing US-style class action lawsuits and the possibility of substantial punitive damages. EU consultation on the proposals ran until the end of April 2011. In February 2011, the European Commission entered into public consultation seeking views on its proposals for collective redress, concentrating on consumer issues, but with incidental impact on securities class actions.[22]

Germany

German law does not specifically provide for any type of investor class action. However, in November 2005 Germany enacted two laws intended to make it easier for investors to bring actions for misstatements or omissions by issuers. The first, the Capital Investor's Model Proceeding Act (Kapitalanleger-musterverfahrensgesetz ('KapmuG')) provides for a form of collective action for securities claims through the centralisation of claims and provides for the possibility of binding test cases, referred to as model proceedings, on common issues of law or fact. Model proceedings are established if at least 10 plaintiffs file claims relating to the same matter. The 'loser pays' rule applies and contingency fees are not permitted.[23] KapmuG included a sunset clause that rendered it ineffective from 1 November 2010. However, it is understood that the Bundestag approved amendments to extend the sunset clause to 2012.[24]

Examples of such proceedings include that of Deutsche Telekom, the first KapmuG proceeding, whose trial commenced in Frankfurt in April 2008. Plaintiffs contended that Deutsche Telekom had failed to inform investors in a 2000 stock offering that it planned to spend US$35 billion to acquire Voicestream in the United States and made misstatements as to the valuation of its real property. The price of the shares later collapsed. In 2005, Deutsche Telekom settled claims in the United States relating to the same alleged misrepresentations for $120 million. The model proceeding will be binding on other plaintiffs, but even if the test plaintiffs prevail, individual proceedings on issues such as reliance and damages will still be required for each of the approximately 15 000 investor plaintiffs.[25]

The KapMug reflects the provisions of the US Securities Exchange Act s10(b); it allows claims for damages because of false, misleading, or omitted public statements in the capital markets. Other than the basic private right of action, however the German class action differs in material respects from the US system. The German system is an 'opt-in' system; only claimants who choose to file an action are bound by the case brought by the model claimant. Thus, claimants in Germany must decide whether to join the model case before there is a settlement or judgment. Also, there are no unnamed claimants. Each claimant must hire their own counsel and file their own suit in their own name even though common issues of law and fact may be decided in a model case. The model claimant cannot settle the case on behalf of the other claimants as there is no true 'class'. Settlement of all claims with the defendant requires unanimous consent under the KapMug.

Other significant differences between the US and German systems exist. For example, while compensatory damages are allowed, punitive damages are not. Thus, recoveries can often be lower than typically seen in the United States. Furthermore, contingency fees are available only in special circumstances. Attorneys are, therefore, not as incentivised to file suits in Germany as they are in the United States. Arguably, this results in fewer cases. Also, unlike the United States, Germany follows the 'loser pays' rule. In the event of defeat, claimants who join in the model case share the costs associated with the model case and individual claimants bear sole responsibility for paying fees and costs if they lose in their individual suits following adjudication of the model case. As a result, litigation funding/insurance is a common component in these suits.

The German KapmuG test case system appears to be less than swift at resolving collective securities disputes; at present there seems to be no known case that has been fully adjudicated through the rather protracted model case process. Model proceedings are still pending in the Deutsche Telekom and Hypo Real Estate cases, for example. Likewise, the number of cases being litigated under the KapMug has been relatively few by comparison to collective actions in some other non-US countries. It is hence difficult to say whether KapMug in its current form will survive beyond 2012, though it appears likely that securities collective action will continue on in some form in Germany even if KapMug is repealed. Although Germany, like many other European countries, is resistent to US style class actions, the need for some form of collective or group securities action continues to be expressed by interested parties.

Korea

'Securities class action suit law' (SCASL) came into force in South Korea in 2005. The law was primarily intended to strengthen minority shareholder rights and further improve corporate transparency by allowing shareholders to seek monetary compensation for losses that result from certain corporate wrongdoings related to insider abuses and disclosures.

The legislation now covers all Korea Stock Exchange (KSE)- and KOSDAQ-listed companies. Under the legislation a securities class action may be brought against a company for illegal acts connected with securities issued by the company as follows:

- false statement (including omission of material information) in the company's prospectus or registration statement filings;
- false statement (including omission of material information) in the company's quarterly, semi-annual or annual reports;
- illegal use of inside information and market manipulation; and
- negligence outside audit.

A minimum of 50 shareholders whose aggregate equity in the company is at least 0.01 per cent must agree and join together as plaintiffs on behalf of other shareholders to bring a class action lawsuit against the company or its insiders. The class action must be certified by the court and both the plaintiff and the defendant must be represented by attorneys. As a way to discourage frivolous class action suits, any person who has represented the shareholders either as the lead plaintiff (or a representative party) or as a plaintiff attorney in three or more class action suits during the preceding 3-year period is in principle to be barred from participating in a class action suit unless the court determines otherwise.

In determining the merits of a class action, the court may question both the plaintiffs and the defendants and compel the regulators and others to provide the relevant documents and other evidence for the purpose of discovery. Acts such as terminating the class action, relinquishing a right granted under the SCASL or coming to an agreement to settle the class action without a court approval are not recognized and thus invalid. The SCASL also provides for a prompt public notice of the class action as soon as it is filed to the court to the KSE and KOSDAQ, which must then release the public notice of the class action to the general public.

Shareholders who did not directly participate in the class action lawsuit are eligible to receive any benefit that may result from it if they are not excluded by the court from the class action and their transactions are appropriately covered by it. A court decision denying a securities class action lawsuit from proceeding to a trial can be appealed.

