2018

DRRT's 10th Annual International Investor Global Loss Recovery Conference

PART
01

Welcome & Introduction

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Today's Agenda
Thursday, March 15, 2018

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- DRRT Team Introduction

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Today's Agenda

Thursday Morning (Session I)

- Welcome & Introduction
- Recent U.S. Supreme Court Decisions and Other U.S. Developments
- Searching for Evidence – Methods in the U.S., Germany, Italy and Other European Countries
- Global Economic Outlook & Trends from Insurers View
- New Regulatory Environment & Jurisprudence in the U.S. and Effects on Shareholder Litigation

Thursday Afternoon (Session II)

- Investor Loss Recovery Efforts around the World I + II
- The Investigation of the Wolf of Wall Street
- Corruption and Bribery – Prosecution and Civil Damage Claims
- Data Security & the GDPR
- Closing Remarks

Tomorrow's Agenda

Friday Morning (Session III)

- Data Security & Claims Filing: Practical Applications
- The Rise of Multi-Jurisdictional Cases
- The Rise of Multi-Jurisdictional Cases
  - Steinhoff (DE/NL/CAN/SA)
  - Valeant (US/CAN)
  - Teva (US/Israel)
  - BRF and JBS (US/Brazil)

Friday Roundtable Lunch

- Institutional Investor-only Roundtable Lunch (registration required)
  Moderated by Ravi Nayer of LGIM

U.S. Class Action Filings

- Record filings of U.S. securities class actions
  - 432 federal securities class actions filed in 2017, including also 197 M&A cases
  - Highest annual number since 498 cases in 2001
  - >30% higher than 2016 (300)

- Foreign Company Defendants
  - Lawsuits against non-U.S. companies listed on U.S. exchanges represent significant portion of record filings (mostly European or Chinese)
  - 55 traditional suits filed against non-U.S. companies represents 25.5% of all traditional securities suit filings in 2017
  - Almost 50% of all filings were related to M&A cases

U.S. Class Action Settlements

- Settlements in 2017
  - 353 securities class actions were resolved
    - 148 settlements (record of 150 in 2007)
    - 30% more than 2016
    - BUT: average settlement values down to $25 million from $74 million in 2016 and no case settled for more than $250 million
  - Aggregate amount of all settlements down to $1.8 billion (without Jan. 3, 2018 Petrobras settlement), compared to $6.4 billion in 2016, >70% less than 2016
  - $2.2 billion in settlement funds for distribution
  - Petrobras (U.S. ADR settlement) of $3 billion was first major corruption case settlement for shareholders

Important Decisions

- *Vivendi*:
  - Exclusion of Non-Reciprocal Jurisdiction from Class Certification in U.S. class actions (2nd Circuit Court of Appeals)
  - May force closer monitoring of U.S. cases for potential exclusions of foreign country investors from U.S. class actions
- *CalPERS v. ANZ*:
  - Holding that *American Pipe* established an equitable tolling doctrine only, which does not apply to the rigid statute of repose prescription period (U.S. Supreme Court)
  - May force closer monitoring and opting out of U.S. class actions at earlier times
- *Money Max v. QBE* [Oct. 2016] FCAFC 148:
  - Australia's Federal Court paved the way for "open" class actions with fees to be charged to the entire class based on so-called "common fund" orders.
  - The court considered it beneficial for class-wide damage settlement, provided the Court has oversight over the fees similar to how U.S. class action fees are approved.
  - We may see more „open" class actions in Australia in the future

Important Developments

- Transformation of the U.S. judicial system
  - More conservative, typically industry-friendly system of Republican-oriented, right-wing judges.
  - Effect on the interpretation of securities laws in the class action context
    - Likely more difficult to bring U.S securities class or direct actions
    - Average dismissal rate of 40% moves up to 50%

- Mandatory Arbitrations
  - Companies are trying to implement by-laws with mandatory arbitration clauses for investor claims
  - Interesting side-note: Petrobras (and all other first category companies on the BOVESPA) are already required to have mandatory arbitration clauses for shareholder-company disputes in their by-laws

- European consumer class actions coming?
  - There have been discussions and actual demands within the Grand Coalition in Germany to set up consumer class actions to deal with cases such as the VW diesel owner claims

PART
02

General Trends in U.S.

Important U.S. Developments: Cases
- *Morrison*
- *Vivendi*
- *ANZ*
- *Cyan Inc.*
- *ATRS*

Impact of Changing U.S. Case Law

- *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 - Supreme Court 2010.
  - Plaintiffs with non-U.S. transactions cannot bring 10b-5 claims in the U.S.
  - Most U.S. class actions against non-U.S. issuers include only ADRs
  - Non-U.S. investor loss recovery actions become increasingly relevant
  - Growing number of non-U.S. cases
- *In re Vivendi, SA Securities Litigation*, 838 F. 3d 223 - Court of Appeals, 2nd Circuit 2016.
  - Any U.S. class action could be reduced to a class of investors from countries that recognize U.S. class actions
  - *Vivendi*-barred plaintiffs would have to intervene in U.S. class action or file a direct action themselves, or pursue their claims outside the U.S.
- *CalPERS. v. ANZ Securities*, 137 S. Ct. 2042 - Supreme Court 2017.
  - Monitoring and awareness of statutes of repose timing in U.S. class actions becomes more important
  - Tolling agreements may work but no (uniform) judicial certainty so far

Morrison: Limiting the International Application of U.S. Laws

- §10(b) Securities Exchange Act of 1934 (and Rule 10b-5) is the most important provision in U.S. securities laws.

- In 2010, in *Morrison*, the U.S. Supreme Court narrowed previous case law by saying "in short, there is no affirmative indication in the Exchange Act that §10(b) applies extraterritorially and we, therefore, conclude that it does not."

- Result: an investor cannot bring 10b-5 claims for transactions on non-U.S. exchanges.

(Failed) attempts to circumvent *Morrison*

- Avoid *Morrison*: only applies to federal laws, so clever plaintiffs may try to use state fraud laws for claims on foreign transactions, if they can prove fraudulent activities in the U.S.

- State Securities Claims: While most U.S. states provide for local class actions, several U.S. federal statutes limit state court security suits

- Securities Litigation Uniform Standards Act of 1998 (SLUSA): Preempts U.S. state fraud claims (as it relates to securities class actions), for groups of 50+ plaintiffs

- Removal: Defendants in securities class actions filed in state court can remove the case to federal court

Vivendi: Exclusion of Non-Reciprocal Jurisdiction from Class Certification in U.S. class actions

- In *Vivendi*, at class certification stage, the Second Circuit narrowed the international participation in U.S. class actions.
- Before certifying a class, a U.S. court has to consider whether the proposed class action is "superior to other available methods for fairly and efficiently adjudicating the controversy" – Rule 23(b)(3) F.R.C.P.
  - "Superiority" requirement: courts look to whether a class action judgment would be recognized in the jurisdictions where putative class members reside.
  - Where there is no such "Judgment Recognition," the class action is not the "superior" mechanism for foreign plaintiffs.
  - Risk of (civil) double jeopardy is determinative factor
- A *Vivendi* reaction could be more vigorous efforts by defendants to defeat class certifications. As a result, courts will likely require plaintiffs to produce affirmative proof that their home jurisdiction will likely recognize a US class action judgment.

Tolling – The New Tolling Timeline and Need for Monitoring in U.S.

- *American Pipe & Constr. Co. v. Utah*, 414 US 538 - Supreme Court 1974 and tolling:
  - U.S. Supreme Court ruled that the Statute of Limitations is tolled by the commencement of a U.S. class action for the benefit of all putative members.
  - U.S. circuits were split about whether the Statute of Repose is tolled with the commencement of a class action suit.
- With zero tolling, limitations period is the lesser of: two years post disclosure or five years from eligible transaction
- Example with complete tolling: limitations periods run from disclosure date until filing of class action. From filing date of class action until certification of the class, limitations are tolled. Only after certification of the class, limitations again begin to run.

CalPERS v. ANZ

- In *ANZ*, the U.S. Supreme Court explained that *American Pipe* established an equitable tolling doctrine which does not apply to the statute of repose
  - Applies to claims arising out of the Securities Act 1933 and Securities Exchange Act 1934 – these claims both have a statute of repose and a statue of limitations
  - Statutes of Repose are absolute bars and not subject to "equitable tolling"
    - "[Equitable] [t]olling is permissible only where there is a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances."
- Result is that whereas the two-year limitations period will be tolled during much of the pendency of a class action; the five-year statute of repose is not.
- Claims are only eligible if they arose five years or less before the filing of the complaint (most significant for opt-out claims).

ANZ: Post-*ANZ* Analysis

- Statute of Limitation:
  - Knowledge-based
  - Equitable (automatic) tolling at filing of class action (*American Pipe* decision)
- Statute of Repose
  - Knowledge-independent, absolute time bar
  - No equitable (automatic) tolling at filing of class action (no *American Pipe* application)
- Contractual Tolling
  - Before *ANZ*, contracts extending limitations period and/or repose period were uniformly enforceable - *ANZ* did not impact limitations period analysis
  - Post-*ANZ*, statute of limitations continues to be tolled under *American Pipe* or applicable tolling agreements
  - Post-*ANZ*, no clarity on interaction between tolling agreement and absolute statute of repose
  - Strict interpretation of Supreme Court ruling could indicate that no extension of the statute of repose is possible
    - *Secretary, US Dept. of Labor v. Preston,* 873 F. 3d 877 - Court of Appeals, 11th Circuit 2017
    - The repose period can be extended by contract; thus, well-written tolling agreements should survive the impact of the *ANZ* decision, because of the underlying rationale of protecting the defendant does not apply

Cyan, Inc. v. Beaver County Employees Retirement Fund

- As a potentially influential securities class action case, this case has piqued media interest. The case is unusual because it stems from a split between courts at the district (trial) level—and not a split at the circuit (appellate) level.
- Oral arguments will give the justices the chance to decide whether state courts can hear so-called covered class actions based on the federal Securities Act of 1933 – or whether a 1998 law (SLUSA) aimed at curbing securities suits mandated that such claims be heard only in federal court.
- The Defendant's Position:
  - Neither state nor federal courts can hear any state-law claims concerning a "covered security" (a security subject to regulation).
  - That a "holistic" reading of the statutory text should mean that federal courts have exclusive jurisdiction to hear "covered class action" claims that arise out of violations of federal securities law.
  - In other words, state courts are not competent to hear "covered class action" claims concerning a covered security.

Cyan, Inc. v. Beaver County Employees Retirement Fund

- The Plaintiff's Position:
  - By contrast, Plaintiff's position is that the plainest reading of the relevant sections of the statutes in fact do not prohibit state courts from hearing cases that exclusively plead claims arising out of the 1933 Act.
  - States would and can apply Federal securities law in state court.
- Why we should care:
  - A ruling for the defendant will likely effectively foreclose the possibility of filing any securities class action claims in state court (at least for covered securities).
  - A ruling for the plaintiffs will likely result in increased securities class actions being filed in state court.
  - If, post-*Cyan*, federal securities claims are allowed proceed in state courts—the States will likely apply Federal substantive law but State procedural law. Some states may have more plaintiff-friendly procedural rules.

Arkansas Teachers' Retirement System (ATRS)

- *Arkansas Teachers' Retirement System v. Goldman Sachs Group, Inc.,* Court of Appeals, 2nd Circuit 2018
- On Jan. 12, 2018, the U.S. Second Circuit:
  - Confirmed the standard (merely a preponderance) for the burden of proof for the defendant to rebut the plaintiffs' fraud-on-the-market theory, and
  - That the trial court must consider the defendant's claims that meaningful disclosures had been made before the defendant's stock price dropped
- Court rulings on reliance are important because reliance is often a difficult aspect of a plaintiff's case; typically, in the U.S., via the fraud-on-the-market theory, a plaintiff can overcome the requirement of providing specific evidence of reliance.

Arkansas Teachers' Retirement System (ATRS)

- The ATRS case says that, to rebut the Fraud-on-the-Market theory, a defendant can present evidence (and the court must consider the evidence)
- If the court were to determine that—prior to a meaningful stock price drop—the plaintiffs' allegations had already been disclosed; this could defeat not only the reliance aspect of the plaintiffs' claims but also give rise to causation issues (i.e., that even if true, the allegations made by the plaintiffs did not lead to the stock price drop)
- Remains to be seen:
  - How other circuits will react
  - How the balance of presumptions, thresholds and burdens will play out in future securities cases

PART
03

Searching for Evidence – Methods in the U.S., Germany, Italy and Other European Countries

DRRT´s

10. International Investor Global Loss Recovery Conference 2018 am 15./16. März 2018 in Frankfurt/Main

Auf der Suche nach Beweisen

Beweissicherung durch Strafverfolgungsbehörden – zivilprozessuale Hilfe für geschädigte Kapitalanleger?

Oberstaatsanwalt a. D. Dr. Hans **Richter**
vorm. HAL IV (Wirtschaft), Staatsanwaltschaft Stuttgart

Sucht die Staatsanwaltschaft Beweise für die Bürger?

Wann und warum und wie sucht die Staatsanwaltschaft Beweise?

Strafanzeigen, Legalitätsprinzip, Tatsachen
Amts- und Antragsdelikte

Staatsanwaltschaft, Polizei, Schwerpunktstaatsanwaltschaft

BaFin und Staatsanwaltschaft
Verwaltungsakten und Strafakten

Anzeigeerstatter, Geschädigter
Individual- und überindividuelle Rechtsgüter
Betrug/Untreue – Insider-/Manipulationsstraftaten zum Beispiel

„Sperrfeuer“ gegen die Kooperation Staatsanwaltschaft/Geschädigter

Abwehrrechte der Betroffenen
– Datenschutz zum Nachteil Geschädigter

Entscheidungswege für Beweissucher und Betroffene

Beweise im Ermittlungs- und Strafverfahren

Dokumente, Aussagen, Sachverständigen-Gutachten

Beweise zum Beleg der Straftat / zur Überführung der Straftäter

Beweise zum „aus der Straftat Erlangtem“

Insbes.: Geldflussermittlung zum Auslandsvermögen

Wer hat die „Aktenhoheit“ nach Anklageerhebung?
(Zwischenverfahren / Hauptverfahren)

Akteneinsicht nach rechtskräftigem Urteil?

Ein „vergoldeter“ Schluss:
Nicht Beweise sondern Geld!

Zugriff auf Täter- und Drittvermögen

– Zum neuen Recht der Vermögensabschöpfung

Ein „vergifteter“ Schluss:
Verhinderte Zwangsvollstreckung durch
(staatsanwaltschaftlich beantragte)
Täterinsolvenz

Searching for evidence in Germany

Civil Jurisdiction

some questions and a few answers

Can you lay back and enjoy a free ride?

Rely on

state criminal prosecution

and simply access their files,

§ 406e StPO?

OLG Stuttgart: so sorry, not available for investors. Only the capital market in general is protected, not individuals.

decided on 28.06.2013 – 1 Ws 121/13

Damage judgements by criminal courts?

„Adhäsionsverfahren“

Auxiliary Jurisdiction, § 403 StPO

De facto very unpopular with criminal courts

and – again –

investors do not qualify as individual victims.

Sing along with whistleblowers? (1)

What do you do if respondent denies the facts?

Not available as material witnesses

No hear-say evidence admissable

Results inadmissable as evidence in violation of

§ 17 UWG (Unfair Competion Act)

The betrayal of trade and business secrets is a criminal offence?

Whistleblowers (cont‘d)

„Insider“ knowledge / facts

i.e. not pure quess-work / shots in the dark

reasonable not random assertions

forces a respondent contesting these facts to present true and detailled statements

„sekundäre Behauptungslast“

Benefits of shredding and erasing?

No Obstruction of Justice

Keep in mind the Claimant has to prove his case in full, no preponderance of evidence

No „automatic“ consequences for assessment of proof:

no presumption as true

no reversal of the burden of proof

only consideration in the global assessment

BGH 11.06.2015 – I ZR 226/13

Document production orders: Let the court track the paper trail?

§ 142 (1) ZPO allows ex officio orders

> "The court may direct one of the parties …..to produce …. documents … that are in its possession and **to which one of the parties has made reference**."

The crux is: How specific does the reference need to be?

e.g. meeting minutes, correspondence between Mrs X and Mr Y

Court document production orders

The practice of German courts is very restrictive

in interpreting that this rule does not allow the courts to cross the boundaries of adversarial procedure and it is not a licence for „inquistion“ (Amtsermittlung)

BGH 27.05.2014 – XI ZR 264/13

Do we need pre-trial discovery in Germany? (1)

NO

Juliana Landwehr, Pre-Trial Discovery, 2017:

„In Deutschland kann auf die Durchführung der pretrial discovery verzichtet werden, weil das deutsche Rechts-system andere Mechanismen bereit stellt, die dazu geeignet sind, das Fehlen der pretrial discovery und die mit ihr verfolgten Zwecke zu kompensieren. Einerseits wird das Fehlen der pretrial discovery zum Teil dadurch aus-geglichen, dass sich der Kläger im deutschen Zivilprozess die Ergebnisse eines zuvor nach der Untersuchungsmaxime geführten Strafverfahrens zunutze machen kann. Zudem kommt einem Kläger in Deutschland die Unparteilichkeit der Sachverständigen bei der bestmöglichen Aufklärung des Sachverhaltes zugute. „

Do we need pre-trial discovery in Germany? (2)

YES: No US-type full-blown discovery, but less restrictions

Sofar, German courts ignore the the basic practice of modern documentary communication.

In companies, there is nearly always a paper trail of communications and of the process towards making decisions.

Respondents in civil court proceedings often base their statements on these documents and should have to show their hand.

INVESTMENTS AND DEFAULT

THE EVIDENCE FOR INVESTORS

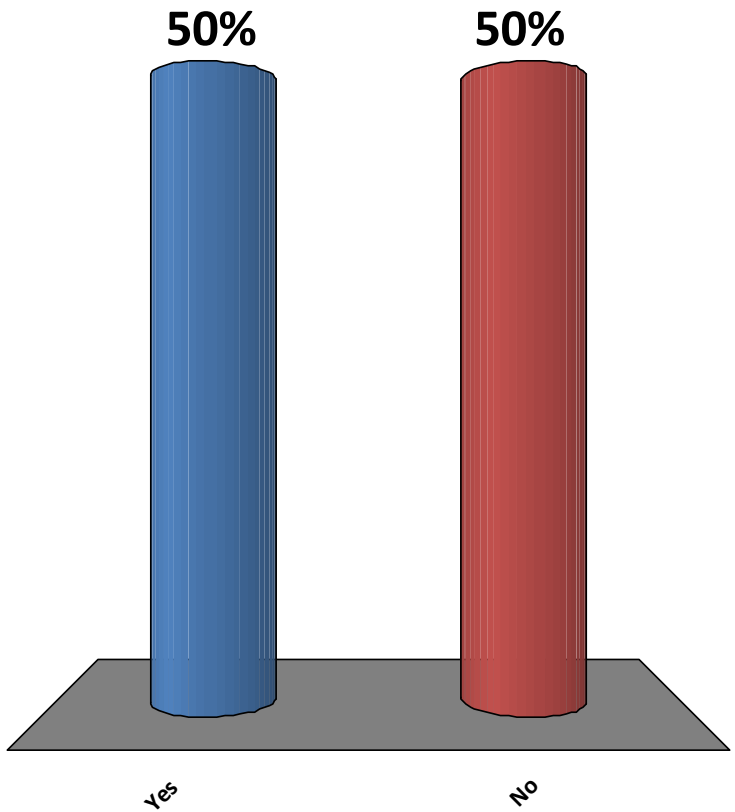
FRANKFURT AM MAIN, 15TH OF MARCH 2018

LUCA BAJ

Should criminal cases be more effective in supporting civil cases and vice versa?

A. Yes

B. No



Disclosure in England and Wales

JENNIFER MORRISSEY – HARCUS SINCLAIR LLP

Civil Procedure Rules for Disclosure

The rules for disclosure are predominately governed by Part 31 of the Civil Procedure Rules and in the Practice Directions on disclosure, which can be found HERE.

Rule 31.2 states that *"A party discloses a document by stating that the document exists or has existed".*

The term *'document'* is given a wide definition in rule 31.4, which extends to electronic documents.

The normal practice for disclosure will be an order that parties give standard disclosure (and is governed by rule 31.6 – see next slide).

What must be disclosed?

Test for standard disclosure is set out in rule 31.6. A party must disclose only:

(a) the documents on which he relies; and

(b) the documents which –

- (i) **adversely** affect his own case;
- (ii) **adversely affect another** party's case; or
- (iii) **support** another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.

What searches must a party undertake?

Rule 31.7(1) states that *"when giving standard disclosure, a party is required to make a reasonable search for documents falling within rule 31.6(b) or (c)."*

The factors relevant in deciding the reasonableness of a search include the following (as per rule 31.7(2):

(a) the **number** of documents involved;

(b) the **nature** and complexity of the proceedings;

(c) the **ease and expense of retrieval** of any particular document; and

(d) the **significance** of any document which is likely to be located during the search.

(3) Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document.

How must documents be disclosed?

Rule 31.10 sets out the procedure for standard disclosure including:

- each party must make and serve on the other party, a list of documents as per rule 31.10(2) in a Form N265 (HERE); and
- the list of documents must contain a disclosure statement complying with rule 31.10(5).

Rule 31.3 governs inspection of documents:

- A party who has had a document disclosed to it has the right to inspect it. There are certain carve-outs to this, for example legal professional privilege and if a document did exist but no longer exists.

Specific disclosure

If a party believes that the disclosure of documents given by a disclosing party is insufficient, they can make an application for an order of specific disclosure.

Under rule 31.12, the Court may make an order for specific disclosure or specific inspection requiring a party to:

"(a) disclose documents or classes of documents specified in the order;

(b) carry out a search to the extent stated in the order;

(c) disclose any documents located as a result of that search."

Example: In the Lloyds/HBOS litigation, the Claimants made an application for an order of specific disclosure following input from experts.

Third Party Disclosure

Even if you are not party to a dispute you may be required to provide disclosure. These rules are set out in rule 31.17.

An application to the court for disclosure has to be made.

Any party making an application against a third party must provide evidence as to why it is necessary for that third party to provide disclosure.

The court will may make an order where (31.17 (3)):

(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and

(b) disclosure is necessary in order to dispose fairly of the claim or to save costs.

Final thoughts for Institutional Investors participating in litigation in England and Wales

1. you will be asked to give disclosure of your documents and documents within your control

2. as soon as litigation is in contemplation place a document hold on all relevant documents and ensure they are not destroyed

3. start thinking about what searches will need to be undertaken and how you might conduct them. For example who are the relevant document custodians? Do you need to liaise with third parties such as investment managers?

