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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GLOBAL SECURITIES
LITIGATION AND
ENFORCEMENT

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CONTENTS

List of Figures page ix
List of Tables x
List of Contributors xiii
Preface xxv

PART I General Report
1. Global Securities Litigation and Enforcement 3
   Martin Gelter

PART II The Americas
2. United States: The Protection of Minority Investors and Compensation of Their Losses 109
   Franklin A. Gevurtz
3. Canada: The Protection of Minority Investors and the Compensation of Their Losses 143
   Stéphane Rousseau
4. Brazil: The Protection of Minority Investors and Compensation for Their Losses 179
   Viviane Muller Prado
5. Mexico: Toward Investor Protection in Global Capital Markets? The Promise and Challenges of Mexico’s Securities Enforcement System 212
   Eugenio J. Cárdenas

PART III European Union
6. Austria: Securities Litigation and Enforcement 261
   Martin Gelter and Michael Pucher
7. Finland: Protecting Minority Investors and Compensating Their Losses 303
   Ville Pönkä

   Pierre-Henri Conac

   Dirk A. Verse

10. Greece: Public Enforcement and Civil Litigation in the Greek Paradigm of Minority Investor Protection 412
    Emmanuel P. Mastromanolis

11. Italy: The Protection of Minority Investors and the Compensation of Their Losses 446
    Guido Ferrari and Paolo Giudici

12. Netherlands: Protection of Investors and the Compensation of Their Losses 469
    Loes Lennarts and Joti Roest

    Mariola Lemonnier

14. Portugal: The Legal Framework of the Portuguese Capital Market 537
    Paulo de Tarso Domingues

15. Romania: The Protection of Minority Investors and the Compensation of Their Losses 558
    Gheorghe Buta

    Mónica Fuentes Naharro

17. United Kingdom: A Confidence Trick: Ex Ante versus Ex Post Frameworks in Minority Investor Protection 627
    Iris H.-Y. Chiu
PART IV Other European Countries

   YULIYA GUSEVA

19. Serbia: The Protection of Minority Investors and the Compensation of Their Losses 692
   MIRKO VASILJEVIĆ, JELENA LEPETIĆ AND JASNA VASILJEVIĆ

20. Turkey: The Protection of Minority Investors and the Compensation of Their Losses in Turkish Capital Markets 729
   FERNA İPEKEL KAYALI

PART V The Middle East

21. Israel: The Protection of Minority Investors and the Compensation of Their Losses 755
   URIEL PROCACCIA

PART VI Africa

22. South Africa: Investor Protection 779
   PIET DELPORT

PART VII South Asia

23. India: The Efficacy of India’s Legal System as a Tool for Investor Protection 813
   UMAKANTH VAROTTIL

24. Pakistan: Securities Litigation and Enforcement 846
   SYED IMAD-UD-DIN ASAD AND RANA TOUSEEF SAMI

PART VIII East and Southeast Asia

25. China: Private Securities Litigation: Law and Practice 879
   ROBIN HUI HUANG

26. Japan: The Protection of Minority Investors and the Compensation of Their Losses 909
   EIJI TAKAHASHI AND TATSUYA SAKAMOTO
viii

CONTENTS

27. Malaysia: Protection of Minority Investors in the Capital Market – Public Enforcement and Shareholders’ Litigation  944
AIMAN NARIMAN MOHD-SULAIMAN

28. South Korea: Protection of Minority Investors in Capital Markets  988
KYUNG-HOON CHUN

29. Taiwan: Investor Protection in Taiwan’s Capital Market  1025
WANG- RUU TSENG

PART IX  Australia

30. Australia: The Protection of Investors and the Compensation for Their Losses  1063
OLIVIA DIXON AND JENNIFER G. HILL

Index  1101
FIGURES

4.1 Relative size of corporate debt and equity markets (market capitalization) 2009–2015 page 182
4.2 IPOs and follow-on public offers in the Brazilian stock market 2004–2015 183
4.3 Market capitalization in Brazil, 2004–2015 183
4.4 Type of investors on the B3 stock market – 2004–2015 185
5.1 Market capitalization (% of GDP) 219
5.2 Trading volume (billions of shares) 219
5.3 Number of listed domestic companies 221
5.4 Public offerings of stock 221
5.5 Number of medium and long-term yearly offerings 222
5.6 Long- and medium-term debt yearly offerings (US billions) (% GDP) 222
5.7 CNBV penalties (2005–2013) by type of issue misconduct 239
5.8 Type of disclosure misconduct, CNBV penalties (2005–2013) 240
5.9 Trading suspensions 2005–2009 247
29.1 The trading value of Taiwan Stock Exchange (TWSE) from 2006 to 2015 (USD billion) 1027
29.2 (a) Directors’ and supervisors’ shareholding ratio in TWSE and OTC companies; (b) block-holder shareholding ratio in TWSE and OTC companies 1029
29.3 Ratio of debt to equity in TWSE and OTC companies 1030
### Tables

