THE GLOBALISATION OF SECURITIES LITIGATION

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Over the last four decades, pension funds' equity portfolios have diversified significantly with a gradual reduction, in many cases, in exposure to their respective domestic markets and a correspondingly increased proportion of their portfolio exposed to equities outside their domestic markets. With the continual search for diversified sources of returns to meet their pension liabilities coupled with global capital markets becoming more integrated, the whole global equity market has become the opportunity set. As investors have looked overseas for their investments, they have also had to ensure that the tools in their engagement armoury are fit for purpose to act as effective stewards of their members' assets in overseas markets. This has, by necessity, required pension funds to look at securities actions as a way of protecting their investments when investing overseas and particularly in the U.S., which has a tried and tested method for compensating defrauded investors.

While class actions have traditionally been the preserve of the U.S. legal system, with the primary focus on U.S. securities orchestrated largely by U.S.-based investors, there have been many interesting developments in case law and legislation across Europe, as well as developments in the U.S., which suggest that there may be more options for global investors who are seeking legal redress.

Although the U.S. will always be the most popular jurisdiction for investors to bring cases, the obstacles that were prevalent across Europe may become less onerous as investors seek innovative ways to bring claims.

Notwithstanding this development, the U.S. has not been without its challenges as the courts sought to deal with the challenges faced by the globalisation of investors' securities portfolios.

There is also an argument that institutional investors no longer view class action securities litigation as merely a way of seeking financial compensation. With the continued amplification of ESG concerns, active engagement in litigation is also being viewed as a means of bringing about corporate governance reforms which otherwise would not have been achieved. When used effectively, securities litigation is also about future-proofing the companies in which pension funds invest, and sometimes acting as a deterrent to other companies who might be tempted to pursue a path which is not in their shareholders' or stakeholders' interests. The changes that can be brought about through class actions can have very positive, long-lasting outcomes.

The participation of global investors in securities litigation in the U.S. to bring about corporate governance reforms is not a new phenomenon. In 2005, a number of U.S., Australian and European funds successfully sued Rupert Murdoch's News Corp in Delaware Chancery Court. The suit alleged that News Corp defrauded investors by refusing them the right to vote on an extension of a "poison pill" provision, as it had promised it would do. The company had claimed that it did not need to honour its promise to shareholders because the board had the right to change its poison pill policy. This was a significant win for shareholder rights and for corporate governance reform, and it has been frequently cited since. In the words of the Delaware Court of Chancery in 2005 "when shareholders exercise their right to vote in order to assert control over the business and affairs of the corporation, the board must give away. This is because the board's power – which is that of an agent with regard to its principal – derives from the shareholders, who are the ultimate holders of power under Delaware law"

Unfortunately, the U.S. Supreme Court's 2010 decision in Morrison v. National Australia Bank Ltd. disrupted decades of legal precedent by barring use of U.S. federal securities laws to recover losses from investments in foreign-traded securities – even where a company dual-lists its stock or sells other securities in the U.S. Investors were abruptly left unprotected, with no right of recovery under U.S. law and seemingly no viable recourse in U.S. courts, whenever the exchange on which their damaged shares traded was outside U.S. borders.

Before the ink on the Morrison decision was dry, attorneys were hard at work developing novel legal theories to overcome the roadblocks it imposed. In the first successful workaround to Morrison, ground-breaking individual lawsuits for institutional investors were pursued to recover losses in BP plc's London-traded common stock and NYSE-traded American Depository Shares (ADS) following the company's 2010 Gulf of Mexico oil spill.

During the course of the BP litigation, ground-breaking rulings were secured that paved the way for 125+ global institutional investors to pursue their claims, marking the first time, post-Morrison, that both U.S. and foreign investors, pursuing foreign claims seeking recovery for losses in a foreign company's foreign-traded securities, did so in a U.S. court. In the process, the rights of investors were secured with U.S. federal law claims concerning BP's U.S.-traded ADS to simultaneously pursue English common law claims concerning their London-traded ordinary shares in a U.S. court. In early 2021, after nine years of hard-fought, landmark litigation, lawsuits pursued on behalf of its nearly three dozen institutional investors were resolved and a confidential, favourable monetary settlement was achieved.

The globalisation of securities litigation was also evidenced in a recent historical $3 billion settlement with Brazil's energy giant, Petroleo Brasileiro SA – Petrobras in which the lead plaintiff was a U.K. pension fund. This was achieved as a culmination of over three years of hard-fought litigation which resulted in a significant victory for investors following a decades-long corruption scandal involving tens of billions of dollars. Allegations against Petrobras involved the company concealing a sprawling, decades-long money laundering and kickback scheme from investors. The scandal ensnared not only Petrobras' former executives, but also Brazilian politicians, including former presidents and at least one third of the Brazilian Congress. According to plaintiffs, defendants' fraudulent scheme involved billions of dollars in kickbacks and tens of billions of dollars in overstated assets, resulting in significant losses to Petrobras investors.

To demonstrate the global nature of this particular case, the Petrobras settlement represented significant milestones in securities class action litigation history not least in it resulting in the largest settlement ever involving a foreign issuer and the largest settlement ever achieved by a foreign lead plaintiff.

This settlement certainly serves as a timely reminder to companies – both foreign and domestic – that raise money by issuing stock on a U.S. exchange that, when it comes to corporate misconduct, their investors will be afforded the protection provided by the U.S.'s robust securities fraud laws.

These developments have prompted Pomerantz LLP, headquartered in the U.S., to open a London office in October 2022 to complement its offices in Paris and Tel Aviv. We can now ensure that U.K. investors and pension funds have a full breadth of understanding of what is going on in the U.S. and around the world, and work closely with them, guiding them through the decision-making process regarding identifying specific cases in which they have exposure and advising them on the best route to recover losses.