4. factor in the internal costs of undertaking disclosure searches into the costs of bringing a claim

5. think about how technology might assist you

6. be aware that even if you are not a party to a dispute you may be ordered by the court to give disclosure of your documents

7. the duty to disclose documents is ongoing and continues throughout the life of the case

Grant & Eisenhofer

Searching for Evidence in the United States

March 15, 2018

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U.S. Federal Law Allows for Six Methods of Evidence-Gathering ('Discovery')

- Document Requests
- Interrogatories
- Depositions
- Inspection
- Physical Examination
- Requests for Admissions

Federal Rules of Civil Procedure Rule 26(b)—Scope of Discovery

- **Relevance** - Any Matter Relevant to a Claim or Defense
- **Necessity** - No Unreasonably Cumulative or Duplicative Information; from Most Convenient, Least Burdensome, and Cheapest Sources
- **Proportionality** – the Likely Benefit Must Outweigh the Cost and Burden
- **No Abuse** – No Annoyance, Embarrassment, Oppression, or Undue Burden or Cost
- **No Delay** – No Discovery after Missing Ample Prior Opportunity
- **No Privilege** - No Privileged Information

Federal Rules of Civil Procedure Rule 26(b)—Scope of Discovery

U.S. Discovery Requirements	Netherlands Document Discovery Requirements
• **Relevance –** any matter relevant to a claim or defense (Rule 26(b)(1))	• **Relevance** – the document must 'relate to' (i.e. be 'of significance to') the 'legal relationship' at issue (i.e. the requesting party's rights and obligations in contract or tort) (Art. 843a(1))
• **Necessity** – no unreasonably cumulative or duplicative information; parties must pursue the most convenient, least burdensome, and cheapest sources (Rule 26(b)(2)(C)(i))	• **Necessity** – the party must have a 'legitimate interest', i.e. a need for the document to prove the issue to which the document relates (Art. 843a(1)). Due process does not require the production of cumulative or duplicative information and information available from an alternative source, e.g. through witness examination (Art. 843a(4))
• **Proportionality** – the likely benefit must outweigh the cost and burden (Rule 26(b)(2)(C)(iii))	• **Specificity** – the request must describe the specific document requested (Art. 843a(1)). *But see* HR Oct. 26, 2012, ECLI:NL:HR:2012: BW9244 (Theodoor Gilissen)
• **No Abuse** – no annoyance, embarrassment, oppression, or undue burden or cost (Rule 26(c)(1))	• **No Disproportionality, Abuse, or Delay** any non-production excusable for 'compelling reasons' (Art. 843a(4))
• **No Delay** – no discovery after missing ample prior opportunity (Rule 26(b)(2)(C)(iii))	• **No Privileged Information** – no privileged information need be produced (Art. 843a(3))
• **No Privilege Information** – no privileged information need be produced (Rule 26(b)(1)	

U.S. Federal Law Allows for Document Discovery and Depositions in Aid of Foreign Proceedings

- **28 U.S.C. § 1782**

The district court of the district in which a person **resides** or is **found** may order him to give his **testimony** or statement or to **produce a document** … for use in a proceeding in a foreign or international tribunal …. The order may be made pursuant to a letter rogatory … by a foreign or international tribunal or upon the application of **any interested person** (…)

U.S. Federal Law Does Not Allow Pre-Action Discovery – Except for Foreign Proceedings

- ***Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004)**

  [T]he 'proceeding' for which discovery is sought under § 1782(a) must be in reasonable contemplation, but **need not be 'pending' or 'imminent'**

U.S. Federal Law Does Not Allow Pre-Action Discovery – Except for Foreign Proceedings

- ***Mees v. Buiter*, 793 F.3d 291 (2d Cir. 2015)**

  [A]n applicant may satisfy the statute's 'for use' requirement even if the discovery she seeks is **not necessary** for her to succeed in the foreign proceeding

  A § 1782 applicant satisfies the statute's 'for use' requirement by showing that the materials she seeks are to be used at **some stage** of a foreign proceeding

  [T]he district court should not condition discovery on an overt expression from the foreign court that it wants or needs the information

Volkswagen

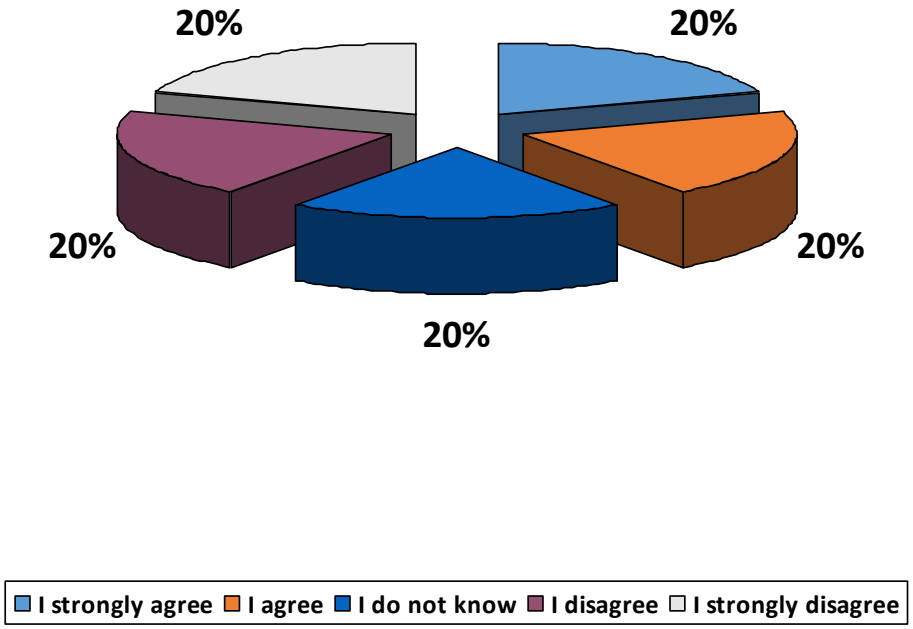
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

In re Application of Deka Investment GmbH, California Public Employees' Retirement System, NORD/LB Asset Management AG, and MEAG MUNICH ERGO Kapitalanlagegesellschaft mbH for an Order Pursuant to 28 U.S.C. § 1782 Granting Leave to Obtain Discovery for Use in Foreign Proceedings	Civ. A. No. _____ ***EX PARTE* APPLICATION FOR AN ORDER PURSUANT TO 28 U.S.C. § 1782 GRANTING LEAVE TO OBTAIN DISCOVERY FOR USE IN FOREIGN PROCEEDINGS**

Applicants Deka Investment GmbH ("Deka"), California Public Employees' Retirement System ("CalPERS"), NORD/LB Asset Management AG, and MEAG MUNICH ERGO Kapitalanlagegesellschaft mbH ("Applicants"), based upon the concurrently filed memorandum

Assuming that you do not have US-style discovery in your home country, would you prefer to have US-style discovery?

A. I strongly agree
B. I agree
C. I do not know
D. I disagree
E. I strongly disagree



PART
04

Global Economic Outlook & Trends from Insurers' View

The Global Rise of Collective Investor Actions and Current Trends in D&O Liability and Insurance

DRRT

Frankfurt, Germany

March 2018

Kevin Lacroix, RT Specialty
Francis Kean, Willis Towers Watson
Jonathan Simon, Willis Towers Watson

RT SPECIALTY

Willis Towers Watson

Global D&O Claims Arena

THE MOST SIGNIFICANT RECENT DEVELOPMENTS

- Rise of Collective Investor Actions outside the U.S. (Europe (Netherlands, UK), Australia and beyond)
- The rise of event-based claims
- Some implications of cyber threats
- Regulatory focus on personal accountability
- New challenges for liability insurers

Global Rise in Collective Investor Actions: Fortis Settlement (Netherlands)

March 2016: Ageas Announces €1.204 Billion Settlement of Fortis Investor Claims (Fortis's D&O Insurance Contributes €290 million)

- **June 2016:** Amsterdam Court announces settlement not binding due to concerns over distributions between and among claimants and representative organizations.
- **December 2017:** Parties submit amended settlement agreement addressing Court's concerns
- **Spring 2018:** Further hearing to agree settlement and distribution

Global Rise in Collective Investor Actions:

RBS Settlement (U.K.)

- **December 2016:** RBS Announces £800 Million Settlement with Three of Five Investor Groups;

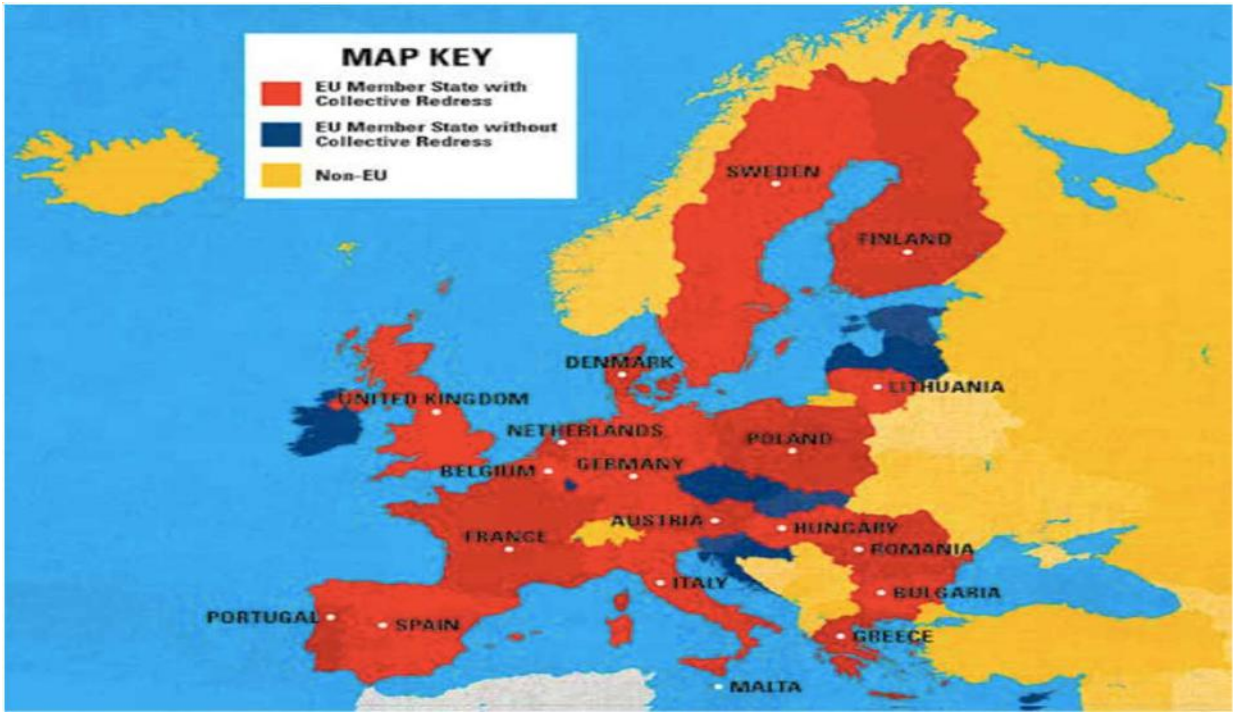
- **June 2017:** RBS Settles With Other Groups for Additional £200 Million.

- **COMBINED VALUE: £1 Billion**

EU Collective Redress Directive

- **June 11, 2013:** Non-binding EU directive for adoption of collective redress mechanisms
- Majority of EU Member States now have some form of claimants combining their claims
- All EU Member States reported on collective redress in July 2017
- EU Commission to evaluate if further action is required

EU Collective Redress Directive



Source: The Growth of Collective Redress in the EU, U-S- CHAMBER, Institute for Legal Reform, March 2017

Australian Class Action Claims

- Federal and State claims possible
- Shareholder class actions dominant and still growing
- Effect on D&O insurance market

Funding Implications of Developments in Collective Redress Claims

- Appetite, availability and cost of funding
- The end of the **Arkin** cap (**Bailey v. GlaxoSmithKline** [2017] EWHC 3195 (QB))
- ‘Opt-in’ versus ‘Opt-out’ actions
- Contingency Fee insurance

Looking Ahead: Collective Investor Actions

- AIG Europe: High profile cases could “pave the way” for similar actions in the future
- Legislative reforms continue
  - e.g., Thailand adopted class action procedures effective December 2015
- Funding firms, plaintiffs’ lawyers will continue to push and innovate
- Future scandals will drive demand for shareholder redress

U.S. Securities Litigation Filing Trend: Event-Driven Litigation

- Formerly, U.S. securities lawsuits primarily alleged financial misrepresentations
- 2016: Fewest Number of Financial Restatements Since 2002
- Fewer securities lawsuits involving financial misrepresentations
- Increasingly, U.S. securities suits follow operational setbacks or reverses
- Significant factor in rising number of U.S. securities lawsuit filings

Arconic Securities Litigation

- **June 14, 2017:** Grenfell Towers fire in London
- **June 24, 2017:** News reports that Arconic manufactures building's exterior metal covering
- **July 13, 2017:** Shareholder files securities class action lawsuit in New York federal court
- Alleges company failed to disclose financial and business risks associated with construction business

U.S. D&O Lawsuit Trend: Employment Practices D&O Claims

- 2017: Series of sexual misconduct allegations involving media, political figures
- Wrongdoers held to account
- Reckoning increasingly involves corporate management
- Allegations that management abetted misconduct or turned a blind eye

21st Century Fox Litigation

- Delaware Chancery Court shareholder derivative lawsuit
- Company officials allegedly permitted climate of sexual misconduct to permeate company
- **November 2017:** $90 million settlement
- Among ten largest derivative settlements ever
- Funded entirely by D&O insurance
- Settlement included detailed remedial measures

Wynn Resorts Derivative Suit

- **Feb. 7, 2018:** Clark County (Nevada) District Court
- Investors sue Steve Wynn (now former CEO and Chairman) as well as the company's board
- Breach of fiduciary duty alleged; board allegedly knew of pattern of misconduct but failed to investigate
- Misconduct Allegations have also surfaced in Gaming Commission of Massachusetts
- Company has $2.4 billion casino project application pending

Regulatory Focus on Personal Accountability of Directors

"…Pursuing individuals has continued to be the rule not the exception. One or more individuals have been charged in more than 80% of the standalone enforcement actions the commission has brought"

Extract from Securities Exchange Commission 5 Core Principles for Enforcement 2018

Regulatory Focus on Personal Accountability of Directors

"We need an approach to investigation that will meet the challenges of supporting the embedding of the culture [of senior management accountability]. This means that generally where there are grounds for investigating a matter, there will be a need to investigate the role of senior management in the conduct issues that arise"

Jamie Symington, Director of Investigations, UK Financial Conduct Authority 15th June 2017

Some Implications of Cyber Threats

"The PRA would expect to see that the board has confirmed that a comprehensive assessment of the potential resulting losses has been carried out and that the overall non-affirmative cyber exposure falls within the stated risk appetite."

Supervisory Statement SS4/17 issued by UK Prudential Regulation Authority

Data Breach D&O Claims Dismissals

Wyndham Worldwide: Dismissed, October 2014

- Board's refusal to pursue the plaintiff's litigation demand was a good-faith exercise of business judgment, made after a reasonable investigation

Target Corporation: Dismissed, July 2016

- Case dismissed on recommendation of special litigation committee formed to investigate plaintiffs' allegations

Home Depot: Dismissed, November 2016

- Court granted the defendants' motion to dismiss based on the plaintiffs' failure to fulfill the pre-suit litigation demand requirement
- **April 2017:** While on appeal, cases settled for agreed cybersecurity measures and payment of plaintiffs' attorneys' fees of $1.1. million

2017: New U.S. Data Breach-Related Securities Class Action Lawsuits

- January 2017: Yahoo
- September 2017: Equifax
- December 2017: PayPal
- December 2017: Qudian.com

Intel Corporation/Advanced Micro Devices Securities Suits

Intel: January 10, 2018 (N.D. Cal.)

- Company failed to disclose that the existence of design flaw in its electronic chips, makes chips susceptible to hacking
- CEO sold millions of shares of Intel stock before vulnerability disclose

Advanced Micro Devices: January 18, 2018 (N.D. Cal.)

- After first denying that its chips were susceptible, company admits its chips are vulnerable to flaw

Some New Challenges for Liability Insurers

- Potential for unlimited liability for costs in civil litigation (XYZ v Travellers Insurance Company ((2017) EWHC 287)

- New implied term in every insurance contract incepting post May 2017 that ”*insurers must pay any sums due in respect of the claim within a reasonable time” (*Enterprise Act 2016)

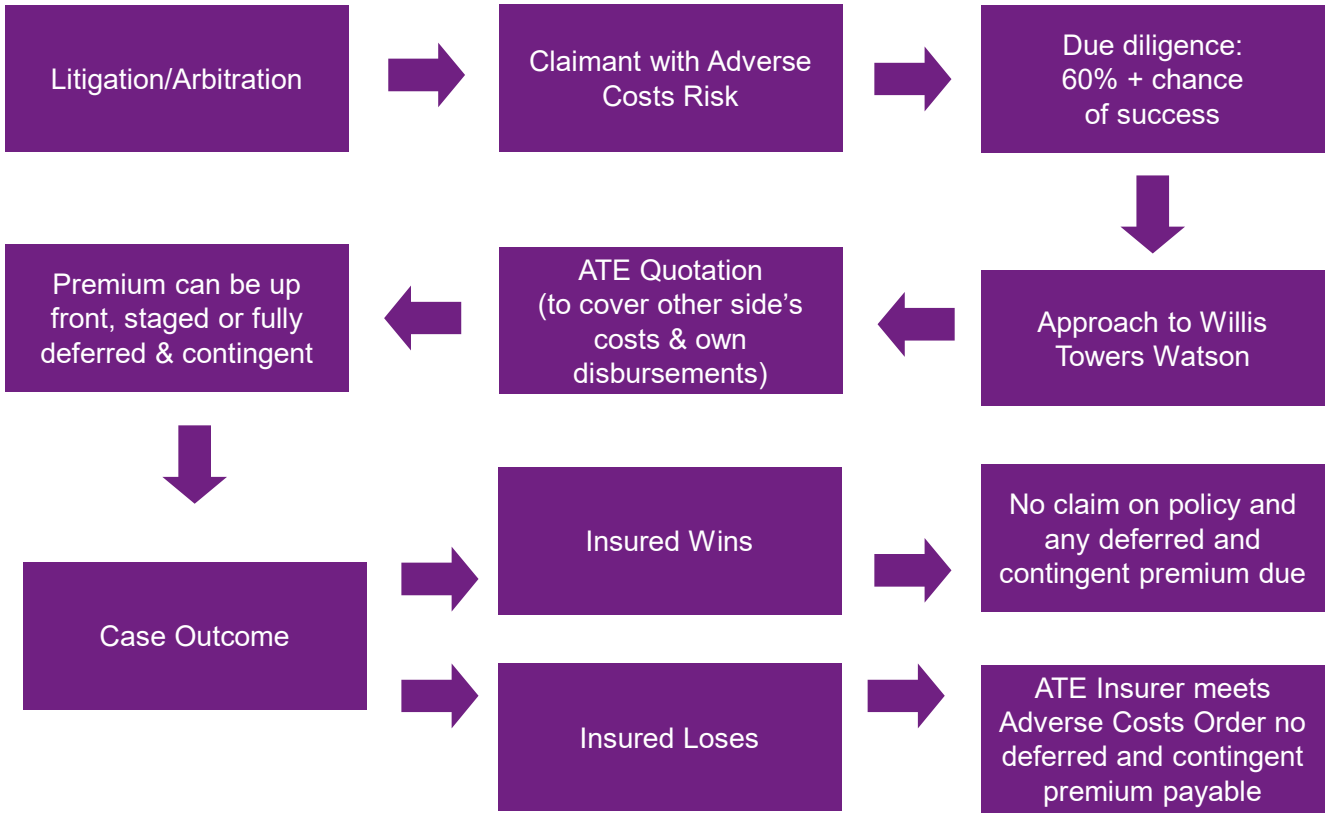
After The Event Insurance – What is it ?

After the Event Insurance, also known as ATE insurance or Litigation Insurance, is where an insurance company provides an indemnity against its insured (usually a claimant to litigation or arbitration) having to pay the other side's (usually defendant's) legal costs in the event that the insured is unsuccessful in the relevant legal proceedings.

In the UK and other common law jurisdictions a losing party to litigation is automatically bound to pay the successful party's legal costs and so the ATE cover provides a safety net against the risk of an adverse costs outcome.

Unlike traditional insurance, which is taken out ahead of an uncertain event occurring, ATE insurance is only available to litigants that are already involved in, or who are contemplating, a legal claim (but where the costs risk is still uncertain). ATE insurers will therefore only be keen to offer a policy for those cases where they believe the prospective insured's claim is likely to succeed.

After The Event Insurance - How does it work?

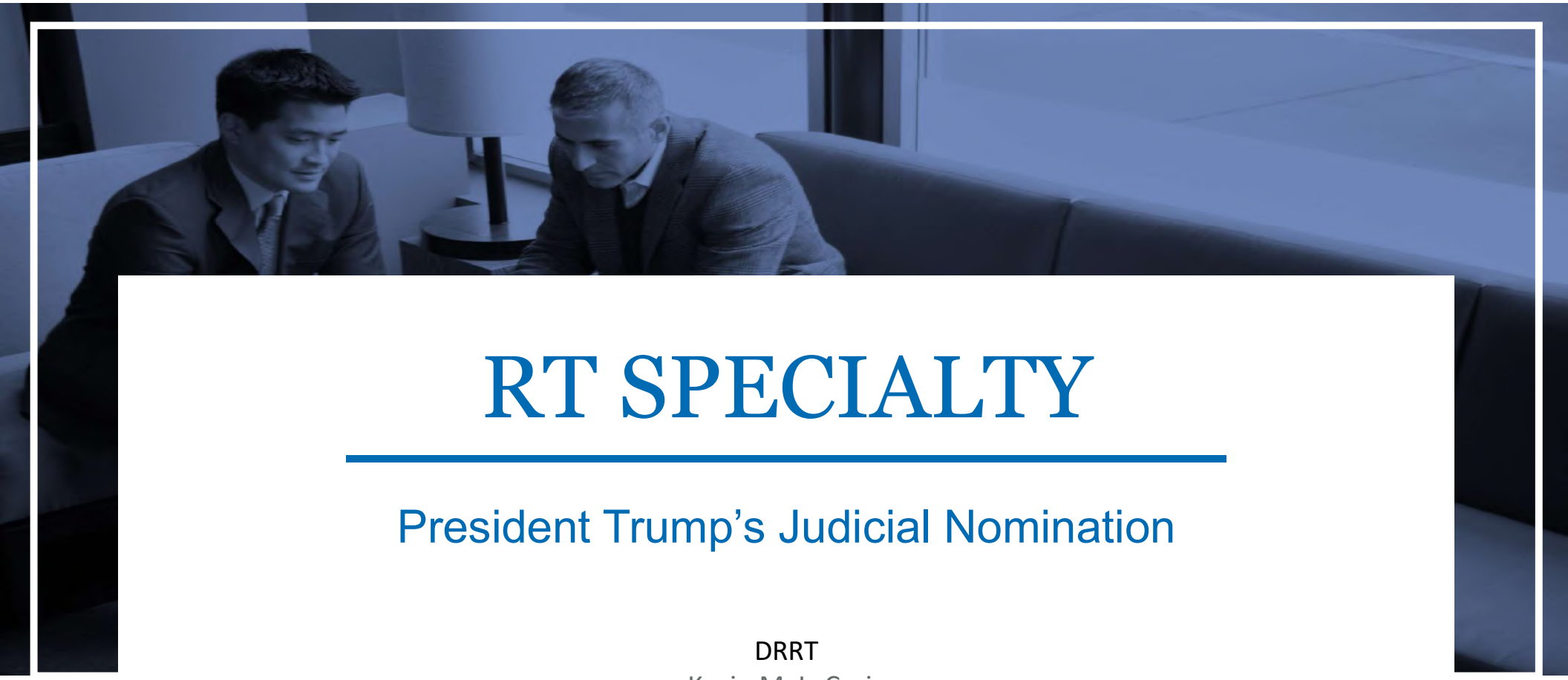


The Future of After the Event Insurance

- Significant increases in the amount of available ATE capacity
- Funders now offering adverse costs indemnities (but see **Progas** Energy Ltd & Ors **v.** The Islamic Republic of **Pakistan** [2018] EWHC 209 (Comm))
- Fully contingent premiums based on a DBA model
- A Captive and reinsurance alternative ?
- The morphing of funders and insurers

PART
05

New Regulatory Environment & Jurisprudence in the U.S. and Effects on Shareholder Litigation



RT SPECIALTY

President Trump's Judicial Nomination

DRRT

Kevin M. LaCroix
Frankfurt, Germany
March 15, 2018

How Will President Trump's Judicial Nominees Shape the Federal Judiciary?

