GLOBAL SECURITIES LITIGATION AND ENFORCEMENT

Global Securities Litigation and Enforcement provides a clear and exhaustive description of the national regime for the enforcement of securities legislation in cases of misrepresentation on financial markets. It covers 29 jurisdictions worldwide, some of which are important although their law is not well known. It will be an invaluable resource for academics and students of securities litigation, as well as for lawyers, policymakers and regulators.

The book also provides a comprehensive contribution to the debate on whether public or private enforcement is preferable in terms of development of securities markets. It will appeal to those interested in the legal origins theory and in comparative securities law, and shows that the classification of jurisdictions within legal families does not explain the differences in legal regimes. While US securities law often serves as a model for international convergence, some of its elements, such as securities class actions, have not been adopted worldwide.

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PREFACE

Global Securities Litigation and Enforcement addresses the issue of compensation of investors' losses on securities markets due to misrepresentations. It originates from the Congress of the International Academy of Comparative Law (IACL) which took place in Vienna in July 2014, where Martin Gelter served as the general reporter for the topic 'The Protection of Minority Investors and the Compensation of their Losses'. However, the book is up to date as to 1 January 2018.

Global Securities Litigation and Enforcement provides an in-depth analysis of the enforcement securities law, especially civil liability and litigation. The book covers 29 jurisdictions on all Continents. It is the first book to deal in depth with such a number of jurisdictions worldwide. Therefore, it should be very useful for practitioners and academics alike. Both common law and civil law jurisdiction are included. One conclusion is that there have been significant changes in the last two decades to statutory and case law in many jurisdictions in order to strengthen the protection of investors on securities markets.

The book contributes to the debate on whether public and private enforcement is better in terms of market development. This discussion is linked to the distinction between common law and civil law and the 'legal origins' theory. Advocates of the 'legal origins' theory, developed in 1997 by a group of economists based at Harvard (R. La Porta, F. Lopez-de-Silanes, A. Shleifer and R. Vishny) have suggested that common law is superior to civil law in order to develop a large capital market with a prominent dispersed ownership. However, Professors Howell Jackson and Mark Roe, based at Harvard Law School, suggested in 2009 that it is not primarily private enforcement that correlates with securities market growth, but rather quantifiable measures of public enforcement, such as the size of the regulators' staff, its financial endowment relative to the size of the countries' Gross Domestic Product (GDP), and the purchasing power of its inhabitants.

In the field of securities legislation, the distinction between common law and civil law jurisdictions has always been artificial given that the *Securities Act* of 1933 and the *Securities Exchange Act* of 1934 of the United States are statutory law, and arguably resemble codifications often thought to be typical of civil law legislation. Consequently, they have often served as a model to many civil law jurisdictions.

While adding a more qualitative analysis to the debate, the results in this book largely confirm the views of Professors Howell Jackson and Mark Roe. Many countries still rely primarily on public enforcement and have still developed large securities markets. China is a clear example despite the availability of private remedies.

The book also hopes to provide a better understanding on the issue of whether the globalization of securities markets has led to an adoption of the public and private enforcement model developed in the United States (US). Is the US model followed and, if so, to what extent?

The New Deal securities legislation in the US based on the motto of Louis Brandeis that 'sunlight is said to be the best of disinfectants; electric light the most efficient policeman' has become the international model based on the principle of disclosure.

As to public enforcement, the US model of enforcement by an administrative authority, acting through administrative or judicial courts, has spread around the world. The Securities and Exchange Commission (SEC), established in 1934, has become the international benchmark. The main reason is that the SEC itself is considered one of the best, if not the best, securities regulator in the world. Its strong enforcement track record has contributed to making the US securities markets the largest in the world. Reports promoting 'international best practices', such as the 1998 of the International Organization of Securities Commission (IOSCO) *Objectives and Principles of Securities Regulation* as well as the International Monetary Fund's Financial System Stability Assessments (FSAP), have also contributed to the spread of the SEC model.

As to private enforcement, civil liability under securities law has also been a very important aspect of US corporate governance, especially in the form of securities class actions. Securities class actions rose to prominence after the Supreme Court's decision in *Basic* v. *Levinson* in 1988 that established the fraud-on-the-market theory. However, securities lawsuits have become more difficult in recent years. This concerns, in particular, listed companies not traded in US stock exchanges. While courts previously often permitted such suits under the 'conduct and effects test', with the case of *Morrison* v. *National Australia Bank* in 2010 it has

become considerably more difficult to sue foreign issuers in US courts. This has reduced the availability of US courts to foreign investors and raised the pressure on foreign legislators to provide remedies in their own jurisdictions. Also, the 'internet bubble', which burst in 2001, the spectacular collapses of once-great firms such as Enron and WorldCom, and the great financial crisis of 2008 have caused major losses and generated reforms strengthening securities legislation worldwide and also calls to strengthen public enforcement and to compensate investors.

With the spread of Anglo-American forms of corporate governance around the world in the past three decades, securities litigation has gained significance in many jurisdictions, including civil law countries. This shows again that the distinction between common law and civil law jurisdictions in the field of financial legislation is largely artificial. These developments have taken place through statutory law or through case law.

Legal regimes differ in details, but there are more similarities than differences as to the legal basis for liability (often general tort law in case of secondary market liability), the defendants (including gatekeepers), and loss and transaction causation. The US *fraud-on-the-market theory* has become a major point of reference, even if only a minority of jurisdictions have adopted it. There are also differences in terms of which plaintiffs are allowed to sue – this group may sometimes include buy-and-hold investors – and the nature of the injury for which recovery can be sought.

It appears that the US has influenced many jurisdictions as to substantive securities law. This has been made easier in civil law jurisdictions by the application by courts of flexible general tort law principles or by the establishment of statutory regimes. However, the US approach to securities litigation remains unique, or almost unique, in the world. Almost no jurisdiction fully embraces the highly contentious litigation environment of US securities class actions, with Canada, Israel, and Australia coming closest. This is not surprising as the US securities class action regime is based on a cluster of procedural legal rules (*class action, pre-trial discovery*, *contingent fees*), which other jurisdictions are cautious to fully duplicate because of a fear of abuse. One or several procedural rules are missing, such as the class action itself and often the opt-out rule when class actions are accepted. As to the opt-out rule, it is not widely accepted even in common law jurisdictions. These differences make it difficult to achieve a similar result as in the US. Therefore, the US model of private enforcement through securities class actions and of the 'private attorney general' has not prevailed worldwide even if compensation of investors' losses is accepted in the

jurisdiction covered in the book. These divergences show the existence of a strong cultural reluctance to adopt the US securities class action model.

One way to make public enforcement more useful for investors, and bridge the gap between public and private enforcement, would be to allow investors to benefit from public enforcement. This could be done by amending some procedural rules, so that, for instance, evidence discovered through public enforcement, especially administrative enforcement, would be available to investors and could be used as an alternative to *pre-trial discovery*. Some countries (e.g. Brazil or Australia) allow their securities authority to file claims for the benefit of investors. However, the results do not seem persuasive. Another approach would be for those jurisdictions to embrace the 2002 Sarbanes-Oxley Act's Fair Funds provision, which allows the SEC to set aside fines paid by the issuer to compensate investors. This program has been very successful in the US. The European Union, where public enforcement is still preferred by policymakers, should certainly consider this approach.

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