The Netherlands

In 1994, the Netherlands enacted legislation permitting actions by consumer associations. In May 2007, the Dutch investor association VEB successfully established in the Amsterdam Court of Appeal that a prospectus issued by World Online contained incorrect information. If the judgment withstands further appeal, affected stockholders will still be required to bring individual proceedings on reliance and damages issues (similar to the KapmuG system).[26]

Of perhaps more significance, in 2005 the Netherlands Civil Code was amended by the Collective Settlement of Mass Damage Claims Act (known as the WCAM). The Act, originally envisioned as a method for resolving large-scale torts, provides for court-approved settlements of 'opt-out' class actions. As in most US class actions, class members will be bound by settlements under the Act unless they affirmatively act to exclude themselves.[27]

In 2007, the Act became a resource for the dual-listed issuer Royal Dutch Shell, which was defending itself in a class action in the District of New Jersey alleging that it had fraudulently overstated its proved oil and gas reserves. In an early decision, the district court declined to dismiss the claims of non-US purchasers for lack of subject matter jurisdiction, concluding that sufficient US conduct had been alleged.[28] As a result of that decision, Shell faced potential damages in the United States relating to trading in all of its outstanding shares, reflecting a total market capitalization loss of $13.4 billion, even though only around 8 per cent of those shares were traded in the United States. Shell began settlement talks with VEB and American plaintiffs' firms that were not involved in the US class action and in April 2007, those parties announced that they had reached a proposed settlement of all claims by non-US purchasers for $352 million. The settlement was subject to the approval of the Amsterdam Court of Appeal and required the US court to conclude that it did not have subject matter jurisdiction over the settled claims. After the Dutch settlement was announced, the federal court revisited and reversed the prior decision on subject matter jurisdiction, concluding that it did not have jurisdiction over claims by non-US purchasers based on a review of facts developed in discovery.[29] The US parties later reached an agreement to settle all remaining claims (those of US purchasers) for approximately $83 million.

In November 2010, the Act was deployed again in *Converium Holding AG*. In its interim ruling, the Amsterdam Court of Appeals declared 'an international collective settlement [is] binding in a case where none of the potentially liable parties and only some of the potential claimants are domiciled in the Netherlands'. The Dutch court cited the *Morrison* case and accepted its awareness of the need for global resolutions of international securities class actions.

Although the Netherlands, more than most jurisdictions, is seen to be in favour of developing its class action system, there are particular aspects of the legal system that may restrict its growth. Under the Dutch Act, only court-approved representative organisations can pursue a securities class action on behalf of investors. Further, such organisations cannot seek damages in court. The Dutch court may only certify the class and decide whether to approve an out-of-court settlement between the parties. This 'representative action' system, therefore, could limit the number of successful settlements in the Netherlands.

CONCLUSION

It is clear that class actions and related group investor action processes are developing rapidly in all corners of the globe. The above snapshots give a flavour of some of the different regimes being adopted and the significant variations between jurisdictions. This globalisation of the class action industry started slowly a couple of decades ago but has gathered significant momentum in the last few years and this is only likely to accelerate as the effects of the US Supreme Court *Morrison* ruling come into play and investors seek alternative venues to the US courts.

For investors, this means a more complex and global network of shareholder litigation to monitor and respond to; for issuers, further evaluation as to where to focus corporate activity and list securities. What is abundantly clear is that class actions are not going away and have become another legal issue for investors and issuers alike to address.

REFERENCES AND NOTES

1 See, for example, *Erin Brokovich* (film), directed by Steve Soderbergh, 2000; John Grisham, *King of Torts*, first edition, ISBN 0-385-50804-2, hardcover, Doubleday, 2003.

2 In this note, the term 'class actions' is used as a generic term including where appropriate group actions and other forms of collective litigation. 'Class action' has in certain contexts a specific meaning (especially in the United States) and it should be clear from the context where this is meant.

3 *Morrison* v. *National Australia Bank* [2010] (24 June) US Supreme Court, 561 US ____ (2010).

4 For example, Cox and Thomas[39].

5 *Bersch* v. *Drexel Firestone Inc* 519 F.2d 974 (2d Cir. 1975); *IIT* v. *Vencap Ltd*, 519 F.2d 1001 (2d Cir. 1975).

6 *SEC* v. *Berger* 322 F.3d 187, 192 (2d Cir. 2003).

7 *Bersch*, 519 F.2d at 987; *Alfadda* v. *Fenn*, 935 F.2d 475, 478 (2d Cir. 1991). See also *Zoelsch* v. *Arthur Andersen & Co* 824 F.2d 27, 31 (DC Cir 1987) (US conduct 'comprises all the elements … necessary to establish a violation'); *Kauthar SDN BHD* v. *Sternberg*, 149 F.3d 659 (7th Cir 1998) (US conduct must be 'material to the successful completion of the alleged scheme'); *SEC* v. *Kasser*, 548 F.2d 109, 115 (3d Cir. 977) (US conduct must have been 'essential to the plan to defraud'); *Travis* v. *Anthes Imperial Ltd* 473 F.2d 515, 524 (8th Cir. 1973) ('significant conduct with respect to the alleged violations in the United States').

8 *Bersch*, 519 F.2d at 989; see *Interbrew SA* v. *Edperbrascan Corp* 23 F.Supp.2d 425, 429 (SDNY 1998).

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12 522 F.Supp.2d 712 (D. N.J. 2007).

13 *In re Rhodia SA Sec. Litig.,* 531 F.Supp.2d 527, 538 (SDNY 2007); *In re Nat'l Australia Bank Sec. Litig.*, 2006 WL 3844465 (SDNY 25 October 2006); *In re Bayer AG Sec. Litig.*, 423 F. Supp.2d 105 (SDNY 2005); *Tri-Star Farms Ltd* v. *Marconi PLC*, 225 F.Supp.2d 567 (WD Pa 2002).

14 See, Black, Harris and Jacques[31].

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