Number of Judicial Vacancies

- As of February 14, 2018, **146** federal court vacancies, representing about one out of six of the authorized federal judgeships

Trump Administration Judicial Nominations (as of February 14, 2018)

- Confirmed:
  - 1 Associate Supreme Court Justice
  - 13 U.S. Court of Appeals Judges
  - 10 U.S. District Court Judge
- Pending Nominations:
  - 11 U.S. Court of Appeals Judges
  - 29 U.S. District Court Judges

Democratic Senator Chris Coons

- Trump administration's federal judicial nominations "will be the **single most important legacy** of the Trump administration
- With respect to the candidates, "given their youth and conservatism, they will have a **significant impact** on the shape and trajectory of American law **for decades**"

New Regulatory Environment & Jurisprudence in the U.S. and Effects on Shareholder Litigation

DRRT

Preston Opinion

- Conference Panels 1 & 2 elaborated on the June 2017 US Supreme Court Decision, *CalPERS v. ANZ*
  - *CalPERS v. ANZ* held no equitable tolling of the statute of repose
  - *CalPERS v. ANZ* did not address the possibility of contractual tolling of the statute of repose
  - *CalPERS. v. ANZ*, 137 S. Ct. 2042 - Supreme Court 2017
- *Preston*, an October 2017 11th Circuit Decision
  - Opinion written by Judge Kevin Newsom (appointed to the 11th Circuit by President Trump)
  - Directly addresses the question that *CalPERS v. ANZ* left unanswered—availability of contractual (non-equitable) tolling of the statute of repose
  - *Preston* is binding authority in the 11th Federal Circuit, persuasive authority in other Federal Circuits
  - Incumbent upon the US Supreme Court to resolve any future circuit splits
  - *Secretary, US Dept. of Labor v. Preston*, 873 F. 3d 877 - Court of Appeals, 11th Circuit 2017

Preston Opinion

- Per *Preston*, contractual tolling of the statute of repose is allowed in the 11th Circuit
- The rationale cited in *CalPERS v. ANZ* for not allowing equitable tolling of the statute of repose was to provide the defendant with certainty about its exposure to unknown liabilities
- The defendant's need for certainty does not similarly apply in the context of a tolling agreement (plaintiffs & claims are known)
- Implications of *Preston*:
  - Parties can sign tolling agreements with increased certainty as to how courts will interpret them
  - Following both *CalPERS v. ANZ* and *Preston*, to preserve claims, tolling agreements are increasingly attractive
  - Tolling agreements must be carefully drafted to comply with post-*Preston* requirements and to ensure tolling of both statute of limitations (knowledge dependent) and statute of repose (knowledge independent)

SEC Enforcement

- Current SEC Chairman is Jay Clayton
  - He assumed position May 2017
  - He was nominated by Trump

- July of 2017: Clayton Announces Guiding Principles:
  - SEC's mission is three-part to: protect investors, maintain efficient markets & facilitate capital formation
  - Focus on promoting the interests of retail investors
  - Regulatory actions drive change; SEC must keep step with changing times
  - Effective rulemaking requires review of existing rules
  - In its rulemaking context, the SEC must consider practicalities and costs associated with compliance efforts
  - SEC must coordinate with other regulators

(Potential) Enforcement Shift

- Still premature to draw meaningful conclusions as to scale of potential changes
- New chairman shows a willingness to reconsider existing rules
  - Time will reveal extent and success of rule revisions
  - Focus on costs associated with compliance could lead to rules resulting in less expensive compliance programs
- Focus on retail investors or "Main Street America"
  - SEC appears most interested in wrongdoing that hurts less sophisticated investors
  - Investment products targeted to retail investors could have an increased enforcement risk
  - By contrast, investment products targeted to sophisticated investors may face less enforcement risk

PART
06

Investor Loss Recovery Efforts around the World I

Successful Cases
Use of Dutch Foundations in Question
Volkswagen/ Porsche (Emission Scandal)

Successful Cases

Alexander Reus, DRRT

Successful Cases

Overview

Fortis/Ageas (NL) 2008

WCAM settlement of €1.3 billion, largest securities fraud settlement in European history

Still pending final approval after March hearings (likely by June 2018)

RBS (UK) 2008

Largest shareholder settlement in the UK (£800 million)

GLO similar to German KapMuG

Petrobras ADR (US) 2014

Record corruption case settlement for shareholders of $3 billion

Brazilian securities arbitration of 3 major groups pending at MAC

Successful Cases

- Fortis/ageas Recap:
  - On March 14, 2016, initial settlement inked with Ageas for € 1.2 billion
  - WCAM settlement under Dutch law, subject to court approval
  - WCAM court rejected settlement on June 16, 2017 and asked for some adjustments
  - Amended settlement agreement reached on December 12, 2017 with €100 million more to address certain retail investor needs
  - Court hearings on March 16 and 27, 2018
  - Final approval expected in June 2018

Successful Cases

- RBS Recap:
  - December 2016 settlement with RBS for £800 million
  - Settlement includes several institutional investor groups, but certain investors in "Shareholder Action Group" are not settled yet
  - Remarkable recovery of 41pence for every share purchased in the 2008 Rights Offering
  - Payments made in Q1/2017, but expensive case with high risk and large litigation insurance costs
  - Despite indications of secondary market liability, English system did not permit an insured and risk-free claim under Section 90A FSMA, otherwise, the claims would have been much bigger
  - Future claims in England under Section 90A FSMA to be advanced by large institutional investors to test and better define the „reliance" requirement as well as advance arguments similar to the „fraud on the market doctrine" in the U.S.

Successful Cases

- Petrobras ADR
  - Record $3 billion corruption and bribery related shareholder settlement announced on January 3, 2018
  - Settlement was reached as the U.S. Supreme Court was about to decide on hearing Petrobras' appeal of a lower court decision certifying the case as a class action with certain limitations
  - There are still at least two groups of opt outs pending in the U.S. which have not settled yet, one of which also active in Brazil
  - Once U.S. cases are resolved, there will be an interesting dynamic and expectations about Brazilian settlement discussions (after the SOL expired in October 2017)

Use of Dutch Foundations in question – is this the end of the Dutch WCAM model

Olav Haazen, Grant & Eisenhofer P.A.

The 'Dutch Foundation' Hype – Why?

- **The Netherlands *En Vogue*: the Collective Settlement Statute (WCAM)**
- **Offers the World Global Peace**
- **Low Court Fees / Modest 'Loser Pays' System**
- **Now More Experienced with Securities Classes than Other EU Member States**

The 'Dutch Foundation' Hype – Why?

- **The Netherlands *En Vogue*: the Collective Settlement Statute (WCAM)**
- **Offers the World Global Peace**
- **Low Court Fees / Modest 'Loser Pays' System**
- **Now More Experienced with Securities Classes than Other EU Member States**
- **Fraud-on-the-Market Presumption that the Fraud Caused the Investors' Loss (*World Online* (2009))**
- **Class-Wide Tolling of Limitations Period *by Letter* (*Deloitte* (2014))**

Collective Actions in the Netherlands

1. The WCAM and *Royal Dutch/Shell*
2. The New Legislative Proposal for a Damages Class Action
3. The Dutch Foundation and *VW*, *Petrobras* and *Steinhoff*
4. Consolidated Damages Claims and *Fortis*

WCAM – *Wet Collectieve Afwikkeling Massaschade*

- **Amsterdam Court of Appeals May Declare a Collective Settlement Applicable to All Class Members**
- **Absent Class Members May Opt Out**
- **Global ('F-Cubed') Jurisdiction:**

  The Class May Include *Foreign* Plaintiffs' Claims against a *Foreign* Defendant for *Foreign* Fraud (*Shell*, *Converium*)

WCAM – Pros and Cons

- Global Peace
- Settlement Leverage Varies
- Institutional Investor Premium Capped

WCAM – *Royal Dutch/Shell*

- Misleading Information Regarding Shell's Oil and Gas Reserves, Which Were in Reality 23% Less
- Class Action Litigation Pending in the United States
- The Grant & Eisenhofer / DRRT / Kessler Topaz Group Moved the Case to the Netherlands for the First-Ever European-Wide Settlement ($450 mio)

The New Dutch Damages Class Action Bill

- Opt-Out Damages Class Action
- No Competing Classes
- Class Represented by Lead Plaintiff ('Exclusive Group Representative')
- Non-Profit Associational Standing Only

The 'Dutch Foundation' - *VW, Petrobras, Steinhoff*

- A.k.a. Article 305a Action / Declaratory Judgment Action
- Action for the Public Interest or a Group Interest
- No Opt-In / No Opt-Out
- Non-Profit Associational Standing Only
- Liability Only / No Damages
- Either Individual Follow-Up Damages Claims (Opt-In) Or WCAM (Opt-Out)
- Class-Wide Tolling (*Deloitte*)

The 'Dutch Foundation' – Pros and Cons

- Works Better for Retail Investors Who Have No Other Options
- Works Better against Dutch Household Names / Consumer Brands with Reputations to Protect
- Settlement Leverage Varies
- Why Join?

Consolidated Damages Claims

- Individual Damages Claims
- May Be Combined with SPV
- Similar to Group of Opt-Out Claims (U.S.)
- Opt-Out Premium

Consolidated Damages Claims
- *Fortis*

- Belgian-Dutch Fortis Joined with RBS and Santander to Acquire ABN Amro But Could Not Afford It
- Fortis' Market Cap Dropped from €33 to €6.8 Bn When It Came Out that It Had Lied About Its Sub-Prime Mortgage Exposure and Had to Be Nationalized by the Benelux Governments

- The Grant & Eisenhofer / DRRT / Kessler Topaz Group Helped Settle All Litigation for €1.3 Bn (WCAM Approval Pending)

Consolidated Damages Claims – Pros and Cons

- Works Better for Institutional Investors
- Stronger Settlement Leverage
- But: Initiative Required (Opt-In)

Update Volkswagen/ Porsche (Emission Scandal)

Andreas Tilp, Tilp Litigation

Overview

- Preliminary notes
- Volkswagen Dieselgate scandal review
- KapMuG: A visual flow chart of institutional claims
- German Litigation update
- Visual depiction of ongoing proceedings and review of claims filed
- Section 1782 Discovery Request and German Discovery Requests
- Request for documents in Germany - section 432 ZPO and section 142 ZPO

Preliminary notes

TILP Rechtsanwaltsgesellschaft mbH and TILP Litigation Rechtsanwaltsgesellschaft mbH represent plaintiffs' investor claims in the "VW-Dieselgate" matter.

Defendants in the legal dispute are:

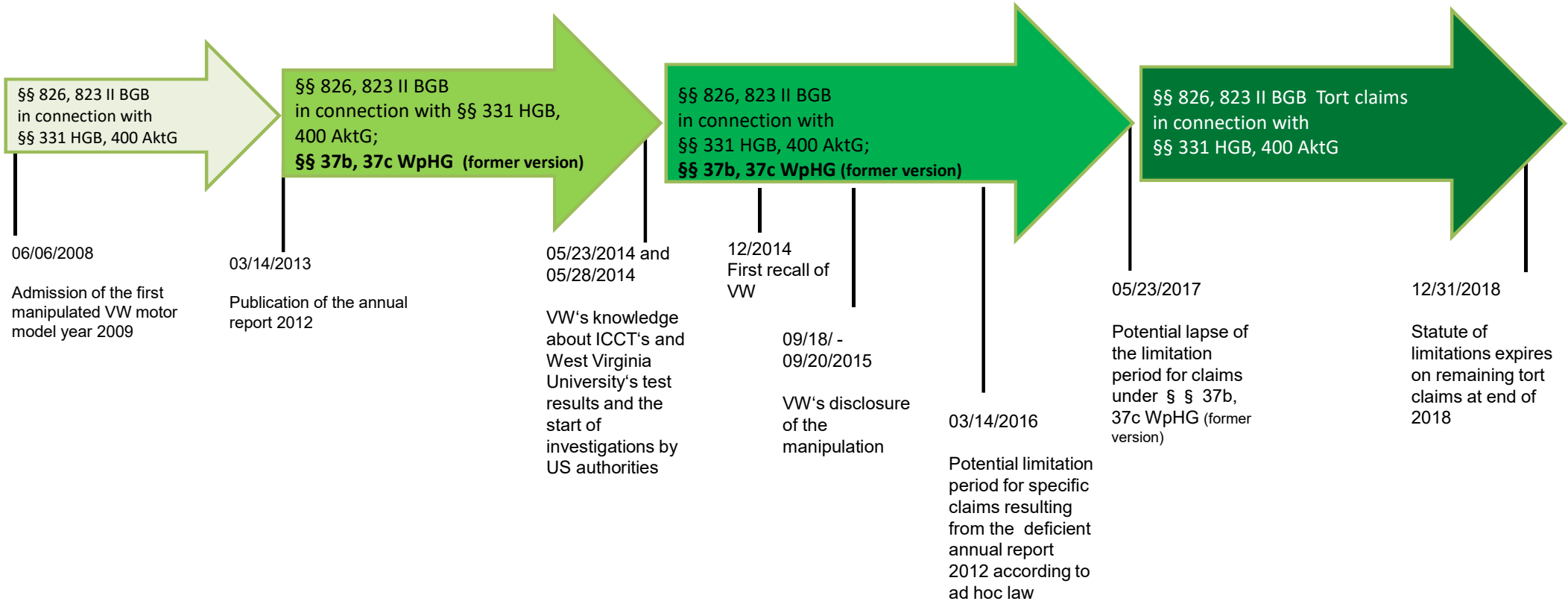
- Volkswagen AG ("VW") at the Regional Court of Brunswick ("LG Braunschweig")
- VW and Porsche Automobile Holding SE ("PSE") at the Regional Court of Stuttgart ("LG Stuttgart")

The content of this Power Point presentation represents the circumstances of the case exclusively from the law firm's point of view.

The following statements refer to facts of the case, however, they do not reflect the alleged claims, nor does the speaker claim the facts of the case to be undisputed.

The information included is up to date as of March 16, 2018 but does not claim to be complete.

VW emissions scandal – relevant purchases and statute of limitation



VW emissions scandal: USA developments in 2017

Class Actions are filed in USA and consolidated into multi district litigation in California under docket Nr: 3:15-md-02672

Complaints from parties such as:

Consumer

Dealer and Reseller

ADR and Bonds

Volkswagen signs a Plea Agreement

Plea signed on January 11, 2017

Plea entered by the court on October 3, 2017

VW admits to conspiracy, obstruction of justice and importing goods based on false statements

VW to pay 2.8 billion dollar fine

Volkswagen was held criminally liable in the USA through the principle of **"respondeat superior,"** which is the liability of an employer for the acts of its employees during the course of business Comparable to German law **§31 BGB**

Criminal complaints are filed against VW employees in USA - some have been resolved to date

Sept. 7, 2016

First criminal complaint filed against VW Executive Richard Dorenkamp for conspiracy to defraud and violation of the clean air act

Sept. 9, 2016

James Liang signs plea deal in USA

January 7, 2017

Oliver Schmidt arrested in USA

January 11, 2017

Second criminal indictment filed against 6 VW Executives for conspiracy to defraud and violation of the clean air act

July 24, 2017

Oliver Schmidt pleads guilty

Key Figures USA:
Oliver Schmidt

- Oliver Schmidt oversaw emissions as manager of the Environmental and Engineering Office at VW's office in Michigan from 2012 to early 2015
- He was arrested on January 7, 2017 while on a family vacation in Florida and signed guilty plea agreement on July 24, 2017
- Sentenced to 7 years in jail and a $400,000.00 fine – he is the highest-ranking VW employee to be convicted in the scheme in the US
- Schmidt wrote in a November letter to Judge Cox: "I feel misused by my own company in the Diesel scandal."
- **Schmidt's criminal indictment contains information that is valuable to the ongoing German proceedings and the knowledge of Volkswagen executive management, for example:**
- **Email to Michael Horn on May 15, 2014: "A thorough explanation for the dramatic increase in Nox emissions cannot be given to authorities…"**
- Email from **April 2, 2014** from Schmidt to VW employee **"It must first be decided if we are honest.** If we are not honest, then everything stays as it is. ICCT has stupidly published the measurements of NAR off cycle, not good".

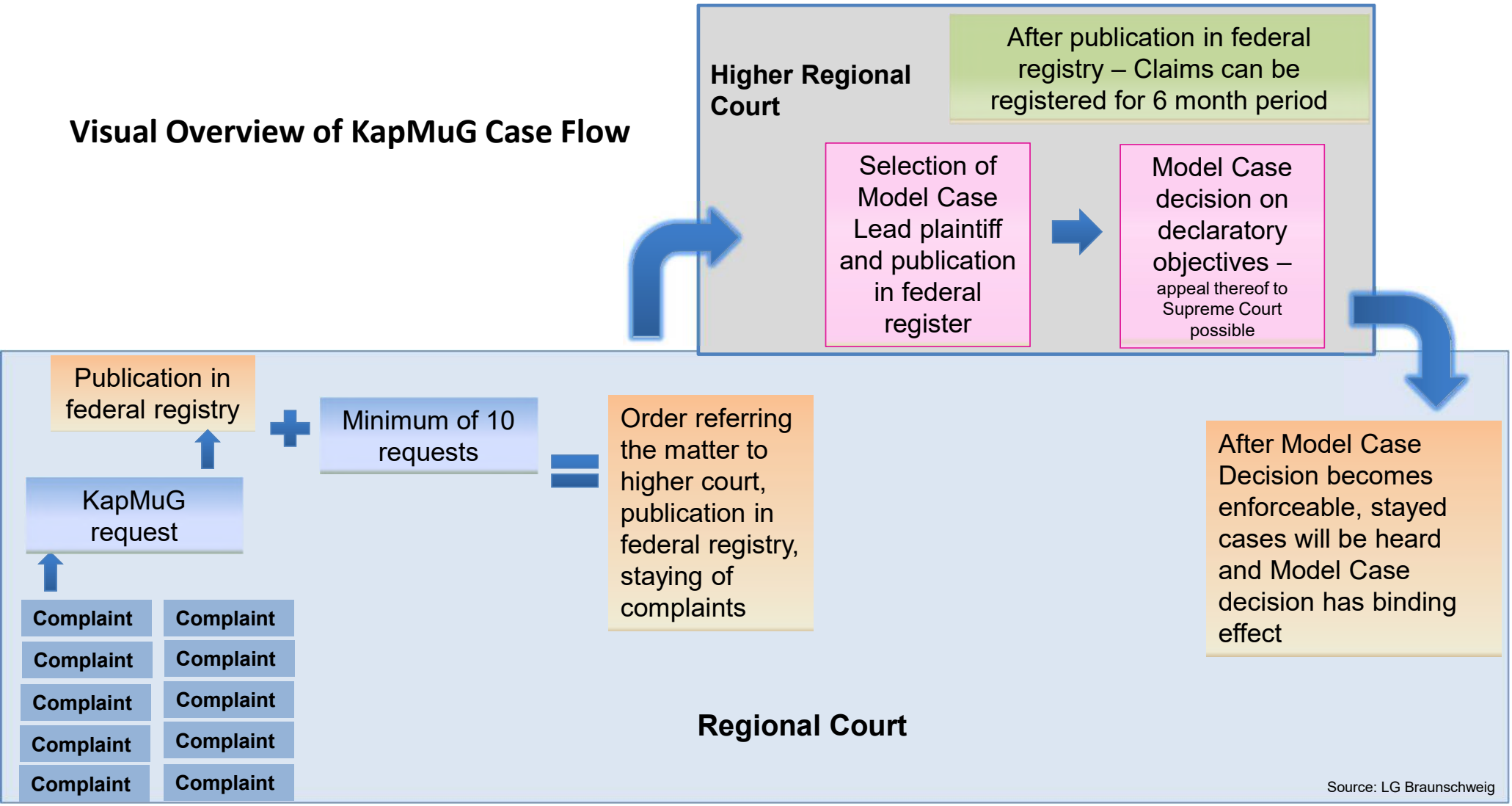
Key Figures USA:
James Liang

- James Liang is a German engineer for Volkswagen and the first employee to be criminally prosecuted.
- A criminal indictment was entered against Liang in Michigan on June 1, 2016
- Liang was the engineer that worked **closely with others on the defeat device** over a large number of years, and according to his indictment, development of the defeat device software began as early as 2006. For example:
- Liang's indictment states that a meeting took place on **October 3, 2006** with the California Air Resources Board and several high ranking VW and Audi executives to discuss the EA189 engine, and **the fact that it met US emission standards. HOWEVER:**
- **On October 12, 2007,** a VW employee emailed a project update to Liang and others that was an update on the progress of the defeat device, stating (in German) that even with recognition of driving cycles**, the VW diesel engine continued to fail U.S. emissions standards.**

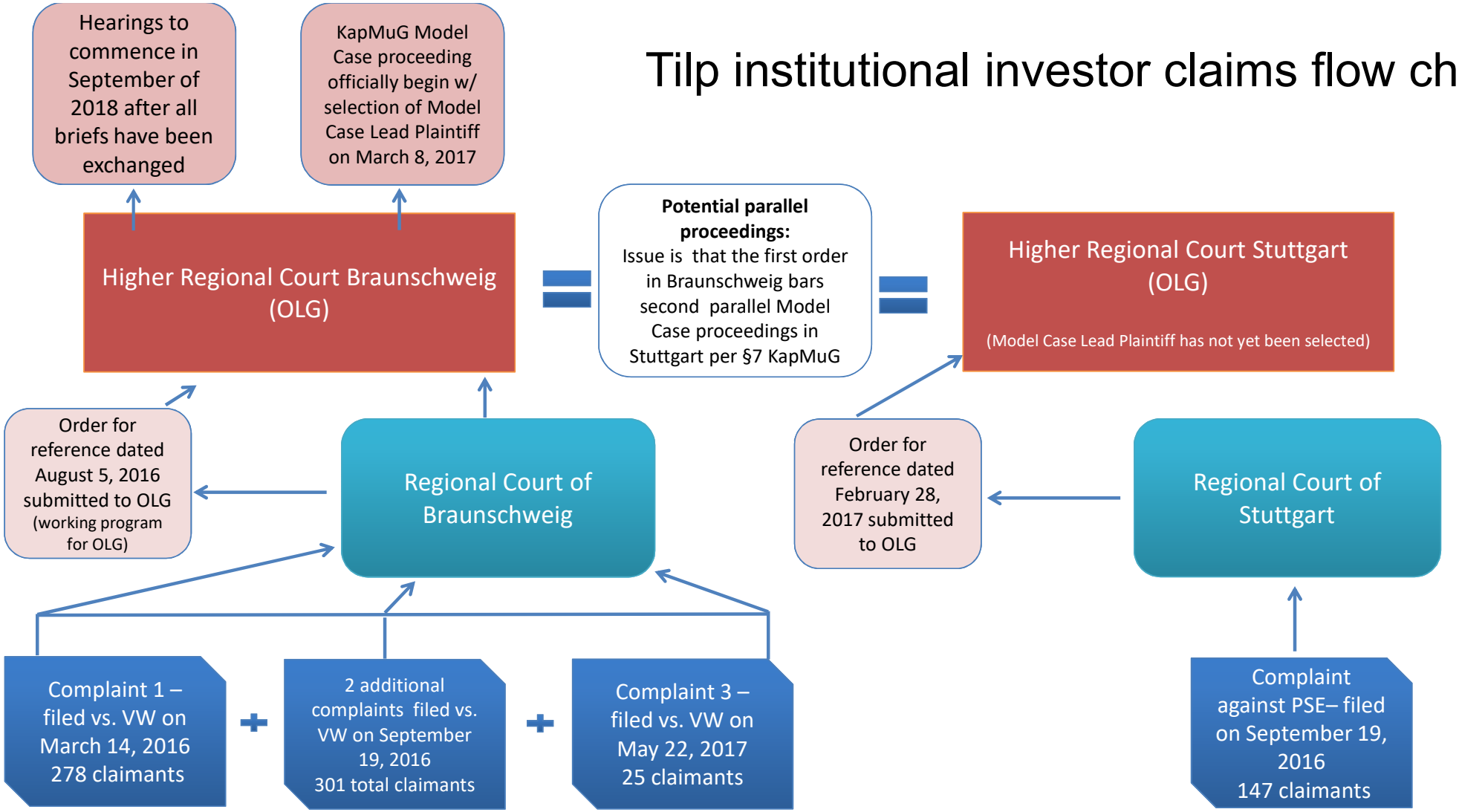
Volkswagen Pleads Guilty in USA and pays large fines and settlements

- With the evidence mounting against them, and pressure from regulatory authorities Volkswagen admits to the installation of a defeat device in US vehicles, and pleads guilty to criminal charges of acts on behalf of their employees and fined 2,8 billion dollars
- VW admits to a conspiracy to defraud the US, to importing goods based on false statements and to intentionally covering up the detection of the defeat device
- Settlements for 2,0 and 3,0 Liter vehicles have also been reached in the USA
- On 28 June 2016, Volkswagen agreed to pay $15.3 billion to settle the various public and private civil actions in the United States, the largest settlement ever of an automobile-related consumer class action in United States history
- Over $25 billion dollars have been paid out by Volkswagen in the USA to date
- **Investor complaints for ADRs and bonds are ongoing in USA and have not yet been settled.**

Visual Overview of KapMuG Case Flow



Tilp institutional investor claims flow chart



Investor claims at German courts

I. Claims against VW at the OLG Brunswick

Model Case Proceedings started at the OLG Brunswick (3. Civil Senate, 3 Kap 1/16). Trial is expected to start on September 3, 2018

Currently - briefs between the parties and interested third parties are being exchanged

The court (1. Civil Senate) issued an order moving claims against Porsche SE to Stuttgart

II. Claims against VW in Stuttgart

The Regional Court in Stuttgart issued an order (12/06/2017) referring the KapMuG matter concerning jurisdictional issues per § 32b ZPO to the Higher Regional Court in Stuttgart (20 Kap 3/17 and 20 Kap 4/17).