5.1 Number and percentage of family ownership by sector among non-financial issuers (2005–2009)  \[\text{page 224}\]
5.2 Annual budget CNBV, 2004–2012  \[227\]
5.3 CNBV compensation, 2014 (trusted employee positions)  \[229\]
5.4 CNBV fines, amount ranges (breaches to selected disclosure requirements)  \[234\]
5.5 Number and type of administrative sanctions by CNBV all securities sector  \[237\]
5.6 Fines per year imposed by CNBV across all securities market sector  \[238\]
5.7 Selected relevant cases involving disclosure-related misconduct (2009–2013)  \[241\]
5.8 Enforcement actions leading to criminal prosecutions (2006–2010)  \[249\]
6.1 Supervision of capital market prospectuses  \[273\]
6.2 Supervision of issuers  \[274\]
6.3 Market supervision  \[275\]
6.4 Administrative penal proceedings by type of violation  \[277\]
16.1 Market capitalization and trading on regulated markets as a percentage of nominal GDP  \[597\]
19.1 Market capitalization per month (data expressed in thousands of dinars)  \[694\]
19.2 Participation of foreign investors in trading  \[695\]
21.1 The size of the Israeli capital market  \[758\]
21.2 Market capitalization of all major financial products listed on Tel Aviv Stock Exchange (TASE) by the end of 2013 (billions of NIS)  \[758\]
22.1 Market Profile: ranking in the world league as at 30 November 2017 (WFE statistics)  \[781\]
22.2 Equity capital raised on the JSE  \[781\]
22.3 Annualized JSE liquidity  \[782\]
22.4 Number of companies / securities listed and market capitalization  \[783\]
23.1 Nature of investigations taken up and completed by the Securities and Exchange Board of India (SEBI)  \[832\]
23.2 Types of regulatory actions taken during the period from 2009–2014  \[833\]
24.1 Breakdown of regulatory actions taken during the last three years  \[855\]
25.1 The holding of the largest shareholders in Chinese listed companies  \[881\]
**LIST OF TABLES**

25.2 Civil cases arising from securities misrepresentation, 2002–2011  
25.3 Ratio of compensation amounts to provable losses  
26.1 Size of the Japanese stock market  
26.2 Share ownership according to the Share Distribution State Survey  
26.3 Sanctions imposed by the Tokyo Stock Exchange  
26.4 Delistings imposed by the Tokyo Stock Exchange  
27.1 Status of equity prospectus 2010–2014  
27.2 Statistics of criminal actions for breach of disclosure obligation under the CMSA (2007–2017)  
27.3 Data on enforcement actions for financial reporting failures for 2007–2017 based on the number of companies involved per type of contravention  
27.4 Enforcement actions for financial misreporting against listed companies and against directors 2007–2017  
28.1 Size of stock exchanges (end of 2017)  
28.2 Shareholding ratio of largest individual shareholders in listed companies  
28.3 Number of shareholders in listed companies  
28.4 Average debt-to-equity ratio of Korean companies  
28.5 Financial statements of the Financial Supervisory Service (FSS)  
28.6 Details of annual report  
29.1 The size of capital market from 2011 to 2015 ($ billion)  
29.2 TWSE's trading value from 2006 to 2015 (USD billion)  
29.3 Directors and supervisors shareholding ratio (in TWSE, OTC and emerging stock board companies, as of March 2016)  
29.4 Block-holder shareholding ratio (in TWSE, OTC and emerging stock board companies, as of March 2016)  
29.5 Ratio of debt to equity (in TWSE, OTC and emerging stock board companies, as of December 2013)  
29.6 Regulatory actions  
30.1 Shareholder class action settlements over $50 million
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xiii
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P R E F A C E

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.

As a conclusion, we would like to thank all the national contributors for making this book possible and for all their hard work answering the very detailed list of questions. The questionnaire underlying this project was initially drafted by Martin Gelter, with considerable contributions by Pierre-Henri Conac and additional help from Frank Gevurtz and Yuliya Guseva. We thank the International Academy of Comparative Law for making this project possible and providing the initial list of contributors, which was then supplemented with help from Pierre-Henri Conac and Dan Puchniak. During the lengthy editing process, we benefited from the help of Olivia Chalos, Ken Edelson, Nemika Jha, Harpreet Kaur, Suzanne Larsen, Sandra Lewitz, and Adriana Zhan. Finally, we also owe a debt of gratitude to Kim Hughes of Cambridge University Press for her patience in delivering the book.