At present, the Higher Regional Court has not picked a case for a decision on jurisdictional grounds.

III. Claims against Porsche SE in Stuttgart

The Regional Court in Stuttgart issued an order (02/28/2017) referring the KapMuG matter to the Higher Regional Court in Stuttgart (20 KAP 2/17).

At present, the Higher Regional Court has not chosen a model case for a KapMuG proceeding.

Jurisdictional issue concerning § 32b ZPO

- The order from the Regional Court in Stuttgart dated December 6, 2017, which refers the jurisdictional matter to the Higher Regional Court for clarification under KapMuG, addresses the issue of the appropriate legal venue to try the VW matter.
- § 32b ZPO establishes the exclusive venue for claims in connection wrong capital market information to be at the court where the issuer is located.
- However, what happens if two issuers are getting sued where the main claim relate to the same core facts but where the legal headquarter office of both issuers is located in different venues?
- There are different opinions:
  - choice of claimant
  - every issuer needs to be sued at the court of its headquarter
  - only the court of that issuer is relevant for whom the core information stems from
  - financial instruments (stocks, bonds) are leading

Legal position of the courts and parties concerning the venue (1)

1. Higher Regional Court of Brunswick (1st civil senate)

The financial instrument (stock, bond) is the basis for the decision where the lawsuit must take place.

- With regard to PSE stock, a claimant must sue the defendant Porsche SE, but also VW AG in Stuttgart.
- With regard to VW stock, a claimant must sue the defendant VW AG, but also Porsche SE in Brunswick.

2. Regional Court of Stuttgart

The court issued an order referring the matter concerning the question of the correct venue to the Higher Regional Court. The Regional Court Stuttgart is of the opinion that the claim must be distinguished by the specific securities.

Legal position of the courts and parties concerning the venue (2)

3. TILP‘s position

Claimant can choose between Stuttgart and Brunswick according to the special situation with two affected issuers and the same facts of the case.

4. VW‘s position

All claims must be bundled in Brunswick, as the core capital market information to be decided on by the court stems from VW AG

5. Porsche‘s position

Any claims against the Porsche SE must be brought in Stuttgart, as this is the place where the issuer of PSE stocks is located.

Any claims against the VW AG must be brought in Brunswick, as this is the place where the issuer of VW stocks is located.

One or two model case proceedings? (1)

Issue:

Does the earlier model case proceeding, initiated by the Higher Regional Court of Brunswick, block a second model case proceeding in Stuttgart?

- On February 28, 2017, the Regional Court in Stuttgart issued an order referring the matter concerning claims against Porsche SE in the Dieselgate case to the Higher Regional Court in Stuttgart. Thus: Is Porsche SE liable (for Porsche stock losses) which should be tried in Stuttgart?

1. Tilp's position

There only should be one model case proceeding with litigation in Brunswick.

Therefore, Tilp filed an immediate appeal to the Higher Regional Court in Stuttgart to prevent a second model case proceeding on the merits in Stuttgart.

2. VW's position

There only should be one model case proceeding in Brunswick. In the alternative: if a second model case proceeding in Stuttgart will be initiated, VW AG wants to become the leading model case defendant.

One or two model case proceedings? (2)

3. Porsche‘s position

The model case proceeding in Stuttgart is a separate proceeding; no infringement on § 7 KapMuG: no barrier effect by the first model case proceeding.

4. Regional Court of Brunswick

The court issued an order staying the proceedings for a claim against both defendants (VW AG and Porsche SE) concerning losses in VW stock and Porsche stock with regard to both model case proceedings in Brunswick and in Stuttgart. Therefore, Porsche SE now is also model case defendant in Brunswick.

28 U.S.C. § 1782 Discovery Request – Assistance from US Courts (1)

- Discovery in United States in Aid of Proceedings Outside U.S
- Allows a litigant party to legal proceedings *outside* the US to apply to an American court to obtain evidence for use in the non-US proceeding
- Together with our US counsel colleagues, a Section 1782 discovery assistance request was filed on April 20, 2017 in the third circuit district court of New Jersey.
- The court approved the request on June 12, 2017 and ordered the issuance of a subpoena on Volkswagen
- These documents will help prove knowledge VW executives, including Martin Winterkorn, had of the massive scandal many years before the crime came to light

28 U.S.C. § 1782 Discovery Request – Assistance from US Courts (2)

- **Example of Requested Documents:**

- All Documents concerning a meeting between VWoA and the California Air Resources Board on August 19, 2015.

- The e-mail dated May 25, 2014 from Oliver Schmidt to Michael Horn, including any attachments, in which Mr. Schmidt informed Mr. Horn about the ICCT Report.

- All Communications between VWoA and the U.S. Environmental Protection Agency or the California Air Resources Board concerning the use of defeat devices in Volkswagen cars.

German Discovery Requests

- **§ 142 ZPO:**
  - Request for production of a specifically named document that is in the hands of the other party or a third party
    - However:
      - Request granted only at courts discretion
      - Not granted by courts very often, although requests are made by plaintiffs on a regular basis
- **§ 432 ZPO:**
  - Request for production of a document (usually made by a judge) to a regulatory agency for documents in their possession
    - Party seeking documents must specifically identify the documents and their location
    - § 432 ZPO is a mechanism meant to allow for easier production of evidence by using regulatory aid
    - Requests can only be made for certified documents ("Urkunden") per § § 415 ff. ZPO
    - Documents must be in the possession of a regulatory agency that is not a party to the litigation
    - § 432 (2) ZPO states that this rule is not to be applied to records or documents which the parties to the dispute are able to procure without requiring the involvement of the court or are entitled to (such as business register printouts or land registry documents)

§ 142 ZPO applications – some examples

- In the alternative to applications under § 432 ZPO, Tilp filed requests under § 142 ZPO concerning specific documents that are in the defendants possession.

- Some examples are:

- E-Mail from Mr. Mannigel (VW Software development and drivetrain electronics) to a colleague concerning the meeting with Mr. Krebs (VW - head of drivetrain development) dated November 13, 2006 where Krebs emphasized the importance of not getting caught with the acoustic function by the authorities.

- E-Mail from Bosch to Mr. Klaproth (Department Diesel project application) and Mr. Mannigel (Department Engine Functions) dated March 09, 2007 requesting deletion of the description of the extended acoustic function from several product information sheets.

- Letter from Bosch to VW wherein Bosch warns VW about the prohibitions for usage of defeat devices in the USA. Bosch also requests VW to hold Bosch harmless of any liability in case of such a usage.

§ 142 ZPO – What has been achieved so far?

- With regard to § 142 ZPO requests, the Regional Court in Stuttgart issued an order on December 21, 2017, for VW AG to submit the following documents based on our claims in Stuttgart
- VW submitted the following documents on February 02, 2018 based on that court order:

  - Memorandum of Frank Tuch to Prof. Dr. Martin Winterkorn dated May 23, 2014 containing the University of West Virginia and the ICCT study detailing the test of NOx emissions, and the resuting data. The memo also addressed the potential issues of the study and the fact that a task force was set up to deal with these within the VW powertrain development department.
    - ➢ proves Winterkorn‘s kowledge of the issue – or at least: „should have known“.

  - Note from Bernd Gottweis to Frank Tuch dated May 22, 2014 addressing the ICCT study and the issue that no thorough explanation can be provided to authorities. The note was attached to the Frank Tuch memo.
    - ➢ proves Winterkorn‘s knowldge of the issue – or at least: „should have known“.

- However, VW refused to submit the e-mail correspondence between Oliver Schmidt and former VW president Michael Horn (VWGoA). VW argued that the request seems to broad to be answered. The court should specify in detail which e-mails they should produce.

TILP
LITIGATION

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www.tilp-litigation.com

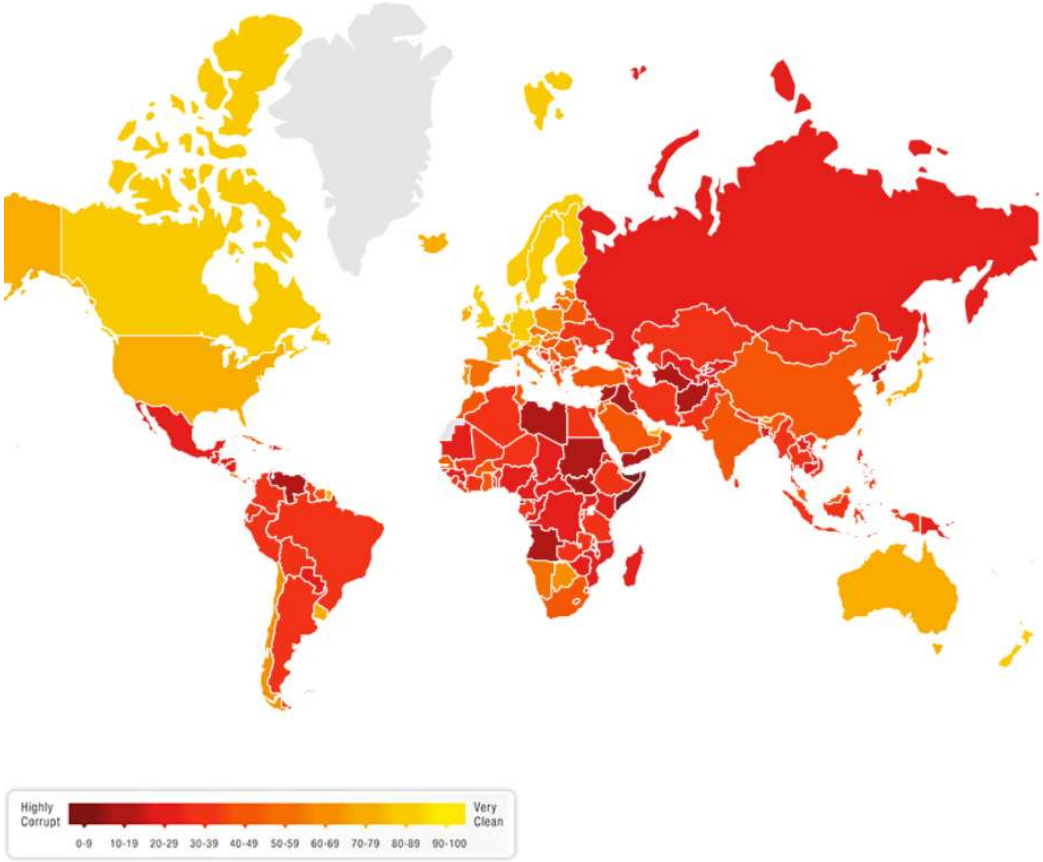
PART
08

Corruption and Bribery – Prosecution and Civil Damage Claims

Introduction

Do you think corruption has increased in your country?

Corruption Perceptions Index 2017



Corruption is a Global Issue

- People and governments worldwide are trying to eliminate corruption
  - U.S.: FCPA (1977); UK: Bribery Act (2011); other countries have similar laws
  - International Anti-Corruption Treaties in place, e.g. OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)

- Common features:
  - Punishment of bribe givers and takers
  - Extra-territoriality
  - Foreign public officials
  - Corporate liability

Securities Litigation Cases

- No private right of action under the FCPA
- Follow-on civil lawsuits against the company, senior officers and directors possible
- Control, supervision and due diligence required
- Various securities and derivative cases related to bribery and corruption
  - not always successful

Two Examples of Corruption Enforcement Cases

- Siemens AG
  - Siemens pleaded guilty in 2008 to paying $1.4 billion in bribes to land government contracts on four continents.
  - The company paid $800 million in fines in the U.S. and $800 million more in Germany. It also paid lawyers and accountants some $1 billion to investigate itself for bribery.
  - Bribed political official to secure a valuable contract

- Kellogg Brown & Root
  - Formerly a Halliburton subsidiary
  - Joint venture that spent $182 million to bribe Nigerian government officials over a 10-year period to win more than $6 billion in construction contracts.
  - KBR and its former parent, Halliburton, paid $579 million in fines
  - CEO sentenced to prison

Example of Securities Case Related to Bribery

- Petróleo Brasileiro S.A. – Settlement
  - Multinational energy company headquartered in Brazil.
  - Massive investigation of rampant corruption involving the company's contracts for the construction of production facilities.
  - Executives at Petrobras allegedly received kickbacks to facilitate the scheme.
  - Following the public revelation of the details of the scheme, the company's shares price fell by over 80% and the price of its ADSs fell by 78%.
  - Petrobras' agreed to pay $2.95 billion to settle U.S. class action
    - largest settlement of a securities lawsuit filed as a follow-on to bribery or corruption allegations

Example of non-U.S. Securities Case Related to Bribery

- Saipem S.p.A.
  - Saipem is accused of bribing Algerian officials from at least 2007-2010.
  - On December 5, 2012, Saipem disclosed it was under investigation by the Italian prosecutor for alleged bribery in Algeria resulting in a 15% stock decline.
  - Due to the illegal contracts and the profit warnings that followed, Saipem stock dropped over 60%.
  - Saipem has previously been found guilty by an Italian court of bribery in Nigeria (1995 – 2004).
  - There is an ongoing investigation by Algerian prosecutors.
  - The illegal contracts were worth approximately $11 billion.

Algerian Contracts (2007 – 2011)

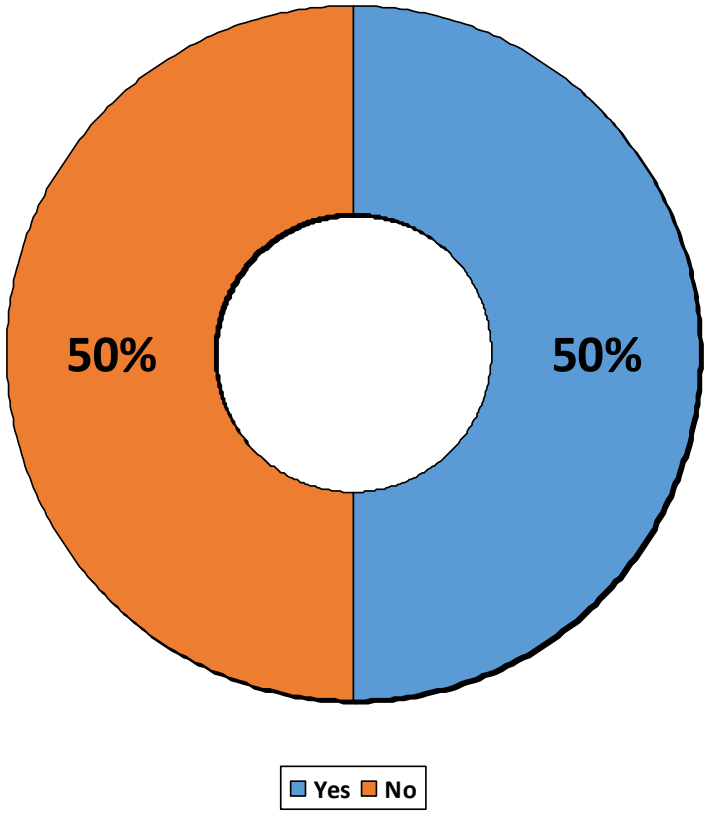
-	2007	Location	Amount (US$ Mil. OR € Mil.)	Expected Completion
1	16-Feb	Saudi Arabia, Tunisia, Algeria, Spain	1,000 (€)	2008
3	31-May	Algeria (Sonatrach)	700 (€)	37 months
9	6-Nov	Algeria (Sonatrach)	285 (€)	26 months
-	2008	Location	Amount (US$ Mil. OR € Mil.)	Expected Completion
8	28-Jul	Algeria	2,800 (€)	2012
12	13-Nov	Algeria (Sonatrach)	1,300 (€)	Q2 2012
-	2009	Location	Amount (US$ Mil. OR € Mil.)	Expected Completion
1	23-Mar	Algeria (Eni & Sonatrach)	1,800	36 months
3	8-May	Algeria (Sonatrach)	200 (€)	23 months
6	5-Jun	Algeria (Sonatrach)	580	26 months
7	24-Jun	Kazakhstan, Congo and Algeria (Sonatrach)	600	Q2 2015; Q3 2011; Q3 2012
-	2010	Location	Amount (US$ Mil. OR € Mil.)	Expected Completion
1	27-Jan	Congo, Nigeria, Egypt, Persian Gulf, Kazakhstan, Algeria, Perù	370	2013
7	20-Sep	Algeria (Sonatrach), Nigeria, Congo	500	34 months
-	2011	Location	Amount (US$ Mil. OR € Mil.)	Expected Completion
9	19-Sep	Angola, Saudi Arabia, Algeria, South America, Ukraine	500	August, 2017

Corruption in LatAm / Brazil and resulting Shareholder Arbitration for Compensation

Cláudio Finkelstein
Marcelo Escobar

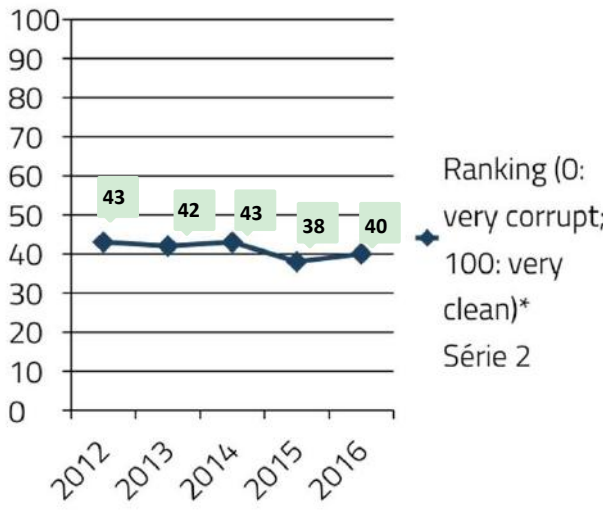
Do you think corruption has increased in your country?

A. Yes
B. No



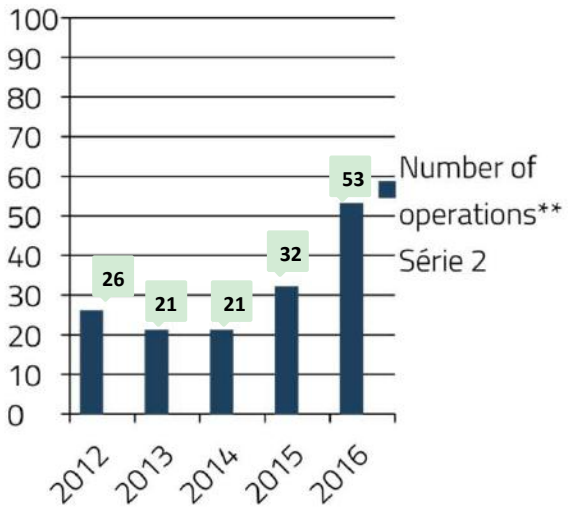
Corruption growth in Brazil (2012 – 2016)

➢ **Brazil's Corruption Perception Index**



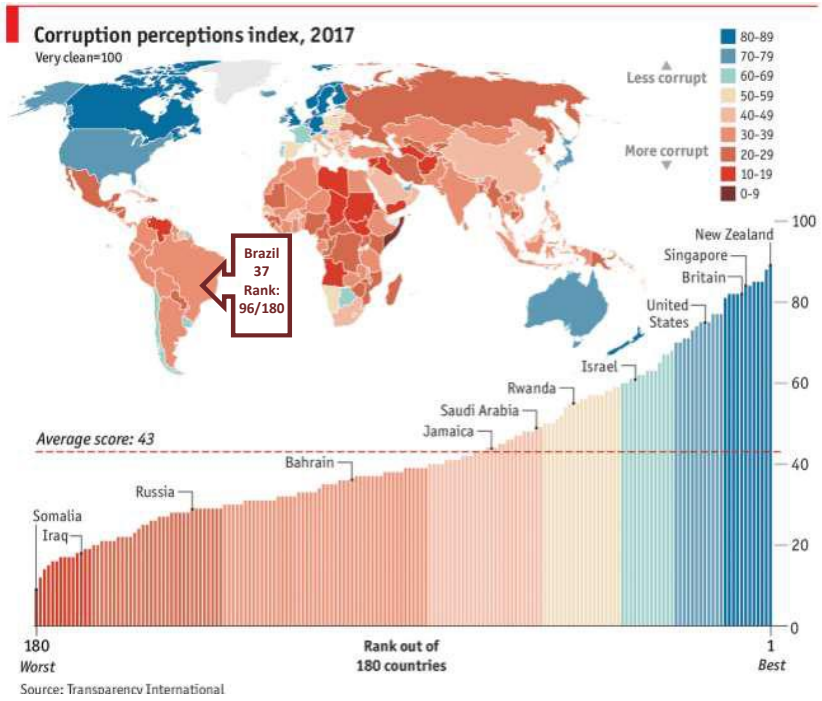
*https://www.transparency.org/news/feature/corruption_perceptions_index_2016

➢ **Anticorruption operations carried out by Brazil's Comptroller General (CGU)**



**http://www.cgu.gov.br

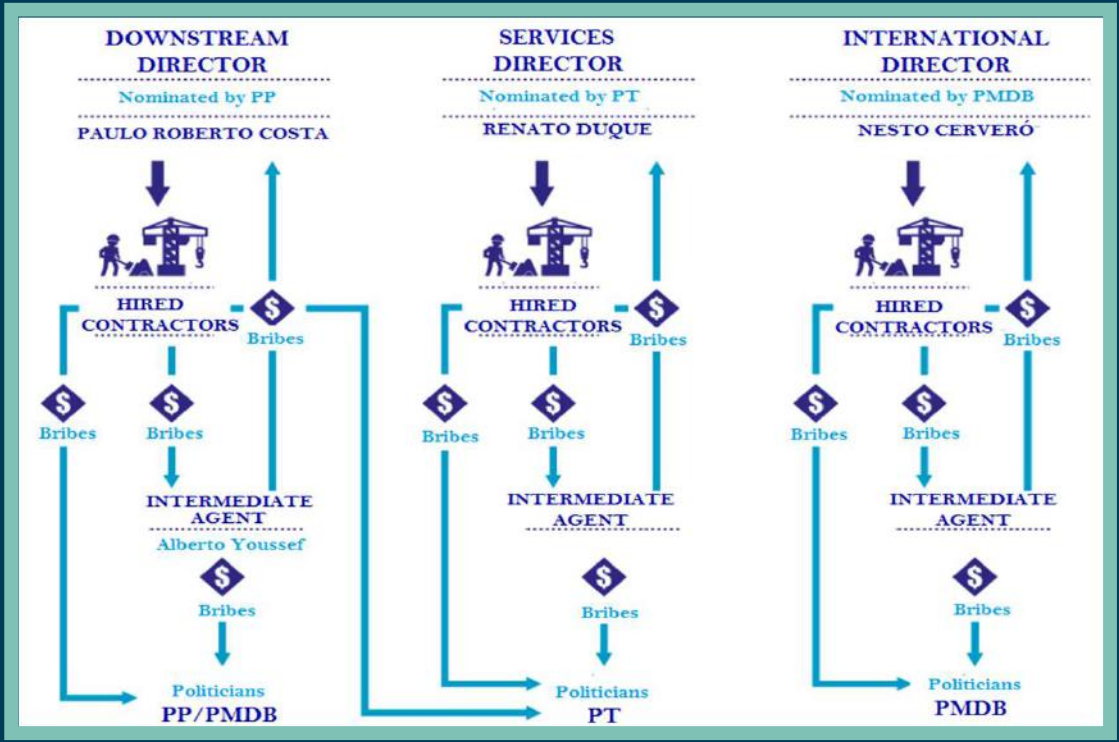
Brazil's Corruption Perception Index 2017



Ongoing Corruption Cases in Brazil

- **Operation Car Wash (Petrobras)**
- **Operation Weak Flesh/Bullish (JBS)**
- **Operation Zelotes (Tax Agency)**

Operation Car Wash: Petrobras



1 who are PP, PT, PMDB?
-Alexander Reus
, 2/21/2018

1 Political Parties in Brazil (Partido Progressita, Partido dos Trabalhadores and Partido do Movimento Democrático Brasileiro).
Camila Simão, 2/21/2018

Shareholder Arbitrations against Petrobras in Brazil (1)

- Petrobras Bylaws:

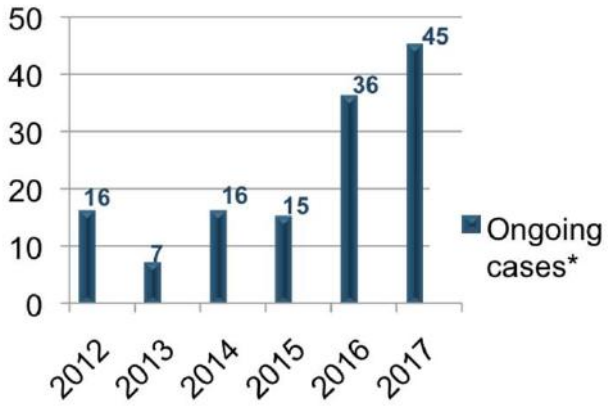
> **Art. 58.** **The disputes or controversies involving the Company, its shareholders, administrators and fiscal councilors shall be resolved through arbitration, in compliance with the rules established by the Market Arbitration Chamber**, with the purpose of applying the provisions contained Corporate Law, in Law Nº 13.303 of June 30, 2016, in these Bylaws, in the rules issued by the National Monetary Council, by the Central Bank of Brazil and by the Brazilian Securities and Exchange Commission, as well as in other functioning of the capital market in general, in addition to those in the Level 2 Regulation, the Arbitration Regulation, the Participation Agreement and the Sanctions Regulation, all of Level 2 of B3. The provision in the caput does not apply to disputes or controversies that refer to the activities of Petrobras based on art. 1 of Law Nº 9,478, dated August 6, 1997, and observing the provisions of these Bylaws regarding the public interest that justified the creation of the Company, as well as disputes or controversies involving unavailable rights.

- 6 known arbitration proceedings started by groups of investors (Brazilian investors, foreign investors and pension funds) – total claims likely > US$7 bn
- Defendants: Petrobras and Federal Government
- Expiration of Statute of Limitation: October 2017
- Forum: Market Arbitration Chamber of the B3 - Brasil Bolsa Balcão S.A. (exchange in São Paulo)

Shareholder Arbitrations against Petrobras in Brazil (2)

- Company's duty to disclose/publish truthful, complete and consistent information which is relevant for investors for making correct investment decisions:
  - ✓ Articles 4 and 157, §4 of the Law No. 6.404/1976 ("Corporation Law")
  - ✓ Article 16, II of the Law No. 6.385/1976 ("Securities Law")
  - ✓ Comissão de Valores Mobiliários ("CVM") Ruling Nos. 202/1993, 358/2002, 400/2003 and 480/2009
- Right of the investor to file damage claims against the company for omitting material facts and/or for disclosing incomplete and/or false information (article 1 of the Law No. 7.913/89)
- Company's liability for the damages caused to investors (article 173, §5 of the Brazilian Federal Constitution; articles 186 and 927 of the Brazilian Civil Code; articles 153 - 158, of the Corporation Law)
- Controlling shareholder's liability for misuse and abuse of power (articles 115 and 117 of the Corporation Law; article 37, §6 of the Brazilian Federal Constitution)
- Damage calculation: (1) rescission damages to put an investor in a position as if the investment was not made, and (2) inflation damages to compensate for the devaluation of the securities after disclosure of the truth

Market Arbitration Chamber (MAC) administration of the proceedings



*Data provided by the MAC.

Relevant Data in 2016*

- Percentage of foreign Parties involved: **29.4%**
- Percentage of arbitrations involving the Public Administration: **23.53%**
- Average time for rendering an arbitral award (after the final submissions): **1.5 months**
- Average duration of the arbitral proceedings: **20 months**

US class action settlement and potential impact on BR arbitrations

- US$3 billion settlement in US civil class action (plus hundreds of millions in USD already paid out as part of early opt out settlements)

- Petrobras' press release:

> The agreement does not constitute any admission of wrongdoing or misconduct by Petrobras. In the agreement, Petrobras expressly denies liability. This reflects its status as a victim of the acts uncovered by Operation Car Wash, as recognized by Brazilian authorities including the Brazilian Supreme Court. As a victim of the scheme, Petrobras has already recovered R$1.475 billion in restitution in Brazil and will continue to pursue all available legal remedies from culpable companies and individuals.
>
> The agreement is in the company's best interest and that of its shareholders, given the risks of a verdict advised by a jury, particularities of US procedure and securities laws, as well its assessment of the status of the class action and the nature of such litigation in the United States, where only approximately 0.3% of securities-related class actions proceed to trial.

- Class action filed by a group of minority shareholders from Petrobras (Associação dos Investidores Minoritários – AIDMIN) before the State Court of São Paulo requesting the Court to order Petrobras to pay the same prorated share compensation to Brazilian shareholders as in the US settlement. Petrobras has not filed an Answer yet.

US class action settlement and potential impact on BR arbitrations

- On 03 January 2018, a group of investors filed an Annulment Action before the Federal Court of São Paulo, requesting the US settlement to be annulled for its alleged violation of art. 159 of the Corporation Law and of principles of Public Administration, such as efficiency, legality and morality. The request was denied by the trial court (the court of first instance).

- On 23 February 2018, the Federal Regional Tribunal of the 3rd Region (appellate court, or court of second instance) confirmed the trial court's decision denying the investors' request, as:

  - The Brazilian Judiciary lacks competence to annul a decision rendered by American Courts (and vice versa). Especially considering that the settlement involves losses incurred by foreign investors outside Brazil;

  - Any Brazilian decision recognizing the US settlement would not be annulled by this Annulment Action either, due to the lack of evidence that the settlement is contrary to Brazil's public interests; and

  - There is not enough evidence to determine if the amount discussed in US settlement is excessive.

Timeline of the Petrobras arbitration in Brazil

- 15/08 2016 •Request for Arbitration
- 06/09 2016 •Receipt of Petrobras' (PBR's) and the Federal Government's Answer to the Request for Arbitration
- 17/09 2016 •Claimants' answer to procedural objections raised by PBR and the Federal Government
- 23/09 2016 • PBR reiterates its objections
- 05/10 2016 •MAC's decision: all objections raised shall be decided by the Tribunal + proposal for consolidation with another arbitration
- 28/10 2016 •Claimants' comments to the consolidation proposal
- 09/11 2016 •PBR's comments to the consolidation proposal (after requesting an extension of the deadline)
- 14/12 2016 •MAC's decision against consolidation + fixture of the deadline for appointing the coarbitrators
- 20/12 2016 •MAC informs the Parties of judicial decision determining the exclusion of the Federal Government from the arbitration
- 05/01 2017 •PBR appeals from MAC's decision and requests the arbitration be suspended + Deadline for appointing arbitrators is suspended
- 06/01 2017 •Claimants rebut PBR's arguments and request that the deadline not be suspended
- 12/01 2017 •Claimants inform that the judicial decision was reverted and the Federal Government should be included in the arbitration
- 15/01 2017 •Claimants' Request for Joinder
- 02/01 2017 •MAC informs of new judicial decision excluding the Federal Government
- 06/02 2017 •MAC's decision against consolidation
- 16/12 2017 •PBR's submission against Claimants' Request for Joinder
- 20/02 2017 •Claimants rebut PBR's arguments
- 23/02 2017 •MAC's decision accepting the Request for Joinder and fixing 10 days for the appointment of the coarbitrators

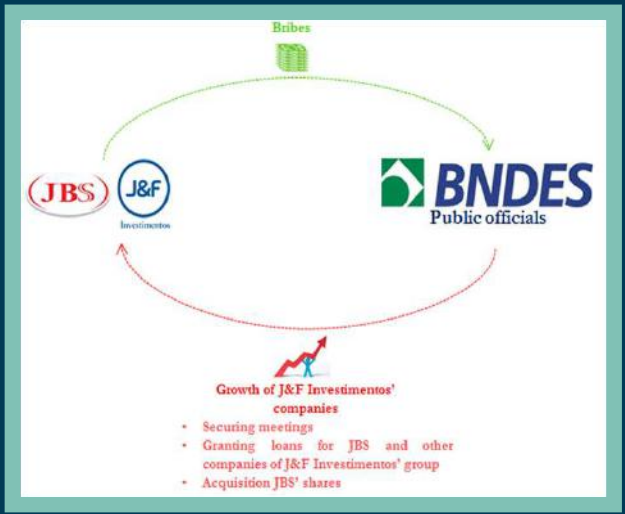
Timeline of the Petrobras arbitration in Brazil

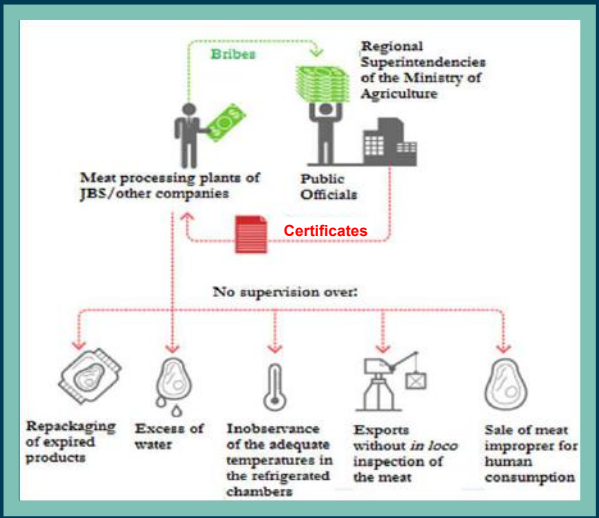
- 23/02 2017 • PBR reiterates its request to suspend the arbitration until definite decision on the Federal Government's participation
- 23/02 2017 •Claimants rebut PBR's arguments
- 15/03 2017 •Claimants' Second Request for Joinder
- 30/03 2017 •PBR's submission against Claimants' Second Request for Joinder
- 30/03 2017 •Claimants rebut PBR's arguments
- 05/ 05 2017 •Claimants' Request for Exclusion of one of the Investors
- 19/05 2017 •PBR's submission against Claimants' Request for Exclusion of one of the Investors
- 29/06 2017 •MAC's decision accepting Claimants' Second Request for Joinder and Request for Exclusion of one of the Investors
- 21/07 2017 •MAC sent the terms of independence signed by the appointed coarbitrators
- 31/07 2017 •PBR's challenge of Claimants' appointed coarbitrator
- 31/07 2017 •Claimants' challenge of PBR's appointed coarbitrator
- 12/12 2017 •MAC's decision to remove both arbitrators and to determine that new coarbitrators be appointed by 22.12.2017
- 15/12 2017 •PBR requests that the appointment deadline be suspended and informs that it's seeking consolidation with new arbitrations
- 02/01 2017 •Claimants rebut PBR's request
- 22/12 2017 •Appointment of coarbitrators by the Parties (not yet disclosed to the other Party)
- 17/01 2018 •Claimants request MAC to disclose PBR`s requests for consolidation and the appointed coarbitrator

Problems with PBR's arbitration

- Slowness of MAC
- Different claimant groups with different theories of liability and damages
- Some include the Federal Government as Defendant and others not
- Issue with “me too” class action in BR
- Defense of company being victim may be better received in Brazil than in the US
- Ability to pay another US$2-3 bn should not be a problem
- US class action needs to be first approved and remaining opt outs settled

Operation Bullish and Weak Flesh: JBS





Shareholder Arbitrations against JBS

- JBS Bylaws:

> **Article 58** **The Company, its shareholders, administrators and members of the Supervisory Board undertake to resolve through arbitration any dispute or controversy which may arise between them**, related to or originating from, in particular, the application, validity, effectiveness, interpretation, breach and its effects, of the provisions contained in the Contract for Participation in the Novo Mercado, in the Novo Mercado Listing Regulations, regulations of sanctions in the arbitration rules of the Market Arbitration Chamber established by BM&FBOVESPA, in these Bylaws, in the provisions of the Brazilian Corporate Law, the standards issued by the National Monetary Council, by the Central Bank of Brazil or by the CVM, in the regulations of BM&FBOVESPA and other standards applicable to the functioning of the capital market in general**, before the Market Arbitration Chamber, under the terms of its Arbitrations Regulations**. (...)§ 2. **Brazilian law will be the only law applicable to the merits of any controversy, as well as the implementation, interpretation and validity of this arbitration clause**. The Arbitration Court will be formed by arbitrations chosen in the manner provided or in the Arbitration Regulations of the Market Arbitration Chamber. The arbitration procedure will take place in the city of São Paulo, State of São Paulo, where the arbitration judgement should be pronounced. The arbitration shall be administered by the Market Arbitration Chamber, being conducted and judged in accordance with the relevant provisions of the Arbitration Regulations.

- No known relevant arbitration proceedings started by investors, so far.
- Likely Defendants: JBS, J&F Investimentos, Batista brothers
- Likely Statute of Limitation: March 2020 (first news of corruption became public in March 2017)
- Forum: Market Arbitration Chamber (MAC)

Shareholder Arbitrations against JBS

- Company's duty to disclose/publish truthful, complete and consistent information which is relevant for investors for making correct investment decisions:
  - ✓ Articles 4 and 157, §4 of the Law No. 6.404/1976 ("Corporation Law")
  - ✓ Article 16, II of the Law No. 6.385/1976 ("Securities Law")
  - ✓ Comissão de Valores Mobiliários ("CVM") Ruling Nos. 202/1993, 358/2002, 400/2003 and 480/2009
- Right of the investor to file damage claims against the company for omitting material facts and/or for disclosing incomplete and/or false information (article 1 of the Law No. 7.913/89)
- Company's liability for the damages caused to investors (article 173, §5 of the Brazilian Federal Constitution; articles 186 and 927 of the Brazilian Civil Code; articles 153 - 158, of the Corporation Law)
- Controlling shareholder's liability for misuse and abuse of power (articles 115 and 117 of the Corporation Law; article 37, §6 of the Brazilian Federal Constitution)
- Damage calculation: (1) Rescission damages to put an investor in a position as if the investment was not made, and (2) inflation damages to compensate for the devaluation of the securities after disclosure of the truth

Problems with JBS arbitration

- Initial concern about solvency
- Issues about where damage occurred
- Penalties to be paid by J&F and not JBS
- Slow speed of MAC in light of PBR's experience
- Amount of damages not as high as in PBR
- No parallel action in the US yet

Thank You!

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PART 09

Investor Loss Recovery Efforts Around the World II

Australia
Japan

Investor Litigation in Australia

Presentation for DRRT's 10th International Investor Global Loss Recovery Conference 2018

Martin Hyde
Principal, Maurice Blackburn
Director, Claims Funding Europe

Maurice Blackburn Lawyers Since 1919 WE FIGHT FOR FAIR

RECENT DEVELOPMENTS REGARDING INVESTOR CLASS ACTIONS IN AUSTRALIA

1. Decision of the Federal Court approving 'common fund' cases where all investors are covered by the outcome of the class action (unless they opt out) and all are obliged to pay the same 'lower than normal' commission rate, as approved by the court.

2. Federal Court has now handed down a significant judgment on the way to deal with overlapping class actions.

3. Debate continues regarding the introduction of contingency fees for lawyers.

SECURITIES CLASS ACTIONS IN AUSTRALIA

- Class action procedure is available in Federal Court and in Supreme Courts of Victoria, NSW and Queensland.
- In securities cases, most common causes of action are:
  - Misleading or deceptive representation in information supplied to investors (prospectus, annual report, *ad hoc* company statements); and
  - Breach of continuous disclosure rules: Australian listed companies must immediately disclose any material information to the Australian Stock Exchange.
- Importantly, neither of the above causes of action requires proof of intent to mislead or defraud shareholders.

THE CLASS ACTION PROCESS

- Representative ('lead') plaintiff commences action on it own behalf and on behalf of 7 or more persons with the same or similar claim
- Anyone can be the lead plaintiff – normally a retail investor.
- Settlement or award binds members of the class, unless they opt-out.
- In theory, an opt-out system similar to US and Canada. In practice, up until 2017 because of the 'free-rider' issue, most claims have been issued on an opt-in basis with the claim group limited to those who have signed a funding agreement.
- Now with the advent of 'open funded classes' this has changed

THE CLASS ACTION PROCESS

- No certification stage – onus is on defendant to raise any complaints about whether the class is properly constituted.
- Discovery is available against the defendant and the lead plaintiff.
- Authorities are in dispute as to whether or when it is appropriate to order discovery against class members. In securities cases, discovery might be limited to trading data, which is typically provided for the purposes of settlement negotiation in any event.
- Normally the party that loses at trial will be ordered to pay the costs of the opposing party. Such costs typically run into millions of dollars. This acts as a significant disincentive to commencing cases that are not strong.

A ‘paradise for plaintiffs’?

Australia is a good jurisdiction for investors to recover losses

1. **There is no class certification.**
2. **Not necessary for shareholders to prove individual reliance – courts have embraced the concept of market based causation.**
3. **Disclosure available against defendant and lead plaintiff.**
4. **Well established funding market.**
5. **Advent of ‘common fund’ cases**
6. **Recoveries are high compared to other jurisdictions – typically between 50% and 60% of total losses.**
7. **Loser pays rule means only strong cases are brought.**

LITIGATION FUNDING IN AUSTRALIA

- Australian lawyers are prohibited from charging a percentage fee.
- In December 2014 the Australian Productivity Commission released a report recommending the introduction of contingency fees for lawyers. Some State governments have confirmed they are actively looking at this, although the Law Council of Australia is not in favour. There has been no movement so far by the Federal Government.
- Adverse cost risk can be very high (eg $10 million to $20 million).
- Plaintiffs can be ordered to provide security for costs for litigation to proceed ($6.2 million in *Pathway Investments v NAB)*
- Third party litigation funders fill the void, charging a commission on success (typically around 30%)

FUNDERS' TYPICAL OBLIGATIONS

- Pay the lawyers' fees (caps or partially success-based fees may be negotiated).
- Fund interlocutory disputes and satellite litigation, which may have been unforseen at the time of commencement.
- Bear the adverse cost risk.
- Provide any security for costs.
- Adopt appropriate procedures to manage any conflicts of interests with the clients.

CLOSED 'OPT-IN' CLASS ACTIONS

- Up until 2016, when a securities class action was funded by a litigation funder, to address the free-rider problem it was typically run as a 'closed class', in which the class was limited to investors that had signed an agreement with the funder.
- Effectively, this turned the opt-out system into an 'opt-in' system.
- Since the decision in *P Dawson Nominees v Brookfield Multiplex* in 2007, most securities class actions have proceeded as closed classes.
- Although investors must agree at outset to pay a success commission to funder, there is no adverse costs risk to investor and no outlay unless the case is successful.

THE 'COMMON FUND' – THE NEW FRONTIER

- In May 2016 in the *QBE* investor class action, the court was asked to make an order establishing a 'common fund'.
- In October 2016 three Federal Court judges handed down judgment approving the common fund application.
- Future securities cases in Australia can now be issued as open class funded cases with all investors bound by the outcome of the case and bound to pay the 'common fund' funding fee unless they opt-out.
- In the QBE case the level of the funding commission will be determined by a judge *after* the case has been settled or decided. However, it is clear from the judgment that it will be lower than the 'normal' 32.5% rate for a closed class funded case.

PLAINTIFF FIRMS – AN EVOLVING LANDSCAPE

- In the last three years many law firms have issued class actions in Australia.
- Historically such actions were issued by Maurice Blackburn and/or Slater & Gordon. In 2015/16 a total of 19 firms issued claims.
- New entrants into the market have experienced significant difficulties with cases being discontinued, settled for low amounts and settlements not being approved by the Court as 'fair, just and reasonable'.
- It is becoming increasingly common for judges to have to manage competing or parallel class actions.

COMPETING OPEN CLASS COMMON FUND CASES – WHAT TO DO?

- Following the QBE decision, in the *Bellamy's* securities class action, both Maurice Blackburn and Slater & Gordon issued common funded cases. Both had large groups of clients already signed up and both had litigation funding in place.

- The court had the option of staying one of the two cases. Instead, Beach J ruled that the Maurice Blackburn case should proceed as a closed 'opt in' class and the Slater's case could proceed as the open 'common fund' case. This was because the judge perceived that the litigation funder of the Slater's case was more established and had a greater track record.

- The Judge also held that the two cases would be held together with different plaintiff experts but a single set of plaintiff counsel arguing the case and the defendants only exposed to one set of adverse costs.

Investor Loss Recovery Efforts Around the World II

Japan

Investor Loss Recovery – Japan Update

- No class actions in Japan – joint claimant groups pursuant to Art. 136 of the JCCP
- No discovery available for either party
- No adverse cost risk for plaintiffs, just need to deposit future court fees for foreign claimants
- No court presence required, as courts prefer documentary evidence over witness testimony
- Japanese Civil Code (JCC) – general tort liability for damages caused by issuer
  - Art. 709 covers any fraudulent statements and omissions of material facts
  - No reliance (transaction causation) required, only loss causation
  - Three (3) year statute of limitation after knowledge
- Japanese Financial Instruments & Exchange Act (FIEA) – statutory securities claims
  - Article 19 and Article 21 – designed to protect investors against accounting fraud or irregularities
  - No reliance required, only loss causation; investor-friendly burden of proof
  - Two (2) year SoL from knowledge of false or omitted information; five (5) years from date of publication of false, written statement (annual or quarterly reports); demand letter tolls SoL for six (6) months

Toshiba Corporation

- Toshiba admitted to accounting fraud and overstated profits amounting to US $ 1.22 billion
- Three complaints filed (the first two are consolidated) for 100+ investors with $550 million in damages
- DRRT and Claims Funding Europe Ltd are co-funding the case, ensuring no risk or costs for investors
- Local counsel is Koga & Partners (also counsel in Olympus and other cases)
- Two alternative damage methodologies vetted with local expert Prof. Kuronuma (Waseda Law School)
- Issues with required capital; $18 billion sale of computer chip business and de-listing threat at TSE to be resolved by April 2018
- Final SoL deadline (JCC claims) will expire April 3, 2018 and DRRT is preparing a final complaint
- Litigation has been positive so far, with Toshiba admitting to liablity for certain wrongdoings in court and will likely only contest damage numbers
- Case is set up for potential settlement after April 2018 and after Toshiba has been able to assess total damage claims of around $1 billion

Mitsubishi Motors Corporation

- Mitsubishi first admitted cheating on fuel economy tests on April 20, 2016
- There are reports of falsified tests going back twenty-five years; current investigations in Japan and in the U.S. regarding full extent and culpability
- DRRT is co-funding this case with Grant & Eisenhofer and KTMC to ensure no costs and risks to investors
- Local counsel is Koga & Partners (also in Olympus and Toshiba)
- FIEA claims expire on April 20, 2018; JCC claims expire on April 20, 2019
- Initial complaint filed on June 26, 2017, claiming $160+ million in damages on behalf of 118 institutional investors
- Mitsubishi has been fighting some preliminary issues, including amount of cost deposit for foreign claimants (future court fees)
- Mitsubishi has not expressly denied liability yet
- Second complaint is in preparation for filing before April 20, 2018 to preserve claims under FIEA; alternatively, demand letter to gain 6 months time (but 5 year FIEA statute of repose cannot be tolled)
- Case will have to develop in 2018 and into 2019 before there are settlement chances

Kobe Steel, LTD

- Kobe Steel, Japan's 3rd largest steel, aluminum and copper manufacturer, admitted on October 8, 2017, that it had engaged in fraudulent product quality testing and rating practices for almost five decades affecting 605 corporate clients worldwide and raising serious safety issues about the integrity and strengths of its products, which are used in the automobile and aeronautic industries
- Kobe stock has plunged initially almost 50% and is currently still depressed by 20%, wiping off nearly ¥100 billion (US $1 billion) in market value after the disclosure, when many investors sold out
- U.S. DoJ and Japanese authorities are investigating the falsification and potential safety threats
- On March 6, 2018, an internal & external investigation report caused CEO Kawasaki to resign, found extensive fraud and implicated various executives at the highest company management level
- DRRT is monitoring the developments and preparing a first demand letter by end of 2018 and a first complaint before October 2019
- FIEA claims will expire in October 2019; JCC claims will expire in October 2020

Additional Cases in Japan

- There are various other cases in Japan to be considered in the future
  - Mitsubishi Materials Corporation – falsified data on aluminum and other products used in aircrafts and cars
  - Toray Industries – faked inspections on reinforcement cords used for car tires
  - Nissan Motor Co. – unauthorized inspectors signed off on quality checks
  - Subaru – fabrication of fuel mileage and vehicle safety inspection data
  - Fujifilm – questionable accounting practices
- In Japan, corporate governance still has room for improvement
  - Corporate governance improvement has focused on improving profitability rather than policing bad behavior
  - More cases are likely to surface

PART 10

Data Security & the GDPR

DATA SECURITY & THE GDPR

EXPERIENCE. *Evolved.*

DRRT Conference on International Investor Global Loss Recovery
March 15-16, 2018

gcg

GCG'S GLOBAL PRESENCE

GCG is a leader in securities and antitrust administrations involving complex financial instruments and related markets both in the U.S. and internationally

Our team has administered some of the most notable securities and antitrust matters:

- *In re Foreign Exchange Benchmark Rates Antitrust Litigation*
- *Axiom Investment Advisors, LLC v. Barclays Bank PLC*
- *Nortel Networks Corp. Securities Litigation (I&II)*
- *Royal Ahold Securities and ERISA Litigation*
- *SEC v. Vivendi Universal, S.A., et al*
- *In re Bank of New York Mellon Corp. Forex Transactions Litigation*
- *Countrywide Mortgage-Backed Securities Settlement*
- *In re Initial Public Offering Securities Litigation*
- *Global Crossings Securities and ERISA Litigation*

GGC is a wholly owned subsidiary of **Crawford & Company**, the leading risk adjusting firm in the world (NYSE symbols CRD.A/CRD.B)

DATA PRIVACY IN THE U.S.

The United States does not have one overarching, comprehensive data privacy law.

Instead, the U.S. has a patchwork of federal and state laws that regulate privacy based on the industry regulated (e.g., healthcare and financial)

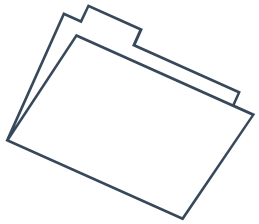
- **Gramm-Leach-Bliley Act (GLBA) or the Financial Services Modernization Act**
- **Federal Trade Commission (FTC) – Section 5 of the FTC Act, Unfair or Deceptive Acts or Practices**
- **Health Insurance Portability and Accountability Act of 1996 (HIPAA)**

CLAIM FILING IN "TYPICAL" U.S. SECURITIES ADMINISTRATIONS

CHALLENGE: Identity of all potential claimants and their eligible transaction information is unknown

SOLUTION: Banks, brokers and others are informed via mailed notice by a claims administrator or DTC LENS posting

- **Banks/Brokers have two options for notice:**
  - Provide their customers' names and addresses or
  - Send claim packets to their customers



- **Claims and documentation are received from:**
  - Investors (email, mail or online)
  - Third party filers, like DRRT, which file in bulk through a secure portal (GCG ICE™)
  - Nominee banks/brokers filing in bulk

- **What do filers provide for these cases?**
  - Claim Form
  - Signature and data verification; authorization document
  - Excel files with data

DATA PRIVACY IN THE EU

BRIEF HISTORY AND BACKGROUND:

European Convention on Human Rights (ECHR) Article 8

- Right to respect for one's "private and family life, his home and his correspondence"

1980

1980: Organization for Economic Cooperation and Development (OECD)

1995

1995: Directive 95/46/EC Adopted By The European Commission

2000

2000: U.S. Safe Harbor for U.S. organizations to comply with EC Directive

2013: Edward Snowden's leaks

2015: Court of Justice of the EU invalidated the Safe Harbor

2016

February 2016: The EC and US agreed to the EU-US Privacy Shield

GENERAL DATA PROTECTION REGULATION (GDPR) OVERVIEW

MAY 25, 2018:

GDPR BECOMES EFFECTIVE AND REPLACES THE EC DIRECTIVE

- The GDPR applies to data belonging to EU residents
- It does not matter WHERE the data is used or processed
- Designed to capture U.S. use of EU data

KEY TERMINOLOGY:

"Data Subject"
owns the data

"Controllers"
determine the purposes for "processing"

"Processors"
process personal data on the controller's behalf

Please note: *The GDPR is new, complicated and still being analyzed; nothing in this presentation is intended to be, or should be relied upon as, legal advice.*

WHAT “DATA” IS PROTECTED UNDER THE GDPR?

PERSONAL DATA DEFINED:

Any information relating to an identified or identifiable natural person (“data subject”) who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his/her physical, physiological, mental, economic, cultural or social identity.

KEY RIGHTS OF THE DATA SUBJECT

1. **Right to transparency**
   - The Controller's contact details
   - The purpose for which the data will be processed
   - Recipients of the data
   - Details regarding international transfers
   - The period of storage of the data
2. **Right to require rectification**
3. **Right to prevent further processing of personal data**
4. **Right to data portability**
5. **Right to erasure of personal data (the "right to be forgotten")**

***** CONSENT FROM THE DATA SUBJECT IS REQUIRED*****

OBLIGATIONS OF DATA CONTROLLERS

DATA CONTROLLER: Natural or legal person that alone or jointly with others determines the purposes and means of the processing of personal data.

OVERVIEW OF KEY REQUIREMENTS

1. Data Processing Agreement must be in place
   - Must provide key, detailed information
2. Appropriate Technical and Organizational Measures
   - Data protection policies, codes of conduct
3. Data protection by Design
   - Technical and security requirements, assessments
   - "Pseudonymization" of data
4. Appointment of a Data Protection Officer (DPO)
   - Controllers and Processers need a DPO
5. Documentation of processing activities

DATA PROCESSING AGREEMENT

DATA PROCESSOR: Any person who processes data on behalf of the data controller.

DATA PROCESSING AGREEMENT is required and must include the following:

- A statement that the processor shall only act on the controller's instructions
- Ensure the security of the personal data and assurances related to data protection breaches, the erasure of data after the provision of services ends and cooperation with the data controller
- Confidentiality obligations on all personnel who process the relevant data
- Sub-processors cannot be retained unless the controller agrees in writing
- At the controller's election, an obligation to either return or destroy the personal data at the end of the relationship (except as required by EU or Member State law)
- An obligation to provide the controller with all information necessary to demonstrate compliance with the GDPR

DISCLOSURES BY PROCESSORS

CLAIM FORM DISCLOSURE:

- By submitting this Claim Form, I (we) consent to the disclosure of, waive any protections provided by applicable bank secrecy, data privacy law, or any similar confidentiality protections . . .

WEBSITE DISCLOSURE:

- Add language that makes clear data is being processed on behalf of a controller, how the data will be used and to whom it will be disclosed, with a link to the company's privacy notice in such language.

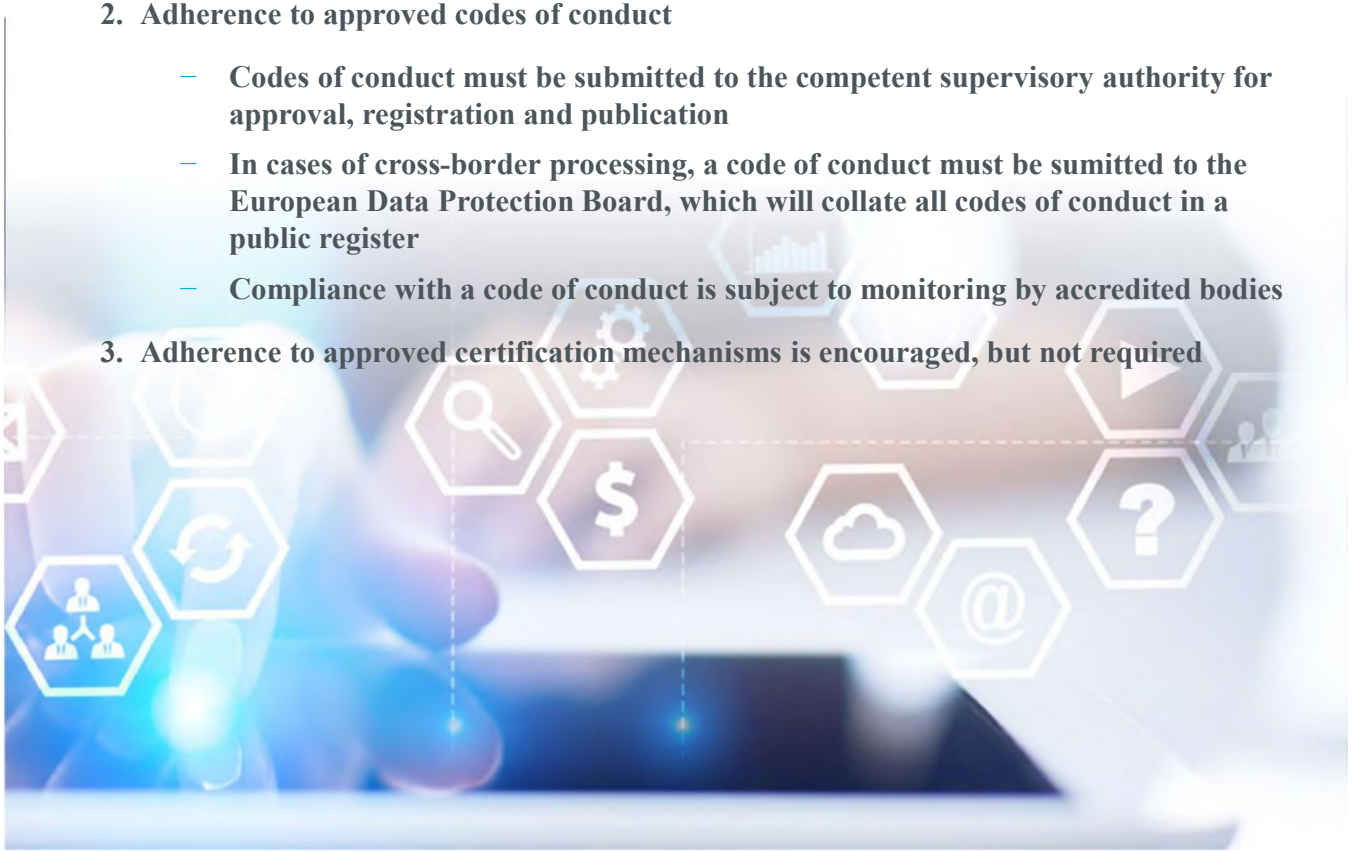
WEBSITE SAMPLE:

On behalf of and under the direction of [Controller], Processor will collect, use, disclose, and process your personal data in accordance with our **Privacy Notice** in order to [process claims in the ___ Administration] (the "Purpose"). In connection with the Purpose, we may disclose your personal data to Controller, and to Controller's affiliated companies and third-party service providers located in your jurisdiction of residence, as well as the U.S., and other jurisdictions that, like the U.S., do not provide a level of protection of your privacy equivalent to the one enjoyed in the European Union. Please review the **Privacy Notice** for a description of how your personal data is collected, used, transferred and disclosed by us on behalf of Controller in furtherance of the Purpose. **By clicking the I UNDERSTAND button below, you acknowledge the collection, use and disclosure of your personal data, as well as the transfer of your information to the United States, [LIST SPECIFIC COUNTRIES] and other jurisdictions, as set forth in the Privacy Notice .**

I Understand

TECHNICAL AND ORGANIZATIONAL MEASURES

1. Update data protection policies
2. Adherence to approved codes of conduct
   - Codes of conduct must be submitted to the competent supervisory authority for approval, registration and publication
   - In cases of cross-border processing, a code of conduct must be sumitted to the European Data Protection Board, which will collate all codes of conduct in a public register
   - Compliance with a code of conduct is subject to monitoring by accredited bodies
3. Adherence to approved certification mechanisms is encouraged, but not required



DATA PROTECTION BY DESIGN

GENERAL TECHNOLOGY REQUIREMENTS (WILL VARY BY ORGANIZATION):

- Firewalls, log recording, data loss prevention, malware detection, etc.
- Regular privacy impact assessments and upgrades of technology will be required
- Redundancy and back-up facilities, regular security testing
- SOC 2 certified data center

ENCRYPTION

- When a Controller transfers personal data, it should be encrypted
- Obligation to encrypt belongs to the Data Controller
- Encryption when data is stored in the case-specific database

LIMITED ACCESS TO DATA

- Only approved employees can access data
- Access reviewed quarterly

DATA PROTECTION (PSEUDONYMIZATION)

PSEUDONYMIZATION DEFINED: The processing of personal data in such a manner that it can no longer be attributed to a specific data subject without the use of additional information – it's ANONYMOUS

- Such additional information must be kept separately such that it cannot be attributed to an identifiable natural person
- Data can be coded so that personal information is not accessible

PRACTICAL APPROACH: Pseudonymous data is subject to the GDPR, but in the event of a data breach it is much less likely to cause harm to the affected individuals, thereby reducing the risk of sanctions and claims for the relevant organization

- Organizations should only use identifiable personal data as a last resort where anonymous or pseudonymous data is not sufficient

APPOINT A DATA PROTECTION OFFICER

RESPONSIBILITIES OF A DATA PROTECTION OFFICER ("DPO")

- DPOs must have "expert knowledge" of data protection law and practices
- Controllers must ensure that the DPO is involved in all data protection issues
- DPOs must inform and advise on compliance with the GDPR and other laws

DOCUMENT DATA PROCESSING

INDEPENDENT RECORD OF DATA PROCESSING ACTIVITIES:

- identifying the DPO and his/her qualifications
- the categories of processing activities performed
- information regarding cross-border data transfers
- a general description of the security measures implemented in respect of the processed data

DATA BREACH NOTIFICATION

ONE OF THE GDPR'S MOST PROFOUND CHANGES TO THE LAW:

- Controllers must report personal data breaches to the relevant supervisory authority without undue delay (when feasible, within **72 HOURS** of becoming aware of the breach)
- Controllers must notify affected data subjects of personal data breaches if such breach poses significant risk to the data subjects' rights and freedoms **"WITHOUT UNDUE DELAY"**
- Processors are required to **NOTIFY THE CONTROLLER** without undue delay after having become aware of the breach
- The notification to the regulator must include:
  - the categories and approximate numbers of individuals and records concerned
  - the name of the organization's DPO or other contact
  - the likely consequences of the breach and the measures taken to mitigate harm

PENALTIES FOR NON COMPLIANCE

GDPR JOINS ANTI-BRIBERY AND ANTITRUST LAWS FOR SOME OF THE HIGHEST SANCTIONS FOR NON-COMPLIANCE

A controller is liable for the damage caused by its processing activities only where it has:

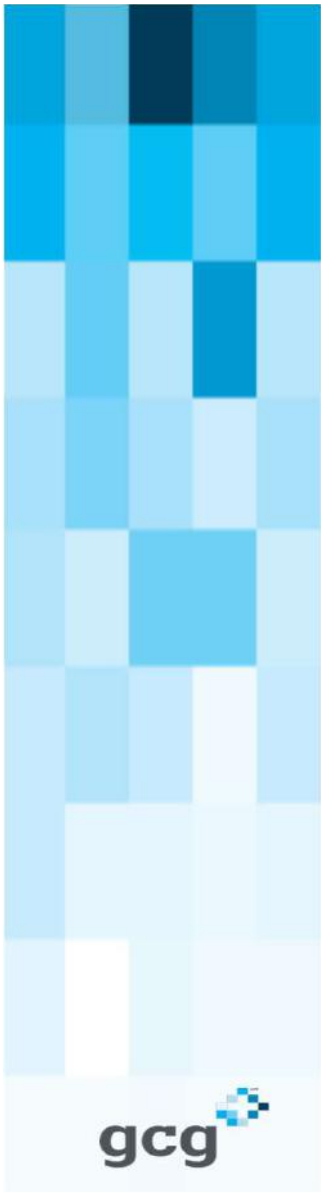
- not complied with obligations under the GDPR or
- acted outside or contrary to lawful instructions of the data subject

The maximum fines depend on the "category" in which the violation occurs:

- For less serious violations, the maximum is **€ 10 million or 2%** of global annual turnover (the company's revenue) of the preceding year (whichever is higher)
- For more serious violations this goes up to **€ 20 million or 4%**

CONTROLLERS' CHECKLIST:

- ☑ Get explicit permissions in agreements with clients
- ☑ Disclose that data is going to U.S.
- ☑ Anonymize data
- ☑ Keep accurate records of data handling
- ☑ Always encrypt or use a secure FTP site to transfer data
- ☑ Appoint a DPO
- ☑ Make sure IT security is up to date
- ☑ In the case of breach, follow all reporting and other requirements
- ☑ Implement an investor's "Right to be Forgotten"
- ☑ Expand the compliance budget!



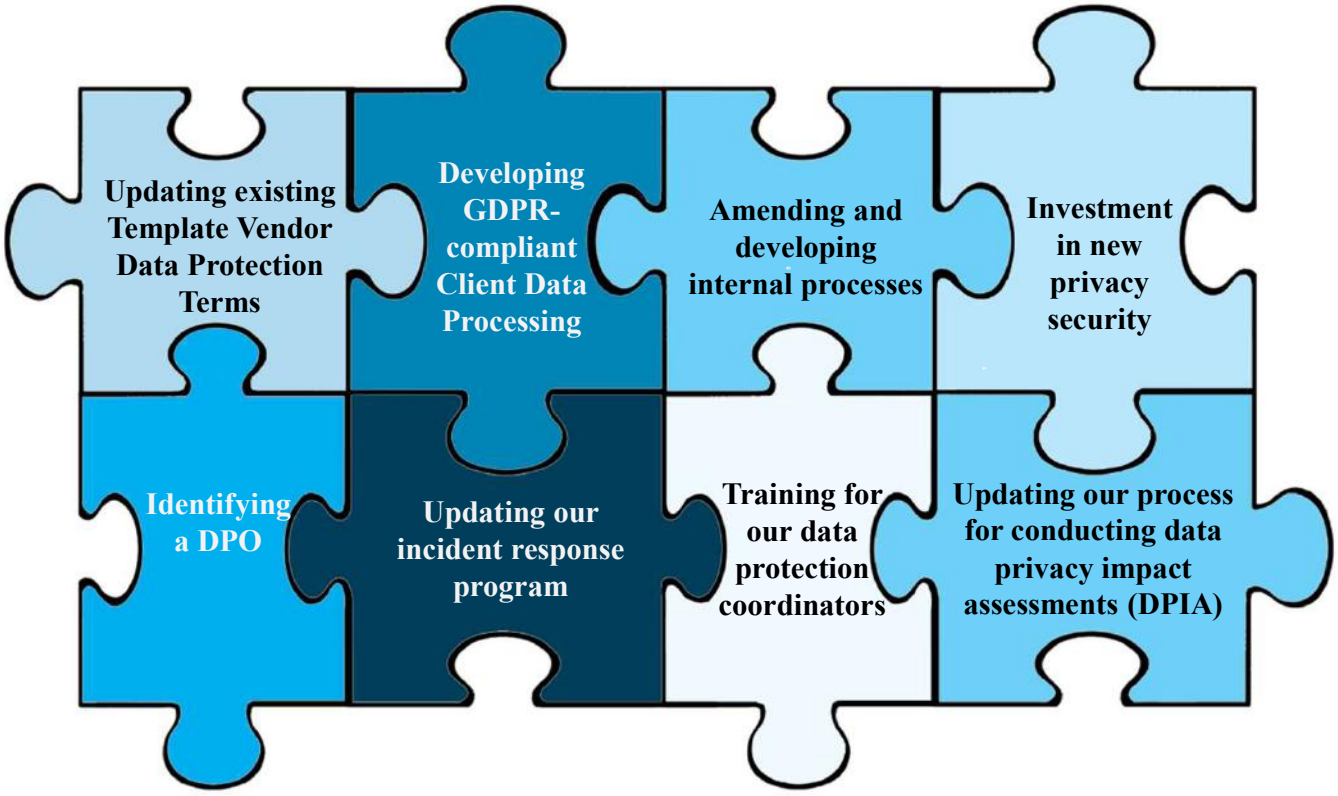
WHAT ARE WE DOING TO ENSURE THE SECURITY OF PERSONAL DATA?

- Dedicated global information security team
- Information security program aligned with industry-standard security frameworks and compliant with regulatory requirements
- Annual IT security risk assessment performed by a third party
- Annual cybersecurity and privacy training courses completed by all employees
- Global incident response procedures assessed by a third party and tested annually
- Security tool health checks and internal/external audits
- Cyber insurance coverage
- Vendor security and privacy assessments and contractual terms

YOUR DATA IS SAFE!

WHAT CRAWFORD IS DOING TO COMPLY WITH THE GDPR

IN OUR ROLE AS A DATA PROCESSOR, OUR GDPR READINESS EFFORTS INCLUDE:



THE GCG TEAM

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Lorri Staal oversees many complex and high-profile class action settlement and regulatory administrations. She has particular expertise in programs that require extensive and detailed analyses of complicated data, and has successfully set up efficient processes for the intake and analysis of claims in complex administrations that result in distributions to hundreds of thousands of participants. These engagements regularly include government and regulatory settlements; international administrations; insurance regulatory matters; mortgage-related insurance matters; and numerous SEC Fair Fund administrations

Ms. Staal regularly draws on her two decades of experience litigating highly complex class action and bankruptcy matters at several large Wall Street firms.

THE GCG TEAM

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Thomas Moore partners with GCG's international clients at each stage of a class action settlement, mass action, bankruptcy proceeding, data breach matter or contact center project to understand their unique needs and align GCG's resources for expedient and cost-effective solutions.

He draws on his extensive legal services outsourcing experience gained while serving as a managing director of a legal services outsourcing firm acting as a principal point of contact for U.K. law firm, corporate and banking clients providing a variety of innovative solutions for legal administration, document review and eDiscovery needs.


gcg
Contact GCG to continue the conversation

PART 11

Closing Remarks

Outlook 2018

U.S. Class Actions

- Increase in 2017 securities lawsuit filings is misleading as 50% were merger-related and could be a one-time event
- 2017 settlement numbers will result in low payouts in 2018
- U.S. opt-outs continue to be attractive avenues for loss recovery

Non-U.S. case inventory continues to grow with new cases

- Steinhoff (SA/NL/DE/EN)
- Kobe Steel (JP)
- JBS (BR)
- Daimler (DE)

Older non-U.S. cases may come to an end in 2018

- Vivendi (2002), Hypo Real Estate (2008), Fortis (2008), etc.

Many more interesting developments to come in 2018 and thereafter

Thank You!

- Thank you to our translators from Syntax Sprachen for their support
- Feedback: We would really appreciate if you could take five minutes of your time to fill out the questionnaire in the "Feedback" section of the Guidebook app
- Please make sure you return the polling devices and translation devices at the Registration Table before leaving
- Attendance Certificates can be picked up at the Registration Table
- Tomorrow's sessions start at 8:30am
- Breakfast will be served in the Mezzanin of the hotel (8:00am - 08:30am)
- Guests for our evening program will meet at 6:15pm in the lobby

DRRT

2018

DRRT's 10th Annual International Investor Global Loss Recovery Conference

Friday, March 16, 2018

Today's Agenda

Friday Morning (Session III)

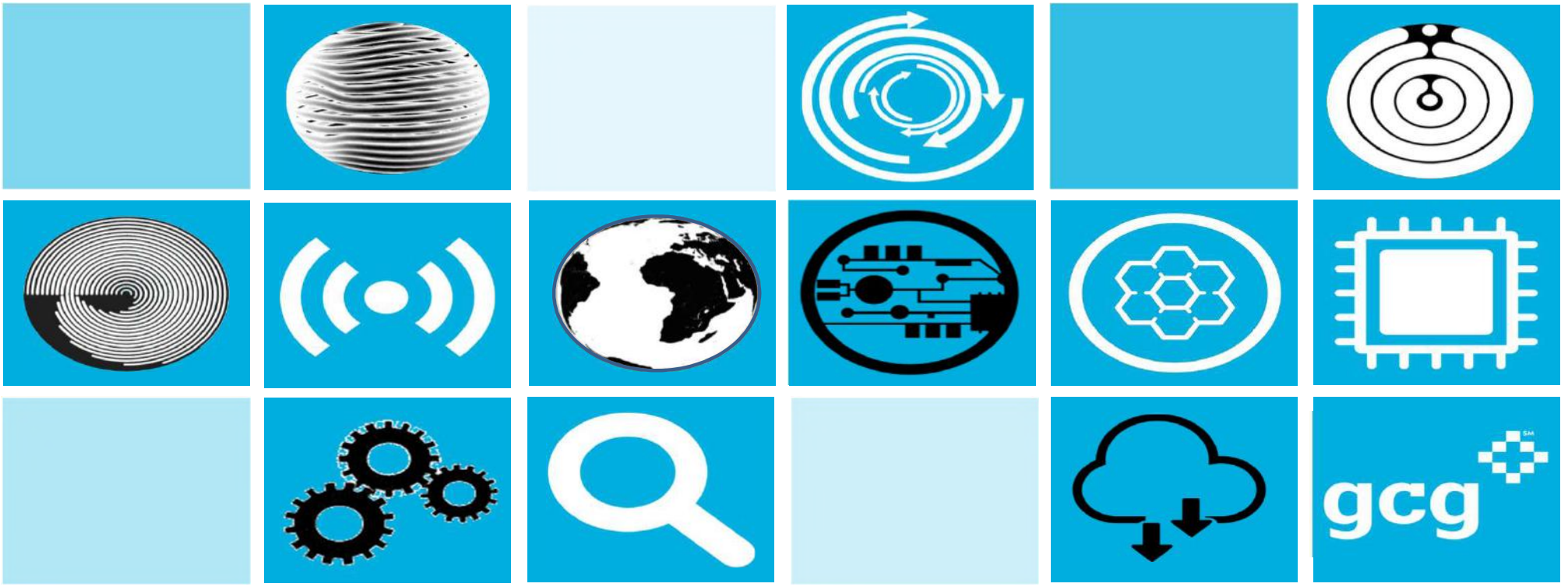
- Data Security & Claims Filing: Practical Applications
- The Rise of Multi-Jurisdictional Cases
  - Steinhoff
  - U.S. Opt-outs – Valeant and Teva

Friday Roundtable Lunch

- Institutional Investor-only Roundtable Lunch (registration required)
  Moderated by Ravi Nayer of LGIM

DATA SECURITY:
Practical Application

EXPERIENCE. *Evolved.*

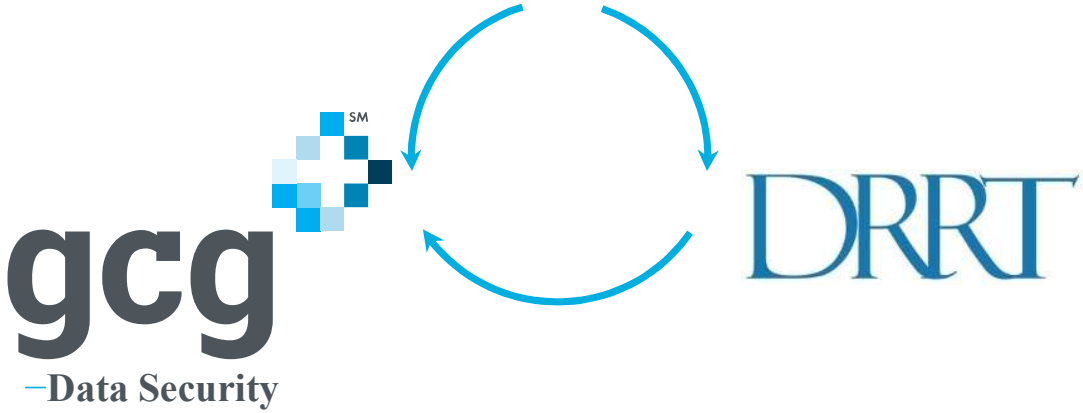


Dated: March 15-16, 2018

gcg

DATA TRANSFER

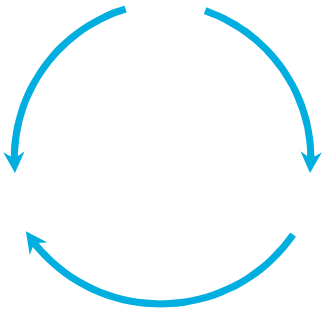
PRE-GDPR



DATA TRANSFER

POST-GD

- Data processing agreement
- Encryption/ Pseudonymization
- Appoint a DPO



DRRT

- Data Security
- Appoint a DPO
- Processing records

TRANSMIT DATA SECURELY

- Post data on a secure FTP site
- Encrypt data when transmitting
- Use secure portals
- Use reference numbers rather than names/addresses when possible

STORE DATA SECURELY

ENCRYPT DATA AT REST

- Mask Tax ID numbers and account numbers
- Use last 4 digits of Tax ID number and account numbers
- Ensure only limited staff has access

NOTICE MAILING

HOW DO I DETERMINE IF THIS NOTICE IS RELEVANT TO ME/MY CLIENTS?

→ **NOMINEE**

- **What are the relevant securities?**
- **Did my clients purchase the relevant securities?**
- **During the Class Period?**
- **What information/documents do I need to provide to file a claim?**
- In a typical securities case, no pre-identified data will be provided.

QUESTIONS???????
CALL GCG!

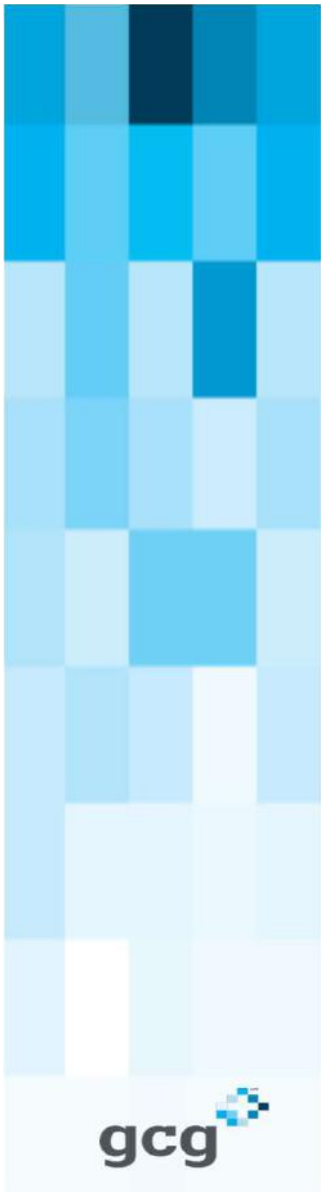
UNDERSTANDING PRE-IDENTIFIED DATA

IN SOME CASES INVOLVING COMPLEX FINANCIAL INSTRUMENTS, PRE-IDENTIFIED TRANSACTIONAL DATA WILL BE PROVIDED ON THE CLAIM FORM

- Identify the source of the pre-identified data, i.e., DTCC, defendants' records (this is often set forth in the Settlement Agreement)
- Identify other sources of transactional records not available to the administrator (ICE, CME, et) or other reasons the administrator might not have transactional data
- Use the pre-identified data to identify internal records that might have additional transactions
- Depending on the source data, the administrator may have some records that the class member does not
- Both internal and external resources may be needed to obtain the data necessary to compare against the pre-identified transactions

COMPARING INTERNAL RECORDS TO PRE-IDENTIFIED DATA

- Conduct an initial high-level comparison
  - Compare counts, total trade values if available, etc.
- Determine whether a more detailed comparison is necessary
- Utilize unique data points (such as Trade Reference Numbers) in each data set to reconcile
- Understand when otherwise unique data points would repeat (trade, assignment, termination)



PROVIDING SUPPLEMENTAL TRANSACTIONAL DATA

IF YOU DETERMINE THAT YOU HAVE ADDITIONAL TRANSACTIONS NOT INCLUDED IN THE PRE-IDENTIFIED DATA, YOU WILL NEED TO PROVIDE THAT INFORMATION IN THE REQUIRED FORMAT WITH BACKUP

- Often a template is required for submission of additional transactional data/correction of existing data
  - Template data points are necessary for transaction to be valued in the expert's damages model
  - Important to understand the data needed for the required template early in the process

- Attestation and Backup Documentation
  - Attestation often required from custodian of data
  - Trade confirms for a specific subset of data
  - Raw data file from a third party (ICE, DTCC, CME, etc.)
  - Raw data from an investment manager might require additional attestation
  - Unique/complex transactions might require additional documentation

PART 13

The Rise of Multi-Jurisdictional Cases

Steinhoff SA/DE/NL
Valeant US/CAN
Teva US/IL

STEINHOFF
INTERNATIONAL HOLDINGS N.V.

Background
South Africa
The Netherlands
Germany
Conclusion

PART

01

Background

About Steinhoff
Factual Background

About Steinhoff

- Steinhoff International Holdings N.V. ("Steinhoff") is a Dutch holding company (since June 2015 as Genesis International Holdings N.V.) with its headquarters and tax residence in South Africa
- Steinhoff is a holding company operating with 40+ local retail brands (household goods, furniture, apparel) in 30+ countries, including such brands as Poundland, Best & Less, Conforama, Pepkor, Poco, Fantastic Furniture, and Mattress Firm
- Founded in 1964 in Germany and listed on the Johannesburg Stock Exchange ("JSE") as Steinhoff International Holdings Limited ("SIHL") since 1999 (no longer listed now)
- Elaborate scheme of arrangement (August 7, 2015) to exchange JSE listed SIHL shares for Steinhoff shares with primary listing on Frankfurt Stock Exchange ("FSE") and inward (secondary) listing on the JSE.
- Effective December 7, 2015 and since then, about 30% of the Steinhoff NV shares have been traded on the FSE, while 70% are traded on the JSE
- Almost all ex-SIHL employees and directors have stayed at the old SIHL / new Steinhoff NV headquarter
- Most directors are South African residents and most operational headquarters staff of over 2,000 are working from the South African office

Timeline

Factual Background

Kika-Leiner Acquisition

On June 26, 2013, SIHL announced that, subject to certain condition being fulfilled, SIHL subsidiary Steinhoff Europe AG would acquire the kika and Leiner groups of companies, a large Austria-based group of furniture retail companies.

As it was exposed later in the Viceroy Report, the payment terms were very suspect and did not reflect the true value of the transaction.

Scheme of Arrangement

On August 7, 2015, SIHL announced a scheme of arrangement, pursuant to which Genesis will acquire all of the Steinhoff shares for a scheme consideration of one Genesis share for every one Steinhoff share held

German Criminal Investigation

On December 4, 2015, German prosecutors launched a criminal investigation, seizing documents and data in a raid on Steinhoff's location in Oldenburg, Germany.

Steinhoff denied any wrongdoing in a press release on the same day.

Timeline

Factual Background

Implementation of Scheme - Relisting

On December 7, 2015, the scheme of arrangement was implemented between SIHL and Steinhoff International Holdings N.V.

The primary listing was changed to the Frankfurt Stock Exchange, while a secondary inward listing took place on the Johannesburg Stock Exchange

Further Investigation Reports

Manager Magazin reported on August 24, 2017 that, in connection with suspected accounting fraud at Steinhoff dating back to the 2015 investigation, German prosecutors were investigating Steinhoff CEO Markus Jooste and some other senior managers. Steinhoff denied allegations of wrongdoing via ad hoc release, but the stock price declined substantially.

Steinhoff denies Wrongdoing

On September 18, 2017, Steinhoff issued another statement denying wrongdoing in relation to its 2016 audited accounts (covering July 1, 2015 to June 30, 2016) and the August 24, 2017 articles claiming such wrongdoing.

Timeline

Factual Background

November 8, 2017

Reuters published a story revealing that Steinhoff did not disclose almost $1 billion in transactions with a related company, despite being obligated to do so.
Steinhoff denied that any disclosure was required or that there was any wrongdoing in a press release on the same day.

December 5, 2017

Steinhoff announced that it was launching an investigation into "accounting irregularities" and the resignation of CEO Markus Jooste with immediate effect.

Stock price crashes.

The Viceroy Report released on the same date questions many off-balance sheet companies and transactions.

December 8, 2017

The German financial watchdog Bafin announced that it had started an assessment probe into the trading of Steinhoff shares and the propriety of information circulated to or withhold from the public.

Timeline

Factual Background

December 11, 2017

The Johannesburg Stock Exchange (S.A.) initiated an investigation into Steinhoff and Deloitte South Africa's actions in connection with the propriety of the books and accounts of Steinhoff/SIHL.

December 15, 2017

The South African Independent Regulatory Board for Auditors (IRBA) announced that it was launching an investigation into Deloitte's auditing of the accounts of Steinhoff/SIHL since at least 2014.

December 23, 2017

The Dutch Authority for the Financial Markets ("AFM") confirmed that it was investigating the auditing of the Dutch Steinhoff's financial statements.

Timeline

Factual Background

January 2, 2018

Steinhoff announced that its 2017 accounts would be accompanied by restated financials for 2015 and 2016, and that previous figures for those years can “no longer be relied upon.” Steinhoff further cautioned that accounts for prior years would "likely" be restated.

February 2, 2018

Steinhoff’s Chairman and various board members, including also former CFO Ben LaGrange, had resigned and the company had even reported its former CEO Jooste to the South African police under allegations of corruption pursuant to the South African Prevention and Combating of Corrupt Practices Act.

February 19, 2018

The Enterprise Chamber of the Amsterdam court of appeal ruled that Steinhoff must restate its annual accounts over the extended book year 2015-2016 and later book years in accordance with the court’s instructions, based on the 100% overvaluation of the POCO asset, which should have been valued at 50%.

Timeline

Factual Background

February 27, 2018

Süddeutsche Zeitung (SZ) reports that ex-CEO Jooste conspired with a fellow Steinhoff executive to inflate assets, revenues and profits of the company by using certain off-balance sheet companies and transactions. SZ discovered secret emails of Jooste in which he asked another manager to add €100 million of revenue from a subsidiary to inflate the company's reported profits. PwC is continuing its review of these figures and transactions and it is look more likely than not that 2014 figures were already false.

March 9, 2018

Steinhoff bond values drop as the company is waiting for a waiver from convertible bondholders in light of debt of €1.9 billion maturing in 2018.

What is next?

The Steinhoff jurisdictional jungle

- SIHL started listing shares in 1999 on JSE, but seized listing of its shares as of Nov. 30, 2017
  - November 30, 2017 – conversion of „old“ Steinhoff shares to „new“ Steinhoff shares on JSE
- Steinhoff NV started listing shares on Dec. 7, 2015 on the FSE and JSE
  - 70% trading on JSE
  - 30% trading on FSE and other European exchanges
- Division of wrong-doing (without Steinhoff NV involvement) into different periods
  - from before December 7, 2015 and only regarding to “old” Steinhoff shares (“Period 1 Claims”), and
  - as of December 7, 2015 until now (“Period 2 Claims”) relating to “new” Steinhoff shares traded on JSE (“Period 2 JSE Claims”) and those traded on FSE (“Period 2 FSE Claims”)
- Division into applicable laws and available jurisdictions
  - Period 1 Claims
    - Jurisdiction in South Africa & applicable law South Africa
    - Pot. Defendants: directors, management, Deloitte South Africa, SIHL, and Steinhoff (total company succession liability)
  - Period 2 FSE and JSE Claims
    - Jurisdiction in Germany, Netherlands and South Africa & applicable laws from Germany, Netherlands, South Africa
    - Pot. Defendants: directors, management, Steinhoff, Deloitte Accountants B.V. and South Africa

PART
02

South Africa

Jurisdiction
Claims
Procedural Methods

Is there jurisdiction over claims and defendants in South Africa?

- POSSIBLE SOUTH AFRICAN BASED CLAIMS IRO THE STEINHOFF LITIGATION
  - JURISDICTION
    - JSE listed shares in 2 periods
      - 1st period = pre-7 December 2015 purchase and only JSE listed shares
      - 2nd period = post 7 December 2015 purchases of JSE and FSE listed shares
        - 2nd period therefore can be split into two groups (JSE and FSE investors)
          - Jurisdiction over JSE listed and traded shares (70% of outstanding shares) is stronger than jurisdiction over FSE listed and traded shares (30% of outstanding shares)

Is there jurisdiction over claims and defendants in South Africa?

- Subject matter jurisdiction in Period 2, in respect of;
  - SIHL & Deloitte SA = South African companies with S.A. connections
  - Steinhoff NV
    - HQ and tax residence in SA (same as SIHL before with same employees)
    - Most of shares traded on JSE (70% in Period 2)
    - Most directors & management are SA residents
    - JSE shares are subject to regulation of SA regulators / JSE
    - Illegal/negligent actions took place in SA; failure to disclose information in SA
  - Deloitte Accountants N.V.
    - Cooperating with SA perpetrators via use of Deloitte S.A.
    - Affecting the value of JSE listed shares (place of damage)
    - Grossly negligent actions / omissions to flag accounting errors (which Viceroy Report was able to raise)

What kind of claims are available in South Africa?

- AGAINST SIHL & STEINHOFF NV
  - application of Dutch and/or German company, prospectus and other regulatory law
    - German WpHG
    - Dutch Civil Code
  - Delictual claim claiming negligence/gross negligence
    - Conduct = misrepresentation/ false disclosures / material omissions
    - Wrongfulness = contra Companies Act, contra JSE requirements, contra fiduciary duty to shareholders
    - Fault (intention or negligence)
    - Causation = but for misconduct, value of shares would not have been inflated and investors harmed upon disclosure
    - Harm = stock value decline / loss of investment value

What kind of claims are available in South Africa?

- AGAINST DELOITTE SA & DELOITTE Accountants NV
  - application of Dutch and/or German prospectus and other regulatory law for Period 2
    - German Civil Code
    - Dutch Civil Code
  - Delictual claim claiming negligence/gross negligence for Period 1
    - Conduct = improper accounting
    - Wrongfulness = contra accounting rules
    - Fault (intention or negligence)
    - Causation = but for misconduct, value of shares would not have been inflated and investors harmed upon disclosure
    - Harm = stock value decline / loss of investment value

What kind of claims are available in South Africa?

- AGAINST SA BASED DIRECTORS & MANAGEMENT
  - application of Dutch and/or German tort laws for Period 2
  - Statutory claim under s. 20(6) of the *Companies Act* of South Africa which states:

    "(6) Each shareholder of a company has a claim for damages against any person who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with

    (a) this Act; or

    (b) a limitation, restriction or qualification contemplated in this section, unless that action has been ratified by the shareholders in terms of subsection (2)".

What kind of claims are available in South Africa?

- CLAIMS SPECIFICALLY RELATED TO THE 12/07/2015 PROSPECTUS
  - s. 104 of the *Companies Act* of SA provides that any director between the issuing of the prospectus and the first general shareholders' meeting, or any director who has consented to his/her name being published in the prospectus as being a director, or promoter of the company, or person who authorised the issue of the prospectus, is liable to compensate shareholders for losses due to untrue statements in the prospectus.
  - Standard of negligence is applied.
- s. 104 CREATES POSSIBLE CLAIM AGAINST PROMOTERS AND ASSOCIATED ENTITIES
  - These could include banks such as ABSA, Commerzbank AG, Standard Chartered Bank
  - Could also include law firms and regulatory authorities, but unlikely.
- STATUTE OF LIMITATIONS
  - 3 years from discovery

What procedural methods are available in South Africa?

- CLASS ACTIONS IN SOUTH AFRICA
  - Class actions founded in Constitution
  - *Children's Resources Centre Trust v Pioneer Foods* (*Children's Resources*) provides common law basis to pursue a class action in respect of civil claims
  - How do class actions operate in South Africa?
    - Generally structured as opt-out representative actions (for damages)
    - Class certification before case can proceed;
      - Identifiable class through objective criteria
      - Triable issue to be determined
      - Common issues of law and/or fact to be determined on a class wide basis
      - Damages to be ascertained on a class wide basis using generally acceptable models
      - Suitable representative plaintiff
      - Preferable procedure over individual cases

What procedural methods are available in South Africa?

- Practical application to securities claims
  - Application for certification served and filed with particulars (in draft) attached
  - Certification application heard within 6-9 months
  - If certification granted, case proceeds through usual trial process (plaintiff's claim and defendant's plea → discovery → pre-trial → trial)
- Damages
  - Case law in respect of competition claims provides that use of statistical modelling to arrive at damages figures is allowable (*Children's Resources*)
  - Alternatively, case could be split into opt-out liability class and opt-in damages class
- Funding and Fees
  - Funding agreements are legal and permissible
  - Funder entitled to a "reasonable" percentage (25% is reasonable)

PART
02

The Netherlands

Jurisdiction
Claims
Procedural Methods

Relevant developments

Bynkershoek
dispute resolution

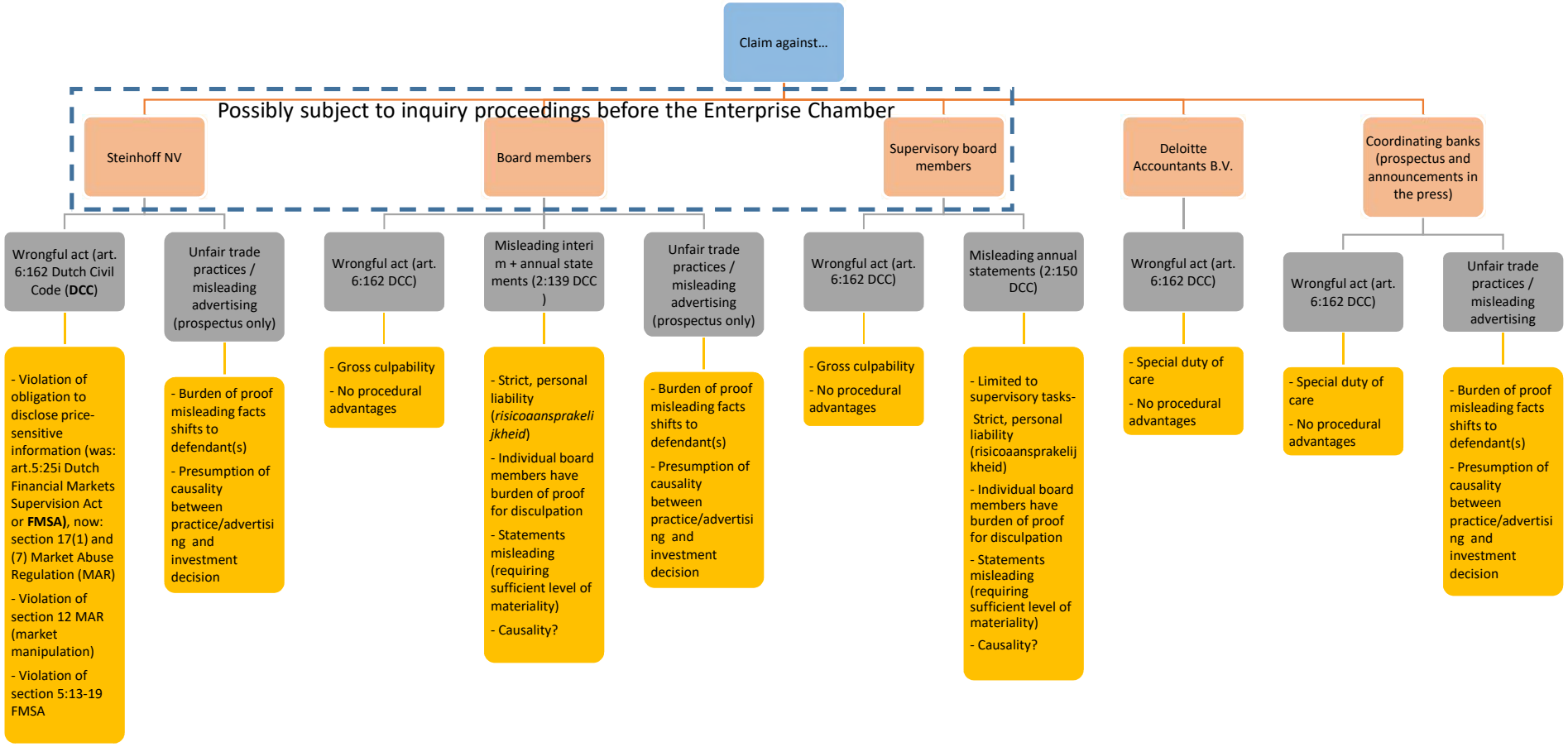
- Case law on admissibility of claim vehicles:
  - are the interested parties' interests safeguarded in an adequate manner (main source of inspiration: Claim Code of 2011);
  - is the claim at hand suitable for a mass claim; and
  - is the vehicle sufficiently representative?
- 'Holder shares': in the proceedings before the Amsterdam court of appeal regarding the binding approval of the Fortis settlement (ECLI:NL:GHAMS:2017:2257, points 8.8-9), the court considered that with a view to the actual development of the share price of Ageas following the disclosure of certain facts it was highly uncertain that holders of "Holder Shares" would have a legal right to compensation for their losses, as these losses would in any way have been incurred in case of timely disclosure of the relevant information. Relevant for investors which held SIHL shares before 7 December 2015.
- Currently, claim vehicles may not claim damages, this will most likely change in the foreseeable future (law is currently under review by the Dutch parliament). The proposed law contains several fundamental changes:
  - introduction of lead plaintiff, and
  - opt-out following start of litigation, second opt-out opportunity only in case of a settlement agreement being declared binding by the Amsterdam Court of Appeal (relevant court of first instance). In general opt-out rule only binds Dutch residents; foreign parties opt-in.

Jurisdiction in the Netherlands

Bynkershoek
dispute resolution

- Dutch courts could exercise jurisdiction over a number of parties involved in the Steinhoff scandal:
  - Steinhoff (Genesis International Holdings N.V. until implementation 18 November 2015), because of residence (Amsterdam) for
    - prospectuses of 7 August and 19 November 2015,
    - annual accounts over extended book year 2015-2016,
    - ad hoc disclosure obligations and interim accounts as of 7 December 2015;
  - independent auditor Deloitte Accountants B.V., because of its place of residence (Rotterdam) for its audit of the annual accounts 2016 over extended book year 2015-2016;
  - non-Dutch residents can be included for their role in any of the above, provided that the claims are closely connected from a factual and legal viewpoint (so as to prevent contradictory judgments, e.g., ECJ in *CDC*, C-352/13, EU:C:2015:335, *Painer*, C-145/10, EU:C:2011:798, *Sapir*., C-645/11, EU:C:2013:228, *Freeport*, C-98/06, EU:C:2007:595),
    - residents of EU Member States (except DK) on the basis of sec. 8(1) Council Regulation (EC) No 1215/2012 (Brussels Regulation recast) and
    - other defendants on the basis of sec. 7(1) Dutch Code of Civil Procedure,
  - provided that this exception to the main principle is not used for luring parties away from the court of their place of residence, ECJ in *Reisch Montage*, C-103/05, EU:C:2006:471 and *Painer*, C-145/10, EU:C:2011:798.
  - Relevant for among others SIHL, Deloitte & Touche (RSA), (former) (supervisory) board members, Commerzbank AG, Standard Chartered Bank and Absa (their role in the publication of the prospectuses).

Legal basis for claims in the Netherlands



Inquiry proceedings (Enterprise Chamber)

Bynkershoek
dispute resolution

- Inquiry proceedings are heard by a special chamber of the Amsterdam Court of Appeal, the Enterprise Chamber ("EC"), which has five members: three professional judges and two non-judicial members chosen from a panel of 16.
- Historically, inquiry proceedings primarily provide a tool to obtain information about the internal affairs of a company, to restore healthy internal relations by carrying out certain reorganizations within a company and, if the EC finds that a company was mismanaged, to determine responsibility. The EC does not establish liability.
- EC may order an inquiry if there are "well-founded reasons to doubt the correctness of the policy" of a company. Relevant facts: internal and external audit failures (over EUR 6 billion of assets), several unreported material conflicts of interest and opaque accounting policies; large number of reassignments and replacements (Chairman, CEO, CFO, COO, several (supervisory) board members) and little progress in internal investigations and relevant disclosures.
- Inquirer(s) have several powers to perform research, supported by a designated member of the EC. Possible (interim) injunctions. Following report, EC can establish mismanagement.
- Following application by shareholders (1% of issued share capital or EUR 20 million in shares), the Foundation can intervene as interested party gaining access to report of inquiry.
- Report of inquiry or decision in which EC determines mismanagement do not form binding evidence. The report is, however, a possible way to obtain substantial information at the expense of the company and functions as a stepping stone for holding (supervisory) board members and/or policymakers liable.

Claims against Steinhoff

Bynkershoek
dispute resolution

- Liability for misleading prospectus(es) and connected disclosure failures can be based on unfair trade practices / misleading advertising / misleading trade practice (sections 6:193b-194 DCC).
  - Advantage 1: burden of proof misleading facts shifts to defendant(s).
  - Advantage 2: presumption of causality between practice/advertising and investment decision.

- Wrongful act (*onrechtmatige daad*, section 6:162 DCC) involving a violation of relevant legal obligations, such as:
  - ad hoc disclosure obligations concerning price-sensitive information (was: art.5:25i Dutch Financial Markets Supervision Act or **FMSA**), now: sections 17(1) and 7 Market Abuse Regulation (**MAR**);
  - market manipulation violation of section 12 MAR;
  - requirements concerning the contents of a prospectus (sections 5:13-19 FMSA);
  - possibly, post-prospectus disclosure obligations (section 5:23 FMSA); and
  - legal requirements concerning interim and annual statements.

Claims against Board

Bynkershoek
dispute resolution

- Misleading interim and annual statements, and prospectus (2:139 DCC).
  - Strict liability (*risicoaansprakelijkheid*).
  - Individual board members bear their own burden of proof for disculpation.
  - In 2015 *Landis* decision Amsterdam district court applied favourable causality rule.
- Unfair trade practices / misleading advertising / (sections 6:193b-194 DCC).
  - Defendants will have to explain why the prospectus was not misleading and have burden of proof.
  - Presumption of causality between practice / advertising and investment decision ("reliance").
- Wrongful act (*onrechtmatige daad*, section 6:162 DCC).
  - Requires serious imputability (*ernstig verwijt*) in order to pierce the corporate veil or direct wrongful act of relevant directors in relation to shareholders (not likely).
  - No procedural advantages.

Claims against Supervisory Board

Bynkershoek
dispute resolution

- Misleading annual statements (2:150 DCC).
  - Strict liability (*risicoaansprakelijkheid*).
  - Individual board members bear their own burden of proof for disculpation. This means that each of them will have to argue why the misleading facts cannot be related to the execution of their supervisory task and provide evidence in support of that.

- Wrongful act (*onrechtmatige daad*, section 6:162 DCC).
  - Requires serious imputability (*ernstig verwijt*) in order to pierce the corporate veil or direct wrongful act of relevant directors in relation to shareholders (not likely).
  - No procedural advantages.

Claims against auditor

Bynkershoek
dispute resolution

- Deloitte Accounts B.V. for its role in the audited of annual accounts over extend book year 2015-2016.

- Wrongful act (*onrechtmatige daad*, section 6:162 DCC).
  - Violation by auditor of someone else's right / act or omission in violation of legal obligation or of what according to unwritten law has to be regarded as proper social conduct, while there is no justification. Auditors have a duty of care towards third parties relying on their statement (Dutch Supreme Court 2014 in *Vie d'Or II*, NL:HR:2006:AW2080).
  - This involves the auditor's statement in the 2015-2016 accounts. Probably not the prospectus of 19 November 2015.
  - No procedural advantages.
  - Reliance on audited financial statements.

Claims against banks

Bynkershoek
dispute resolution

- Commerzbank AG, Standard Chartered Bank Johannesburg for 19 November 2015 prospectus and Commerzbank AG and Absa for 7 August 2015 prospectus plus possible violation of duty to disclose relevant facts not included in the prospectus.

- Unfair trade practices / misleading advertising (sections 6:193a-195 DCC).
  - Burden of proof misleading facts shifts to defendant(s).
  - Presumption of causality between practice/advertising and the shareholders' decision to invest in Steinhoff.

- Wrongful act (*onrechtmatige daad*, section 6:162 DCC).
  - This involves the bank's role in the primary FSE listing and secondary JSE listing in fall 2015.
  - No procedural advantages.

What procedural methods are available?

Bynkershoek
dispute resolution

- Currently, a claim vehicle can sue defendants in order to get a declaratory judgment (section 3:306a DCC)
  - No claim for damages.
  - As to declaratory judgment, no assignments required.
  - Following decision, interested parties can use the decision for their own benefit, in order to claim damages individuals, or by assigning their rights/claims to a claim vehicle.
  - This will change – most likely if the new collective action law comes into play and works retroactively.
- Settlement can be declared binding by Amsterdam court of appeal (sections 7:907 DCC and 1013 Dutch Code of Civil Procedure (**DCCP**)).
  - Requires two consenting parties.
  - Debate about the merits of the settlement.
  - Interested parties may object, including representative foundations (section 1014 DCCP).
  - If declared binding, court will set an opt-out period of at least 3 months (section 7:908 DCC).

Outlook - Netherlands

Bynkershoek
dispute resolution

- 7 February 2018 : incorporation of the Foundation (Stichting Steinhoff International Compensation Claims):
  - means and objectives covering a wide array of possible actions in the interest of the Participants, such as:
    - intervention in proceedings before the Enterprise Chamber of the Amsterdam Court of Appeal,
    - litigation (joinder or intervention) in the Netherlands, if required,
    - Support of litigation in other countries, if required, and
    - Scrutiny of, and potential objection to, any WCAM settlement subject to court approval.
  - Ensuring compliance with the Dutch Claim Code.
  - Engaging executive board and supervisory board members.
- 14 February 2018 : first docket session of proceedings / completion of filing with Amsterdam District Court between Dutch Retail Investors' Association (Vereniging van Effectenbezitters) and Steinhoff (only, represented by Linklaters).
- Almost certainly, Steinhoff will request the district court to stay the proceedings invoking sections 29 and 30 Council Regulation (EC) No 1215/2012 (Brussels Regulation recast):
  - section 29: same cause of action and the same parties (*lis pendens*), any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established, and
  - section 30: in case of related actions, any court other than the court first seised may stay its proceedings.
- 19 February 2018 : decision of the Enterprise Chamber on SIH's 2016 accounts .
- Meanwhile : other parties preparing actions.

PART
02

Germany

Jurisdiction
Claims
Procedural Methods

Is there jurisdiction over claims and defendants in Germany?

- Jurisdiction of claims against a person in a member state of the EU is determined by the Brussels I Regulation. It is independent from the place of business of the plaintiff.
- Art. 7 No. 2 Brussels I Regulation:
  - A person domiciled in a Member State may be sued in another Member State, in matters relating to tort, delict or quasi-delict in the courts for the place where the harmful event occurred or may occur.
- Place where the harmful event occurred: ECJ decided it can be where the event which gave rise to the harm occurred ('Handlungsort') and place where the harm arose ('Erfolgsort')

Is there jurisdiction over claims and defendants in Germany?

- Handlungsort: where Steinhoff should have be acting = place of the listing = Frankfurt am Main
- Erfolgsort: place where the harm against the investors arose. The place where the damage materialized. This can be the place of the bank account (place of the payment to acquire the securities – see *Kolassa* decision).
- ECJ decision: *Universal Music Holding* – Place where the payment obligation arose.
- Issue of claims of investors who did not enter into the payment obligation at a German stock exchange.
- Higher Regional Court of Frankfurt (OLG Frankfurt, EuZW 2010, 918): Place of the exchange - as link to the Erfolgsort.
- Supreme Court of Austria (OGH, IPRaX 2018, 96): The place where the issuer is bound to ad hoc disclosure obligations - as link to the Handlungsort.
- Art. 4 Brussels I Regulation:
  - Jurisdiction in the Netherlands remains as seat of the company (Netherlands), place of business (South Africa) or the main branch (South Africa)

What kind of claims are available in Germany?

Prospectus Liability pursuant to §21 Securities Prospectus Act ("WpPG")

Requirements:

1. Existence of a prospectus
    - Public offering prospectus, § 21 WpPG or sales prospectus, § 22 WpPG
2. False / incomplete statements
    - Example: unsecured claims in a large amount
3. Materiality of the statements
4. Purchase within 6 month of the initial public offering of the security

Consequence:

- Buyer still owns the securities

  return of the security in exchange of the purchase price, unless it exceeds the initial offering price, + standard costs

- Buyer does not own the securities

  Price difference between the purchase and sales price; purchase price is limited as above

Shifting of the burden of proof regarding the following points:

Missing culpability (intent + gross negligence) / no purchase based on the prospectus / knowledge of the wrongness

SoL: 3 years

What kind of claims are available in Germany?

§§ 37 b, c Securities Trading Act (WpHG (a.F.)) - now §§ 97, 98 WPHG (secondary market regulations - ad hoc disclosures)

Requirements

1. Omitted/false ad hoc disclosure of the issuer
2. Affecting securities that are being listed on a domestic stock exchange
3. Causality

   Causality between omitted/false ad hoc disclosure and the investment decision (Purchase / Sale)
4. Liability

   Burden of proof is shifted to issuer who has to prove that he did not act with intent or gross negligence.
5. Damages

   Rescission Damages: Return of the security against purchase price

   Inflation Damages: Difference of the actual trading price and the hypothetical price in case of a proper disclosure

   IKB decision: BGH XI ZR 51/10 (Rn. 67 f.) Inflation damages result in less requirements of causality

SoL: 3 years

What kind of claims are available in Germany?

Special Reporting laws, §§823 para. 2 Civil Code in conjunction with 37 v, w WpHG a.F.

Requirements:

1. Issuance of securities as domestic issuer
2. False representation in the annual and interim reports
3. No disclosure requirements based on general company law?

   Liability of secondary persons – Regional Court of Stuttgart, see model case declaratory judgement proposal dated December 6, 2017 (22 AR 2/17) Rz. 99/100.

4. Liability

   in dispute, Regional Court of Stuttgart decided similar to §§ 37 b, c WpHG: primary market liability of the issuer as long as he had knowledge or gross negligent not to gain knowledge.

   Burden of proof is shifted to issuer

5. Causality
6. Issue: Are §§37 v and w WpHG protective laws (Schutzgesetz)?

   Yes, according to the Regional Court of Stuttgart: Due to the European requirement to implement the EU Transparency Directive,§ 37 v WpHG has to be interpreted according to the directive. The liability of the issuer has to be guaranteed.

SoL: 3 years

What kind of claims are available in Germany?

Tort Law: § 823 para. 2 Civil Code in conjunction with, 331 Commercial Code, (secondary: §400 Stock Corporation Act)

Requirements:

1. False representation in the annual and company reporting
2. Related to material facts – Material are important differences between the facts in the annual report and the actual situation of the company.
3. Intent

Tort Law: § 826 BGB Civil Code

Requirements:

1. Violation of public morals (Sittenwidrigkeit)

   BGH: improper influence of the secondary market using gross false ad hoc disclosures and advantage of the board (stake in the company)

   BGH: reprehensible nature has to be determined based on the circumstances as a whole

2. Liability

   Intent required – ad hoc disclosure has substantial potential to affect the stock price and knowledge of the board that the (false) disclosure will lead to investment decisions

3. Causality

   In general no easier burden of proof – but: see *IKB* decision regarding inflation damages

What procedural methods are available in Germany?

- Opt-in group action pursuant to the German Model Case Act (KapMuG)
  - Investors need to take an active role either by filing a complaint or by registering their claims
  - Investors who have filed a complaint or assigned claims to plaintiff who has filed a complaint will participate
  - Individual claims will be stayed and only the model case proceeds with the abstract case will continue
  - Individual cases will resume once the model case has been decided
  - Registration possible within six months after the announcement of the model case plaintiff (§ 10 KapMuG)

Outlook

- Complaint filed in December 2017 at the Regional Court of Frankfurt a. M.
- KapMuG request filed with the same complaint
- Further complaints will be filed to assist the first request for a model case proceeding
- Ten similar situated complaints necessary to initiate KapMuG proceedings – filings will follow during 2018
- Registrations will be possible at the latest after the determination of the model case plaintiff – expected at the end of 2018
- Expectation for a trial in 2019

Conclusion

- Advantages Germany:
  - Model Case Proceeding (cost effective collective redress) with the option to file a complaint or simply register the claims at a later stage
  - Broad claims with good burden of proof, especially regarding prospectus liability and secondary liability of the ad hoc liability
  - BUT: limitation on included transactions (JSE) and Period 1 claims
- Advantages Netherlands:
  - Opportunity to use the investigation of the Enterprise Chamber
  - Use of the Dutch foundation model according to§305a
  - Declaratory judgement proceeding by a Dutch § 305a foundation
  - Possibility of a WCAM settlement
  - BUT: limitation on damage claims and inclusion of Period 1 claims
- Advantages South Africa:
  - True opt-out class actions for damages available
  - Longest class period available (June 26, 2013 – December 5, 2017)
  - Costs effective process
  - Difficulties to bring claims based on purchases before Dec. 7, 2015 in Europe
  - Difficulties to settle case only in Europe when 100% of pre-Dec. 7, 2015 and 70% of post-Dec. 5, 2017 transactions took place in SA
  - But: issues with solvency of defendants and jurisdiction over Steinhoff

Hence: Use of a combination of legal systems for an optimum of legal redress

The Rise of Multi-Jurisdictional Cases

U.S. Opt-Outs

Valeant Pharmaceuticals International, Inc.

- On October 19, 2015, Valeant disclosed for the first time that it had acquired a specialty pharmacy, Philidor RX Services
- Reports surfaced that Valeant was using specialty pharmacies, including Philidor, that it owned to transfer its inventory internally, while claiming it was making sales
- The share price of Valeant dropped 90% from its pre-disclosure high of US $257.53 in July 2015
- Valeant is the subject of several criminal investigations including the SEC and Congress

US Class Action

- Consolidated class action pending before the U.S. District Court of New Jersey
  - Motion to dismiss was denied in part and granted in part (granted to certain debt offerings)
  - All actions (including opt-outs) are currently stayed pending the criminal proceeding against former executives (an ex-Valeant Director and the former CEO of Philidor)

Canadian Class Action

- Valeant facing several class actions in Canada
- Quebec class granted leave and certified the class on August 29, 2017. All other actions currently stayed
- DRRT, G&E along with our Canadian counsel Gowling are preparing opt-out litigation

Teva Pharmaceuticals Industries

- Teva Pharmaceuticals is an Israeli multinational pharmaceutical company that is listed on both the NYSE and the Tel Aviv Stock Exchange
- There are pending class actions in both Israel and U.S. arising out of:
  - Failure of timely disclosures
  - Allegations of price fixing
- Teva stock price has dropped over 20% in the first 90 days post-disclosure
- Ongoing DOJ criminal investigation
- In addition to disclosure-related securities claims (in the class action), there is the potential to plead antitrust claims in the opt-out context
- Class action motion to dismiss heard on March 6, 2018
- MTD outcome pending